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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR09-1179

RAY O'NEAL, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 10 MARCH 2010 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CR-03-1042-1, CR-04-410-1] THE HONORABLE BERLIN C. JONES, JUDGE REVERSED & DISMISSED

D.P. MARSHALL JR., Judge

"If the court suspends imposition of sentence on a defendant or places him or her on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he or she is being released." Ark. Code Ann. § 5-4-303(g) (Supp. 2009). "[A]ll conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revocable." *Wade v. State*, 64 Ark. App. 108, 111, 983 S.W.2d 147, 149 (1998) (quoting *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980) in the probation context). "[C]ourts have no power to imply and subsequently revoke conditions which were not expressly communicated in writing to a defendant as a condition of his [probation]." *Ibid.* Here, it is undisputed that Ray O'Neal neither received a copy of his probation

conditions nor signed or initialed them. The circuit court revoked O'Neal's probation because he failed to report to his probation officer to receive the conditions.

O'Neal pleaded guilty to several drug-related offenses in February 2008. The transcript of this hearing is not a part of the record. The resulting judgment and commitment order reflects that the circuit court sentenced O'Neal to 48 months' probation and ordered him to pay certain fines, fees, and costs, to complete 120 hours of community service, and to enter drug and alcohol treatment. The record does not show that O'Neal got a copy of the judgment and commitment order. Before he entered his plea, O'Neal met with a probation officer and was told to report for probation intake within 48 hours of being released from custody.

O'Neal made one probation report in February 2008, approximately six days after being released. He did not meet with his probation officer face-to-face. The record is not clear whether he mailed this report form in or came to the probation office, though the latter seems most likely. O'Neal was given an intake appointment for about a week later. He never showed for this appointment.

On the report form, O'Neal listed 1803 W. 26th St. in Pine Bluff as his address. The probation office, however, had a different address for him in its records: 1908 W. 28th St. in Pine Bluff. O'Neal's probation officer sent O'Neal a letter instructing him to report, but she could not remember which address she sent the letter to. O'Neal

never reported again. When the probation officer performed a home visit at 1908 W. 28th St., the resident said that O'Neal had never lived there.

In early April 2008, O'Neal was twice arrested for shoplifting. The State filed a revocation petition in July 2008. Nearly a year later, O'Neal was arrested on a warrant for violating his probation. O'Neal's probation officer finally met with him in jail, but O'Neal refused to sign his probation conditions and would not allow the probation officer to read them to him. After a hearing, at which O'Neal objected to revocation because he did not receive his conditions early on, the circuit court revoked O'Neal's probation for failing to report for his intake appointment.

One thing is clear from the record: O'Neal never received a written copy of his probation conditions. His probation officer so testified unequivocally. The State points to both O'Neal's plea agreement and the judgment and commitment order as written documents that could satisfy the statute. Ark. Code Ann. § 5-4-303(g). The state of this record, however, prevents us from deciding whether either document would suffice. The plea agreement is not in the record. The judgment and commitment order is. But nothing of record demonstrates that O'Neal received, read, signed, or initialed either of these documents. *Cf. Brewer v. State*, 274 Ark. 38, 40–41, 621 S.W.2d 698, 700 (1981).

This incomplete record shows failures on both sides of the case. When O'Neal

pleaded guilty and was sentenced, before he left court he should have received a written copy of his probation conditions—or at least some document reflecting his obligation to report for probation intake. It is also clear, however, that O'Neal knew about his intake obligation because he contacted the probation office once. He should have kept his intake appointment the following week instead of absconding.

In the face of all these failures, the circuit court should have proceeded another way. Rather than pressing forward with revocation—a proceeding which must be based on the probationer's receipt of written conditions, the court should have used its contempt power. That power was the way to get O'Neal back into court to receive the conditions, or punish him for not following through on his intake obligation, or both. *E.g.*, *Finn v. State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991). As this record stands, however, the circuit court erred by revoking O'Neal's probation for failing to report because the statute was not followed. Ark. Code Ann. § 5-4-303(g); *Wade*, *supra*.

Reversed and dismissed.

ROBBINS and GLOVER, JJ., agree.