

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR08-1157

BOBBY LEE GREEN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 24, 2010

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT
[NO. CR-05-220-1]

HONORABLE SAM POPE, JUDGE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

LARRY D. VAUGHT, Chief Judge

This is an appeal from an order revoking appellant Bobby Lee Green’s probation and sentencing him to six years’ imprisonment and a four-year suspended sentence. Appellant’s counsel has filed a no-merit brief and a motion to be relieved as counsel, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(k)(1), asserting that there is no non-frivolous argument to be made in support of an appeal. The clerk of this court furnished appellant a certified copy of his counsel’s brief and motion to be relieved, informing appellant that he had the right to file pro se points for reversal. Appellant has not filed pro se points.

On March 13, 2006, appellant pled guilty to possession of cocaine with the intent to deliver, a class Y felony. He was sentenced to ten years’ probation, conditioned on good behavior, and ordered to pay fees and court costs. On May 7, 2007, Green’s probation was

extended one year. On February 29, 2008, the State filed a petition to revoke appellant's probation for violating several of his probation conditions; specifically, committing the offenses of DWI, possession of instruments of a crime, refusal to submit, disorderly conduct, and possession of a controlled substance (crack cocaine).

A hearing on the petition was held on May 18, 2008. The State presented the testimony of Lieutenant Steven Stain of the Monticello Police Department and Kelly King, Green's probation officer. Lt. Stain testified that on February 17, 2008, after asking Green to exit his vehicle, Lt. Stain detected an odor of intoxicants, observed Green's bloodshot and watery eyes, and witnessed Green's unsteady stance. Lt. Stain also retrieved a crack pipe from Green's front shirt pocket. Lt. Stain arrested Green for DWI and possession of an instrument of crime. Once in custody, Green failed to cooperate by refusing to sign the *Miranda* forms, refusing a breathalyzer test, and answering all questions with the claim that he was "mentally retarded." King testified that Green twice tested positive for controlled substances and that he had not paid his fees and costs.

Green testified that he was not intoxicated the day he encountered Lt. Stain. He further testified that the object in his pocket belonged to a girl who "went crazy" and that he had just taken it from her in order to entice her into his car so he could safely take her home. He claimed that he was unaware that he had to pay fees and court costs and that he would have paid them had he known of the requirement. Green's wife testified that her husband did not have a drug or alcohol problem and that had they known about the fees and costs, they would have paid them.

The trial court found that the State proved that Green committed the offense of DWI, that he possessed an instrument of crime, that he possessed or consumed controlled substances, and that he failed to pay court costs and fees. Accordingly, the trial court revoked Green's probation and sentenced him to imprisonment for six years coupled with a four-year suspended sentence.

Appellant's counsel correctly argues that the only rulings adverse to Green were two evidentiary objections along with the revocation decision. Counsel addresses each, arguing that the objections do not have merit and that the evidence supported the trial court's decision. We agree.

The first adverse ruling occurred when the trial court permitted Lt. Stain to testify that Green was not retarded. While Green's counsel objected to the testimony, arguing that the lieutenant was not qualified to make that determination, the trial court permitted Lt. Stain to relate his past experiences with Green. Lt. Stain then testified that on prior occasions, he had conversations with Green and that Green understood and signed *Miranda* documents after having them read to him.

Rule 701 of the Arkansas Rules of Evidence provides that opinion testimony from a lay witness is limited to those opinions which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. Lt. Stain's testimony falls within this rule. It was not offered as expert testimony that Green was or was not mentally retarded. Rather, it was lay-witness testimony from Lt. Stain that he knew from prior experiences that Green understood the lieutenant's questioning and requests. This is not

a meritorious ground for reversal.

The second adverse ruling occurred during King's testimony that Green tested positive for controlled substances in March and April 2008. Green's counsel twice objected to this testimony, arguing that it was irrelevant because the petition to revoke did not allege these facts as a violation of probation. The trial court allowed the testimony for "sentencing and also for intent." While it could be argued that the trial court took this evidence into consideration in revoking Green's probation, such an argument lacks merit because there was other evidence introduced that clearly established that he violated his probation, i.e., his demeanor on the date of the incident, the odor of intoxicants, his possession of the crack pipe, and his failure to pay fees and costs. As such, the second adverse ruling is not a meritorious ground for reversal.

The final issue is whether there was sufficient evidence to support the trial court's revocation. On appeal of a revocation, our review is directed toward determining whether the trial court's findings are clearly against the preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006); *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996). In order to revoke the terms of probation, the State must prove that the defendant violated a condition of his probation by a preponderance of the evidence. *Carruthers v. State*, 59 Ark. App. 239, 956 S.W.2d 201 (1997). Whether this standard is met is determined by questions of credibility and the weight to be given to the testimony, and we defer to the trial court's superior position with regard to those issues. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). After evaluating the record under the proper standard of review, we hold that the revocation of Green's probation was not clearly against the preponderance of the evidence. As such, we affirm

Cite as 2010 Ark. App. 174

the revocation and grant counsel's motion to be relieved.

Affirmed; motion to be relieved granted.

KINARD and GRUBER, JJ., agree.