Cite as 2010 Ark. App. 462

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-1291

MICHELLE BURKHART APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** JUNE 2, 2010 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CR 2002-611] HONORABLE GARY RAY COTTRELL, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Michelle Burkhart appeals the revocation of her suspended imposition of sentence, for which she was sentenced to a term of imprisonment of four years in the Arkansas Department of Correction. On appeal, she challenges the sufficiency of the evidence, arguing that the circuit court erred in finding that her failure to pay fines and costs was inexcusable. We affirm.

On April 4, 2003, appellant pled guilty to a charge of failure to appear, a Class C felony. The circuit court withheld imposition of sentence for a period of ten years, conditioned, among other things, on the payment of a $2,500 fine and $150 in court costs. She was sentenced pursuant to a judgment and commitment order filed on June 9, 2003.

On July 21, 2009, the State filed a petition to revoke the suspended sentence on the basis that appellant had failed to make any payments toward her fine, court costs, and

administrative fees, leaving an unpaid balance of $2,785.[1] A hearing was held on the petition to revoke on September 9, 2009.

At the hearing, the State initially introduced, without objection, the court's file, including all past judgments and dispositions, as well as the restitution ledger. The State then presented testimony regarding the alleged harassing communications and rested its case.

Appellant's counsel then called the court's clerk and questioned her about the various pending criminal and domestic cases and/or related judgments and payments involving appellant. Appellant then testified on her own behalf, explaining that the nonpayment charge was a mistake and that she thought her outstanding fines and costs would be satisfied by her prison time. She did acknowledge a history of nonpayment related to multiple judgments against her and stated that she was not exactly sure what was owed because there were so many. She explained that she would have paid the outstanding amount if she had known she owed it and asked for another opportunity to make up for the oversight. On cross-examination, appellant acknowledged that she was released from prison on September 2, 2005, and that she had made no payments during the four years since her release.

After the defense rested, the circuit judge stated that there was really no contesting the fact that appellant was in violation of the court's orders relative to the payment of fines and costs owed in case number 2002-611, as nothing had been paid. He stated that it is the duty

[1]The petition also alleged that appellant had committed the new offense of harassing communications in violation of the terms and conditions of her suspended imposition of sentence.

of every defendant to determine what is owed, and noted that there was no defense raised as to her inability to pay. He revoked appellant's suspended sentence and sentenced her pursuant to a judgment and commitment order entered on September 9, 2009, and appellant filed a timely notice of appeal on the same date. This appeal followed.

Standard of Review and Applicable Statutory Law

In a hearing to revoke probation or a suspended imposition of sentence, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). 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); *Haley*, *supra*. The State bears the burden of proof, but needs only prove that the defendant committed one violation of the conditions. *Id.* 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. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or a suspended sentence. *Id.* Since 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 judge's superior position. *Id.*

Discussion

Appellant cites *Bearden v. Georgia*, 461 U.S. 660 (1983), and *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984), for the proposition that a sentence of imprisonment for nonpayment of fines works an invidious discrimination against indigent defendants in

violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. She notes that she is such an indigent defendant and further that her non-payment was not deliberate. She submits that, pursuant to *Drain*, the circuit court was required to inquire into the reasons for her failure to pay and may revoke and sentence her to imprisonment only if she had willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay. We note that the court in *Drain* also stated:

> If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Drain, 10 Ark. App. at 342, 664 S.W.2d at 486.

We distinguish *Bearden* and *Drain* from the instant case because those cases dealt with the defendants' inability to pay. Here, the only argument set forth by appellant is that she was confused about what, if any, amounts she owed in a number of separate cases, not that she was unable to make the payments.

Where the alleged violation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. *Owens v. State*, 2009 Ark. App. 876, 372 S.W.3d 415. Once the State has introduced evidence of nonpayment, however, the burden shifts to the defendant to offer some reasonable excuse for the failure to pay. *Id.* Arkansas Code Annotated section 5-4-205(f)(3) (Supp. 2009) sets

forth several factors to be considered by the trial court, including the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. Although a probationer cannot be imprisoned solely on the basis of failure to pay, his failure to seek employment or make bona fide efforts to borrow money to pay may support a finding that his failure to pay was a willful act warranting imprisonment. *See Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

This court held in *Hanna v. State*, 2009 Ark. App. 809, 372 S.W.3d 375, that the State's introduction of documentary evidence in the form of a ledger sheet reflecting a defendant's nonpayment of court costs and fines satisfies the above-referenced burden. Once the State introduces evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for the failure to pay, but the State always retains the ultimate burden of proving that the probationer's failure to pay was inexcusable. *Id.*

In appellant's failed attempt to excuse her actions, she specifically testified that (1) she was simply confused as to what amounts she owed pursuant to the respective sentences against her, and (2) she would have paid them had she known what was owed. We defer to the circuit judge's superior position regarding questions of credibility and the weight to be given testimony. *Haley*, *supra.* That testimony, together with the confirming restitution ledger that was introduced without objection, supports the determination of the circuit court. Accordingly, we affirm.

Affirmed.

PITTMAN and GLOVER, JJ., agree.