

**ARKANSAS COURT OF APPEALS**

DIVISION II  
No. CACR09-227

JIMMY SIMPSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** JANUARY 13, 2010

APPEAL FROM THE CRITTENDEN  
COUNTY CIRCUIT COURT,  
[NO. CR-2007-112]

HONORABLE DAVID BURNETT,  
JUDGE

AFFIRMED AS MODIFIED; MOTION  
TO BE RELIEVED GRANTED

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**JOHN B. ROBBINS, Judge**

Appellant Jimmy Simpson pleaded guilty to breaking or entering and felony theft of property on June 15, 2007. Mr. Simpson was sentenced to four years in prison for his breaking or entering conviction, and was given a ten-year suspended imposition of sentence for his theft conviction. Mr. Simpson was paroled from prison in March 2008.

On October 7, 2008, the State filed a petition to revoke Mr. Simpson's suspended imposition of sentence, alleging multiple violations of his conditions. After a revocation hearing held on December 2, 2008, the trial court found that Mr. Simpson violated his conditions by failing to pay fines and costs, failing to report his address to the sheriff's office, driving with a suspended driver's license, and being in possession of a stolen vehicle. The trial

court revoked Mr. Simpson's suspended imposition of sentence and sentenced him to ten years in prison.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k)(1) of the Arkansas Supreme Court Rules, Mr. Simpson's counsel has filed a motion to withdraw on the grounds that this appeal is without merit. Appellant's counsel's motion was accompanied by a brief discussing all matters that might arguably support an appeal, and a statement as to why each point cannot support a merit appeal. Mr. Simpson was provided with a copy of his counsel's brief and notified of his right to file a list of pro se points, and Mr. Simpson has filed a list of points on his behalf. After examining the record and the briefs presented, we conclude that Mr. Simpson's revocation must be affirmed.

Debra Wiseman, an employee of the Crittenden County Sheriff's Office, testified that Mr. Simpson owed fines and costs of \$770.00 payable at \$50.00 per month after his release from prison. According to Ms. Wiseman, appellant has paid nothing toward his fines and costs. Ms. Wiseman further stated that she has received no contact from Mr. Simpson informing the sheriff's office of his address.

Officer Harvey Taylor testified that he was patrolling in West Memphis on October 2, 2008, when he initiated a traffic stop of a truck being driven by Mr. Simpson. After making the stop, Officer Taylor performed a license-plate check and determined that the truck was stolen. Officer Taylor also determined that Mr. Simpson's driver's license was suspended, and he arrested him.

Charlotte Mathis testified that her truck was stolen from a body shop, and after the West Memphis police arrested Mr. Simpson they called Ms. Mathis and told her they had recovered her truck. According to Ms. Mathis, the truck was trashed and she paid \$585.00 to get it repaired, which included a \$500.00 insurance deductible.

Mr. Simpson testified in his own defense, and explained that he had not paid any fines or costs because he was released from prison to a drug treatment program and was unemployed. Mr. Simpson acknowledged driving the stolen truck, but maintained that he did not know that it was stolen. He said that he got the truck from a man named Herbert Cummings. On cross-examination, Mr. Simpson acknowledged that there was no question that his license was suspended.

There were no adverse evidentiary rulings during the revocation hearing, and Mr. Simpson's counsel correctly asserts on appeal that there can be no meritorious challenge to the revocation of his suspended sentence. Arkansas Code Annotated section 5-4-309(d) (Supp. 2009) provides that if a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension, the court may revoke the suspension. The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). On appeal, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* In the instant case, Officer Taylor testified that Mr. Simpson was driving with a suspended license, and Mr. Simpson

admitted this fact in his testimony. One of appellant's conditions was that he not violate any state law, and the undisputed fact that he was driving with a suspended license was alone sufficient to support his revocation.

We now turn to the pro se points submitted by Mr. Simpson. Many of his points appear to be directed toward the sufficiency of the evidence supporting his revocation, but as previously stated there can be no meritorious challenge to the trial court's finding that he violated a condition. Mr. Simpson also suggests that the prosecutor, public defender, and trial court acted in concert to send him to prison, but he cites no facts to support that claim and did not raise it before the trial court. Mr. Simpson next contends that Officer Taylor did not testify and that the abstract of the hearing is incorrect, but our examination of the record shows otherwise. Finally, Mr. Simpson argues that he was not brought to a revocation hearing within sixty days of his arrest, presumably referring to that requirement as set forth in Ark. Code Ann. § 5-4-310(b)(2) (Repl. 2006). However, in *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987), the supreme court held that if a probationer fails to raise his motion to dismiss the revocation petition for lack of a speedy hearing before the hearing, he has waived his rights. Because Mr. Simpson did not raise this issue below the argument was waived for purposes of appeal. We have reviewed Mr. Simpson's pro se points, and conclude that there is no basis to reverse his revocation and ten-year prison sentence.

Finally, we recognize that the trial court also ordered Mr. Simpson to pay \$585.00 in restitution upon his revocation. However, Ark. Code Ann. § 5-4-205(a)(1) (Supp. 2009)

provides that a defendant who is *found guilty* or who *enters a plea of guilty or nolo contendere* to an offense may be ordered to pay restitution (emphasis added). The restitution statute specifically applies to convictions, and does not authorize restitution in revocation proceedings. A sentence is void or illegal when the trial court lacks authority to impose it. *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007). Whether or not it was raised below, the issue of an illegal sentence may be raised by this court *sua sponte*. See *Turner v. State*, 88 Ark. App. 40, 194 S.W.3d 225 (2004). Because the trial court lacked the authority to order restitution in this case, we modify the judgment against Mr. Simpson so as to delete the \$585.00 in restitution.

Affirmed as modified; appellant's counsel's motion to be relieved is granted.

KINARD and GRUBER, JJ., agree.