

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 09-890

ANTHONY JOSENERGER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 10, 2010

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[NOS. CR-2005-322 & CR-2008-1495]

HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Anthony Josenberger appeals the decision of the Sebastian County Circuit Court revoking his suspended sentences in two cases, CR-2005-322 and CR-2008-1495. For reversal, appellant argues that the evidence does not support the trial court's findings and that the trial court erred by revoking his suspended sentences based on a violation that was not included in the petition to revoke. We affirm.

On March 23, 2005, in case number CR-2005-322, appellant pled guilty to the offenses of attempted residential burglary and false imprisonment. The court withheld imposition of sentence for five years, conditioned upon good behavior and the requirement that he have no contact with Linda Greene. The court also ordered appellant to pay restitution in the amount of \$830 and fees at a rate of \$50 per month. The trial court revoked this sentence in May 2006, and in September 2007, the court revoked the sentence imposed

upon the first revocation. Upon the second revocation, the court sentenced appellant to six years in prison with a one-year suspended imposition of sentence to be served upon his release from prison, which occurred on September 3, 2008.

On February 18, 2009, appellant pled guilty to the offenses of possession of marijuana and criminal trespass in case number CR-2008-1495. The trial court withheld imposition of sentence for one year, conditioned upon good behavior and the payment of a public defender fee, a fine of \$750, and court costs. In addition, the trial court ordered appellant to have no contact with Bobby Blair.

On May 5, 2009, the State filed a petition to revoke in both cases. In the petition, the State alleged that appellant had violated the terms of his suspended sentences by committing the offense of disorderly conduct, by having contact with Linda Greene, and by failing to pay restitution, fees, fines, and costs.

The trial court held a hearing on June 3, 2009. Officer Anthony Parkinson of the Fort Smith Police Department testified that he received a dispatch to respond to a disturbance. When he arrived at the location, he observed appellant and Linda Greene arguing on the sidewalk. Parkinson ascertained that appellant was on parole and contacted appellant's parole officer, who advised Parkinson to arrest appellant. At the scene, Greene claimed that appellant had burglarized her house. Parkinson said that appellant responded to this allegation by saying that Greene was his "on-again, off-again" girlfriend and that she invited him to her house. Parkinson said that appellant called Greene obscene names and that appellant directed

derogatory comments toward him as well. Parkinson testified that appellant continued to utter profanities all the way to the police station. The State also introduced appellant's payment records showing that appellant had paid only \$70 in restitution in case number CR-2005-322. The records also showed that appellant owed \$1,000 in fees and costs in both CR-2005-322 and CR-2008-1495.

Appellant testified that he was not able to meet his financial obligations because he was in jail a portion of the time and because he also had to pay child support and parole fees. He stated that he sometimes worked for his uncle in the cement and roofing business earning approximately \$200 a week. He resided rent-free in his deceased grandparents' home and paid only the costs of water and electricity. Appellant claimed that the recession made it difficult to find a "legit" job. During cross-examination, appellant admitted that he occasionally smoked marijuana. Appellant said that he either purchased the marijuana or that his cousins supplied him with that substance.

The trial court issued its ruling from the bench and revoked appellant's suspended sentences, finding that appellant violated the conditions by using marijuana, committing the offense of disorderly conduct, and violating the no-contact order concerning Greene. Upon revocation, the trial court withheld imposition of sentence for one year in CR-2005-322 and sentenced appellant to a year in jail in CR-2008-1495. This appeal followed.

Appellant argues on appeal that the evidence is not sufficient to support a finding that he violated the conditions of his suspended sentences. Further, he argues that the trial court

erred by basing his decision on the use of marijuana because that violation was not included in the petition to revoke. In a hearing to revoke probation or a suspended imposition of sentence, the State must prove its case by a preponderance of the evidence. *May v. State*, 2009 Ark. App. 703. To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Supp. 2009). 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). When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *May, supra*. Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial court's superior position. *Haley, supra*.

In both cases, the terms of appellant's suspended sentences contained a prohibition against possessing or using marijuana or any other drug or controlled substance prohibited by law. In his testimony, appellant admitted that he used marijuana. Consequently, revoking appellant's suspended sentences on this basis is not clearly against the preponderance of the evidence. Although the violation of this condition was not included among the allegations in the petition to revoke, appellant did not object to the testimony elicited on this subject, nor did he raise an objection when the trial court ruled in open court that appellant violated this condition. While it is true that appellant's right to due process required that he be given

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notice of the conditions of the suspended sentences he was alleged to have violated, it is also true that the denial of any right, even a constitutional one, must be objected to at trial to be preserved for appeal. *Cheshire v. State*, 80 Ark. App. 327, 95 S.W.3d 820 (2003). Because appellant failed to object, we affirm the trial court's decision to revoke on the ground that appellant violated the terms of his suspended sentences by using marijuana. We need not discuss the trial court's findings on the other transgressions because the violation of one condition is sufficient to support revocation. *Haley, supra*.

Affirmed.

PITTMAN and BAKER, JJ., agree.