

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR09-957

HARVEY TYSON LEWIS  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** May 19, 2010

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT  
[NO. CR-2007-1453B]

HONORABLE JAMES O. COX,  
JUDGE

AFFIRMED

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## JOSEPHINE LINKER HART, Judge

Harvey Tyson Lewis appeals from an order of the Sebastian County Circuit Court revoking his suspended sentences for breaking or entering. In its March 18, 2009 petition to revoke Lewis's suspended sentence, the State alleged that in 2009, Lewis had failed to pay his court-ordered fees and costs. It also alleged that in 2009, Lewis had committed the offenses of theft of property and second-degree terroristic threatening on March 1; theft by receiving on March 5 and 6; and aggravated robbery, felon in possession of a firearm, and obstructing governmental operations on March 12. The trial court found that Lewis violated the terms and conditions of his suspended sentences by failing to pay his fees and costs and by committing the offenses of second-degree terroristic threatening and theft by receiving. Lewis was sentenced to six years in the Arkansas Department of Correction. On appeal, he argues that the State failed to show by a preponderance of the evidence that he violated the terms and conditions

of his suspended sentences because it failed to show that his nonpayment of fees and costs was willful; the trial court arbitrarily disregarded testimony that drew into question the reliability of the State's witnesses due to their prior felonies and "admitted being involved in drug usage at the time of the alleged offenses"; and there was no evidence presented that he knew that the items he pawned were stolen. We affirm.

When we review a trial court's findings that an appellant violated the terms and conditions of his or her suspended sentence, those findings are upheld unless they are clearly against a preponderance of the evidence. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998). Evidence that is insufficient to support a criminal conviction may be sufficient to support a revocation. *Id.* We defer to the trial court's superior position to resolve matters of witness credibility and the weight to be given testimony. *McLeod v. State*, 2010 Ark. 95. The supreme court has stated that it will not rely on testimony only if it is "inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." *Brown v. State*, 374 Ark. 341, 345, 288 S.W.3d 226, 230 (2008).

Lewis first argues that the State failed to show that he violated the terms and conditions of his suspended sentence by a preponderance of the evidence because the State failed to present evidence that his failure to pay his public-defender fee was willful. Lewis's argument misapprehends the law on this issue.

The State was obligated to prove by a preponderance of the evidence that Lewis inexcusably failed to comply with his payment obligation. Ark. Code Ann. § 5-4-309(d)

(Repl. 2006). Once the State introduced evidence of nonpayment, Lewis bore the burden of going forward to offer some reasonable excuse for his failure to pay. *Hanna v. State*, 2009 Ark. App. 809, 372 S.W.3d 375. This shifting burden of production is intended to draw out the probationer's reason for nonpayment. *Id.*

Here, Lewis offered no excuse for his failure to pay his fees and costs. Our case law makes it clear that he had a duty to explain his failure to pay before the State is obligated to prove by a preponderance of the evidence that he made no good-faith effort to pay. *Id.* (citing *Brown v. State*, 10 Ark. App. 387, 389, 664 S.W.2d 507, 508 (1984)("[T]he probationer can[not] sit back and rely totally upon the trial court to make inquiry into his excuse for nonpayment.")). Accordingly, we hold that there was no error for the trial court to find that Lewis violated the terms of his suspended sentence by his failure to pay his court-ordered fees and costs.

For his second point, Lewis argues that the trial court arbitrarily disregarded testimony showing that the alleged victims and other witnesses were unreliable, because they had prior felonies and had admitted to using drugs at the time of the alleged offenses. We reject this argument because it is outside the scope of our review. As noted previously, we defer to the trial court's superior position to resolve matters of witness credibility and the weight to be given testimony. While we do not blindly accept a trial court's reliance on a witness's testimony, we note again, that we may only reject it if it is "inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." None of the testimony

that Lewis challenges rises to this level.

Moreover, the testimony that Lewis now challenges is, at best, only marginally relevant to the issue of his willful failure to pay his fees and costs. It was not part of the State's case on this issue. However, to the extent that it has any bearing on this issue, it does not inure to Lewis's benefit. In cross-examining the witnesses who testified that Lewis committed new criminal offenses, Lewis tried to elicit responses that implicated the witnesses, as well as Lewis, in illegal narcotics activity. This evidence would tend to show that Lewis was spending money on something nonessential or illegal instead of paying restitution. *Williams v. State*, 2009 Ark. App. 554, at 4.

We need not address Lewis's final argument that there was no evidence presented to show that he knew that the items he pawned were stolen. The State must prove only one violation to establish that Lewis violated the conditions of his suspended sentences. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). Accordingly, we find it unnecessary to address the other grounds for the revocation of Lewis's suspended imposition of sentence.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.