Cite as 2010 Ark. App. 157

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 09-799

KENDRICK WHITE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** FEBRUARY 17, 2010 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CR-2002-970-2-5] HONORABLE JODI DENNIS, JUDGE AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Kendrick White appeals the revocation of his probation as entered by the Jefferson County Circuit Court. Appellant had pleaded guilty to second-degree sexual assault in 2005, negotiating his charges downward from rape, and in exchange for that plea, he received a five-year probationary term. In 2008, the State filed a petition to revoke on the basis that he had failed to abide by certain conditions to which he agreed. The trial court revoked his probation and sentenced appellant to a five-year prison term. Appellant contends that the State did not prove that he was provided written conditions under which he was being given a probated sentence in accordance with Ark. Code Ann. § 5-4-303 (Repl. 2006). This, he asserts, deprived the trial court of the authority to revoke his probation. We disagree and affirm.

Arkansas Code Annotated section 5-4-303(g) (Repl. 2006) states: "If the court suspends imposition of sentence on a defendant or places him on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he or she is being released." In *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980), the supreme court explained that:

> All conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revokable. Therefore, courts have no power to imply and subsequently revoke [for violation of] conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence. This result not only comports with any due process requirements owed to a defendant upon the imposition of a suspended sentence but may serve to deter criminal conduct which a defendant might otherwise commit but for a full appreciation of the extent of his jeopardy.

268 Ark. at 191, 594 S.W.2d at 853; *see also Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983). If a probationer is given written conditions of behavior, then under Ark. Code Ann. § 5-4-309(d) (Repl. 2006), a circuit court may revoke a defendant's probation at any time prior to the expiration of the probation period if it finds by a preponderance of the evidence that the defendant had inexcusably failed to comply with a condition of his probation. *See Davis v. State*, 368 Ark. 351, 246 S.W.3d 433 (2007).

In this case, appellant was notified of the alleged violations of his conditions by the State's petition to revoke filed in February 2008, which enumerated that appellant (1) committed a crime by failing to register his change of address on the sex offender registry, (2) consumed alcohol, (3) used controlled substances (marijuana, opiates, cocaine), testing positive numerous times between March and August 2007, (4) failed to report on at least eight

occasions between April 2007 and February 2008, (5) left the state of Arkansas without approval of his supervising officer, (6) failed to submit to substance abuse and mental health counseling as referred in July 2007, (7) was delinquent on payments for supervision fees and fines, and (8) failed to complete community service.

At the probation-revocation hearing held in November 2008, two of White's probation officers testified that they were familiar with his "Conditions of Suspended Sentence or Probation" set forth in a document in appellant's file. Probation Officer Norsworthy testified that she was appellant's probation officer from July 2007 through August 2008. She said that during the time appellant met with her, his primary issue was marijuana use, which is why he was referred for drug treatment. Norsworthy stated that when she first took on his file, appellant admitted that he was drinking about a pack of beer per week. She said that she did go over the written rules of probation with him. Norsworthy recounted that when appellant lost his job at a local tree service, he moved without permission to Louisiana for a job. She said he also failed to do his community service, to report, to register as a sex offender after he moved, or to pay fees and fines in installments as he was supposed to be doing. Norsworthy warned appellant that he needed to get in compliance with these requirements immediately or she would go forward with a violation report. Norsworthy made that report on February 7, 2008, which was the basis for the petition to revoke filed on February 28, 2008.

Probation Officer Brown stated that she had taken over appellant's probation file in August 2008 and met with him to go over his rules and special conditions. Brown testified that the file reflected that appellant initialed each condition of probation and signed the agreement on July 8, 2005. Brown said that although she had taken over his file after the petition was filed, appellant admitted to her that he was consuming alcohol, that he did not report, that he left the State, that he had not submitted to counseling, that he had not paid his fees, and that he had failed to register as required.

Appellant's first probation officer, Tonya Lemons, was the one who had appellant initial each condition and sign the probation conditions, but Lemons was not in attendance at the revocation hearing. The State offered the document into evidence, which was admitted over defense counsel's objection. Appellant's counsel moved to dismiss the petition on the basis that the State had not proved that appellant actually received written conditions of probation, as required by Ark. Code Ann. § 5-4-303(g). The judge denied that motion and found him to have violated his conditions. A judgment of conviction was entered, and this appeal followed.

Whether there is proof that a probationer received written conditions of probation is a procedural matter, and not one of the sufficiency of the evidence, because the purpose of providing the conditions in writing is to prevent confusion on the probationer's part. *See Nelson v. State,* 84 Ark. App. 373, 141 S.W.3d 900 (2004). This procedural issue was raised

to the trial court and is therefore preserved for appellate review. *See Whitener v. State*, 96 Ark. App. 354, 241 S.W.3d 779 (2006).

The judge did not err in denying the motion to dismiss. The record reflects that written conditions were initialed and signed by Kendrick White on July 8, 2005. The probation officers's testimony provided evidence that such written conditions existed and the specific conditions therein. The probation officers both testified that they went over the conditions of probation with appellant, and that appellant admitted to violations of many of the conditions. The trial court admitted the written conditions into evidence. Because (1) the purpose of the written-conditions requirement is to avoid confusion on the part of the probationer, (2) there were written conditions initialed and signed with appellant's initials and name, (3) there was evidence upon which to find that those written conditions were expressly communicated in writing and verbally to appellant, and (4) there lacked any evidence of confusion on this probationer's part, we affirm the decision to revoke.

Affirmed.

GLOVER and MARSHALL, JJ., agree.