

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CACR08-1018

April 8, 2009

DARRYL KENT MEDLOCK
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT,
[CR-2004-356]

HONORABLE GARY R. COTTRELL,
JUDGE

AFFIRMED

Appellant, Darryl Medlock, pleaded nolo contendere in April 2005 to the offenses of theft of property and overdraft. He was sentenced to concurrent terms of ten years in the Arkansas Department of Correction on each offense, with an additional ten years' suspended imposition of sentence; was assessed no fines or court costs; and was ordered to pay restitution in the amount of \$1046.96 in \$75 monthly installments beginning sixty days after his release from prison.

The State filed a petition to revoke Medlock's suspended imposition of sentence in December 2006, alleging that he had failed to make restitution payments since June 1, 2006, leaving an unpaid balance of \$971.96. Medlock posted a \$200 cash bond on the revocation warrant. The revocation hearing was scheduled for October 24, 2007, but

Medlock failed to appear because he was incarcerated at the time on other charges; he was arrested on the failure-to-appear warrant when he was released from the Department of Correction on March 2, 2008. Due to Medlock's recent release from prison, the trial court continued the revocation hearing until May 28, 2008, to give him an opportunity to start making payments. After the revocation hearing, the trial court found that Medlock had failed to make payments on his ordered restitution, revoked his suspended imposition of sentence, and sentenced him to three years in prison. Medlock appeals, arguing that the trial court erred in finding that his nonpayment of restitution was willful and in failing to consider alternative measures other than imprisonment. We affirm.

A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Id.* The appellate courts defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Id.*

At the hearing, Medlock testified that he began working for Cloye's Gear on May 21, 2008, earning \$8.25 per hour, and that he was living with his mother. He said that prior to his release from jail, he had no income to pay restitution, and that his mother

supported him. He acknowledged that he was released from prison in October 2005 and did not return to prison until October 15, 2007, but he stated that he had paid \$200 in restitution prior to October 2007. However, a payment sheet introduced into evidence by the State indicated that he had only paid \$125 in restitution. Medlock also admitted that he had made no restitution payments from the continuance in March 2008 until the revocation hearing.

In revoking Medlock's suspended sentence, the trial court found that Medlock had been released from prison in October 2005 and had until October 15, 2007, to make payments on the restitution and had failed to do so; that he had been given since March 10, 2008, to the revocation hearing to make payments and had failed to make any payments; that only \$125 in restitution had been made, with the last payment having been made in February 2007; and that while Medlock had to return to prison on other charges, that was not the fault of the trial court. The trial court found that Medlock had the ability to pay and had failed to do so.

Where the alleged violation is a failure to make court-ordered payments, it is the State's burden, by a preponderance of the evidence, to prove that the failure to pay was inexcusable. *Phillips v. State*, 101 Ark. App. 190, 272 S.W.3d 123 (2008). Once the State introduces evidence of nonpayment, a defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Id.* Failure on the part of a defendant "to make bona fide efforts to seek employment or to borrow money to pay restitution

may justify imprisonment.” *Gossett v. State*, 87 Ark. App. 317, 319, 191 S.W.3d 548, 549-50 (2004).

Here, Medlock testified that prior to his release from jail on March 8, 2008, he had no income to pay restitution and that his mother supported him. However, he presented no evidence as to why he had no income. He was a forty-eight year old man who lived with his mother, had no dependents, and had secured a job only one week before his revocation hearing. He presented no evidence of anything that would have prevented him from working before that time. He had two years between being released from prison and returning to prison on another charge in which to make payments on his restitution, yet he only made \$125 sum total in restitution. Nevertheless, he was able to post \$200 cash bond when he was arrested on the revocation petition. He was given another opportunity to make restitution when the trial court continued the revocation hearing from March 2008 until May 2008, yet he still made no restitution payments. The trial judge had the best opportunity to assess Medlock’s demeanor and credibility, as he was able to observe Medlock at the hearing, *see Peppers v. State*, 3 Ark. App. 166, 623 S.W.2d 544 (1981). We hold that the trial court’s finding of willful nonpayment was not against the preponderance of the evidence.

Medlock also argues in passing that it was clearly against the preponderance of the evidence for the trial court to not consider alternative punitive measures other than imprisonment. However, when a trial court finds that nonpayment is willful, as the trial court did in this case, it does not have to explore alternatives to imprisonment and may

revoke the suspended sentence and impose a term of imprisonment. *Bowen v. State*, 12 Ark. App. 147, 671 S.W.2d 763 (1984).

Affirmed.

GRUBER and MARSHALL, JJ., agree.