

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR08-1460

WESLEY BARRINGER,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered APRIL 28, 2010

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NOS. CR2002-480, CR2002-551,
CR2004-389, CR2006-1065]

HONORABLE BERLIN C. JONES,
JUDGE,

AFFIRMED

KAREN R. BAKER, Judge

Appellant Wesley Barringer challenges the Jefferson County Circuit Court’s revocation of his probated sentence. He alleges that the State failed to show by a preponderance of the evidence that he committed the offense of terroristic threatening, failed to perform community service, and willfully refused to pay restitution, as well as fees and fines. We find no error and affirm.

We will uphold a trial court’s probation-revocation determination unless the decision is clearly against the preponderance of the evidence. *See Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge’s superior position in credibility determinations. *Id.* To revoke probation, the trial court must

find by a preponderance of the evidence that the probationer inexcusably violated a condition of that probation. *Id.* The State need only prove that the appellant committed one violation of the conditions in order to revoke appellant's sentence. *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001); *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987).

On review, we hold that a preponderance of the evidence supports the trial court's revocation of appellant's probation. A petition to revoke was filed on January 7, 2008, and on February 12, 2008, a revocation hearing was held. The original charges for which appellant received probation included forgeries, theft of property, a reduced charge of possession of a controlled substance, use of paraphernalia to manufacture methamphetamine, and nonsupport. All the parties agreed before the hearing began that the final tally of the charges subject to revocation were one D felony, six C felonies, and one B felony.

At the revocation hearing, Dametria Rochelle, a probation/parole officer, testified that appellant was delinquent \$525 in probation service fees with the last payment made on June 6, 2007. She also testified that he owed \$11,865 to the Jefferson County Sheriff's Office with the last payment made on June 20, 2007. In her testimony, she explained that the majority of the money owed was from appellant's most recent case subject to revocation, the felony nonsupport. In that case, on March 16, 2007, appellant pled guilty to nonsupport and received 60 months of probation. One of the conditions of appellant's probation was that he pay a supervision fee in the amount of \$25 a month to the Department of Community Correction. Another condition ordered him to pay restitution in the total amount of \$9,000

in monthly payments of \$170 a month to the victim of the nonsupport charge, Heather Barringer, through the Jefferson County Sheriff's Office. He was also to pay costs and/or fines to the Jefferson County Sheriff's Office in the additional monthly amount of \$170.

Appellant attempted to justify his failure to pay the required payments as a result of his loss of work and residential rehabilitation for alcohol abuse. He testified that he had been unable to pay fines, fees, or restitution because he had been laid off in June 2007, and that, following his loss of work, he had checked himself into a rehabilitation facility. His residential rehabilitation began in October 2007, and continued through January 2008. He offered two reasons arising from the change in his employment and his residential rehabilitation that led to his inability to pay. One reason was that he did not know what to pay or where to send payments. The other reason was that the majority of his earnings during his stay at the rehabilitation facility were automatically paid to the facility; therefore, he claimed he had no discretion or authority to apply his earnings to the assessed fines, fees, and restitution even if he had ascertained the proper payment protocols. Appellant also confirmed that since leaving the facility, he had been working multiple shifts at a restaurant. However, no attempts to cure the deficiencies were made.

Despite appellant's attempt to excuse his failure to pay fines and restitution, the trial court found that appellant had committed a multitude of violations¹ and that these violations

¹These violations primarily stemmed from appellant's alcohol abuse, which, in the court's opinion, led to his arrest in June 2007 for terroristic threatening. Moreover, the court chastised appellant for failing to perform community service, failing to cooperate in any manner with the probation officer, failing to otherwise follow the rules, failing to seek drug

specifically included a failure to make good-faith efforts to pay fines and restitution. Because the State need only prove one violation of the conditions of probation, this one violation is sufficient to uphold the trial court's revocation of appellant's probations.

