

ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR08-527

BRITTANY NICOLE GARTRELL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 27, 2009

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT,  
[NO. CR-2005-444]

HONORABLE GARY COTTRELL,  
JUDGE

REVERSED AND DISMISSED IN  
PART; REVERSED AND  
REMANDED IN PART

**JOSEPHINE LINKER HART, Judge**

This case is once more before us after we ordered re-briefing. It had been submitted in no-merit format pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals. However, we concluded that arguments addressing the lawfulness of the trial court’s decision to revoke Gartrell’s suspended imposition of sentence (SIS) on grounds other than those specified in the revocation petition and its decision to revoke Gartrell’s SIS on a misdemeanor theft of property offense nearly twenty months after Gartrell received a twelve-month SIS on that charge would not be wholly frivolous. Gartrell now raises these two points. We reverse and dismiss in part and reverse and remand in part.

Brittany Nicole Gartrell pleaded guilty in Crawford County Circuit Court on April 10, 2006, to the charges of residential burglary, misdemeanor theft of property, and possession of

methamphetamine. She received a SIS for five years on all the charges. On October 24, 2007, the State petitioned to revoke her SIS, alleging as the sole and only basis for revocation that she had been arrested for “possession of drug paraphernalia, possession of marijuana, and possession of Xanax” and that this conduct violated the terms of her SIS.

At the revocation hearing, Fort Smith Police Officer James Nelson testified that when he searched a car in which Gartrell was a passenger, he discovered drug paraphernalia, marijuana, and Xanax. After Nelson’s testimony, the State introduced evidence that ranged far afield of the allegations in its petition. Gartrell’ s probation officer, Craig Robie, testified that Gartrell had reported sporadically, failed to pay her fines and costs as ordered, failed drug tests on several occasions, been arrested for obstruction of government operations, fleeing apprehension, disorderly conduct, and public intoxication, and, lastly, had been arrested for possession of drug paraphernalia, possession of marijuana, and possession of Xanax.

At the close of all the evidence, the trial judge revoked Gartrell’ s SIS and sentenced her to consecutive five-year sentences in the Arkansas Department of Correction. Significantly, however, he made express findings that he “ had not even taken into consideration” the violations alleged in the State’ s revocation petition.

We note first that the State concedes that the trial court lacked jurisdiction to revoke Gartrell’ s SIS for misdemeanor theft because the sentence had ended before the State filed its revocation petition. Accordingly, the State agrees that the judgment and commitment

order “ should be modified to reflect that the revocation does not pertain to appellant’ s conviction for misdemeanor theft of property.”

We agree that this point has merit. Arkansas Code Annotated section 5-4-309(d) (Repl. 2006) states that,

(d) If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation *at any time prior to the expiration of the period of suspension or probation.*

(Emphasis supplied). While it is lawful to revoke a suspension or probation subsequent to the expiration of the period of suspension, this action is subject to conditions that are not present in this case. Ark. Code Ann. § 5-4-309(e).<sup>1</sup> Further, the supreme court has determined that this is a jurisdictional issue. *Carter v. State*, 350 Ark. 229, 85 S.W.3d 914 (2002). Accordingly, we hold that the trial court was without jurisdiction to revoke

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<sup>1</sup> Arkansas Code Annotated section 5-4-309(e) (Repl. 2006) states:  
(e) A court may revoke a suspension or probation subsequent to the expiration of the period of suspension or probation if before expiration of the period:  
(1) The defendant is arrested for violation of suspension or probation;  
(2) A warrant is issued for the defendant's arrest for violation of suspension or probation;  
(3) A petition to revoke the defendant's suspension or probation has been filed if a warrant is issued for the defendant's arrest within thirty (30) days of the date of filing the petition; or  
(4) The defendant has been:  
(A) Issued a citation in lieu of arrest under Rule 5 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation; or  
(B) Served a summons under Rule 6 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation.

Gartrell' s SIS for misdemeanor theft and therefore reverse and dismiss that revocation.

Gartrell next argues that her due process rights were violated when her SIS was revoked for charges not stated in the revocation petition. She asserts that she has a “ fundamental right” to know what allegations are going to be presented against her. She acknowledges this court' s opinion in *Cheshire v. State*, 80 Ark. App. 327, 95 S.W.3d 820 (2003), but contends that the instant case is distinguishable because the *Cheshire* court revoked on a ground alleged in the revocation petition. We believe that this point has merit as well.

Arkansas Code Annotated section 5-4-310 (Repl. 2006) provides in pertinent part:

- (b)(1) A suspension or probation shall not be revoked except after a revocation hearing.
- (2) The revocation hearing shall be conducted by the court that suspended imposition of sentence on the defendant or placed him or her on probation within a reasonable period of time after the defendant's arrest, not to exceed sixty (60) days.
- (3) The defendant shall be given prior written notice of the:
  - (A) Time and place of the revocation hearing;
  - (B) Purpose of the revocation hearing; and
  - (C) Condition of suspension or probation the defendant is alleged to have violated.

Here, the trial court chose to revoke Gartrell' s SIS for alleged violations other than those stated in the State' s revocation petition. We believe this case is controlled by *Hawkins v. State*, 251 Ark. 955, 475 S.W.2d 887 (1972), where in an opinion reversing a revocation, Justice George Rose Smith stated such procedure was “ fundamentally unfair, for a defendant cannot properly prepare for the hearing without knowing in advance what charges

of misconduct are to be investigated as a basis for the proposed revocation.” While the State asserts that Gartrell’ s notice argument was waived because it was not first raised to the trial court by contemporaneous objection, we believe that this court in *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985), over a spirited dissent by Judges Mayfield and Cracraft, came to the opposite conclusion.

While we are mindful of language in *Cheshire, supra*, that suggests otherwise, we note that Cheshire’ s revocation was also based on a ground that was alleged in the State’ s revocation petition. It is settled law that the State must prove only one violation to establish that a defendant violated the conditions of his SIS. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). While minor defects in a revocation petition do not constitute reversible error, *see Reynolds v. State*, 282 Ark. 98, 666 S.W.2d 396 (1984), and *Phillips v. State*, 40 Ark. App. 19, 840 S.W.2d 808 (1992), Gartrell’ s revocation was based on alleged violations that were clearly of a different nature than those asserted in the revocation petition. Accordingly, we reverse and remand on this point.

Reversed and dismissed in part; reversed and remanded in part.

KINARD and BROWN, JJ., agree.