As this court recently explained, a probation violation that arises from a failure to pay restitution invokes the application of two statutes, one general and one specific. *Hanna v. State*, 2009 Ark. App. 809, 372 S.W.3d 375. The general statute applies when an individual is accused of violating any condition of a probation or suspended sentence. *Id.* Under this statute, probation may be revoked "if a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation." Ark. Code Ann. § 5-4-309(d) (Supp. 2009). The more specific statute applies when restitution is ordered as a condition of probation. *See* Ark. Code Ann. § 5-4-205(f)(2). When restitution is a condition, and the individual fails to pay, a court may revoke "if the defendant has not made a good faith effort to comply with the order." *Id.*

Determining whether a good-faith effort has been made to comply with the order is critical to the trial court's decision as to whether the individual has violated his or her probation. The statute lists the kinds of facts for the judge's consideration in evaluating the probationer's good-faith effort or lack thereof. "In determining whether to revoke probation" for a failure to pay restitution, the court "shall consider" the defendant's employment status, earning ability, financial resources, the willfulness of the failure to pay, and any other special

counseling or anger management, and failing to notify his probation officer of his unilateral decision to check himself into rehabilitation.

circumstances that may have a bearing on the defendant's ability to pay. Ark. Code Ann. § 5-4-205(f)(3)(A)–(E). *See also Hanna, supra.*

Some of the various facts bearing on good faith are the probationers' particular economic circumstances, the quantity of their efforts to pay, and the quality of those efforts in deciding whether failures to pay restitution were inexcusable. *Hanna, supra.*; *see, e.g., Hoffman v. State*, 289 Ark. 184, 189–90, 711 S.W.2d 151, 153–54 (1986) (standard of living, purchase of \$17,000.00 car, and limited job search); *Baldrige v. State*, 31 Ark. App. 114, 117–18, 789 S.W.2d 735, 737–38 (1990) (young probationer made some payments while supporting four dependents by doing all available manual labor). This inquiry reflects the “delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources.” *Hanna, supra.*

In this case, the majority of the money appellant failed to pay in accordance with the court order was for restitution related to the felony nonsupport charge. Once the State introduced evidence of nonpayment, the burden of going forward shifted to appellant to offer some reasonable excuse for his failure to pay. *Hanna, supra.* Despite the shift in the burden of proof, the State always retained the ultimate burden of persuading the fact-finder, of proving that appellant's failure to pay was inexcusable. *Id.*

It is the probationer's obligation to justify his failure to pay, and this shifting burden of production draws out the probationer's reason for nonpayment. *Id.* If he asserts an inability

to pay, and provides evidence demonstrating that inability, then the State must carry its ultimate burden of demonstrating no good-faith effort by a preponderance of the evidence.

See id.

Once the assertion of inability to pay is made, the State can then carry its burden in various ways. *Id.* It can undermine the probationer's credibility, or it can show a lack of effort, such as a failure to make bona fide efforts to seek employment or to borrow money to pay restitution. *See id.* The State can also show that the probationer is spending his money on something nonessential or illegal instead of paying restitution. *Id.* These are just some of the ways that the State may justify imprisonment even when an individual alleges an inability to pay.

In this case, appellant was able to work and readily found employment while in rehabilitation and after he prematurely left that facility. He was physically capable of working multiple shifts at a restaurant. He offered no reasonable explanation for his not working from June to October 2007 before he admitted himself into the rehabilitation facility. Evidence supported, and he in fact admitted, that his continued drinking interfered with his ability to function, and he acknowledged that refraining from the use of alcohol was a specific condition of his probation. His use of alcohol further supports the conclusion that his purchase of alcohol resulted in a waste of his available resources.

In this case, there was evidence that appellant spent his money on something nonessential, alcohol, and this use of alcohol was also in violation of his terms of probation.

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He offered no reasonable explanation as to his failure to pay, and chose to devote his resources to alcohol use instead of paying restitution, which would further provide for the support of those dependent upon him. The State adequately addressed appellant's assertions of his inability to pay.

Accordingly, we find no error and affirm.

PITTMAN and HART, JJ., agree.