

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR09-1359

DONALD T. STILLWELL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 30, 2010

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[CR-2005-299C]

HONORABLE DAVID BURNETT,
JUDGE

AFFIRMED; MOTION GRANTED

DAVID M. GLOVER, Judge

This is a no-merit appeal of a revocation proceeding. On August 2, 2005, appellant, Donald Stillwell, pleaded guilty to the offense of first-degree forgery, a Class B felony, at which time he was placed on supervised probation for a period of five years and ordered to pay fines and costs of \$1750 at the rate of \$50 per month beginning September 15, 2005.

Later, on March 12, 2009, the State filed a petition for revocation, alleging that Stillwell had violated the terms of his probation by failing to pay fines, costs, and fees; to report as directed; to pay probation fees; and to notify the sheriff and his probation officer of his current address and employment. At the revocation hearing, the trial court found that Stillwell had violated his probation by failing to pay fines and fees and by failing to report as directed. The trial court then sentenced him to twenty years in prison.

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Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Arkansas Rules of the Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. Counsel's motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to appellant made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished appellant with a copy of his counsel's brief and notified him of his right to file *pro se* points; appellant has not filed any points. There were three objections adverse to Stillwell at the revocation hearing.

I.

The first adverse ruling was the trial court's revocation on the basis that Stillwell had failed to pay his fines and costs as directed. A circuit court may revoke a suspension or probation if it finds by a preponderance of the evidence that the appellant inexcusably failed to comply with a condition of that suspension or probation. Ark. Code Ann. § 5-4-309(d) (Supp. 2009). In revocation proceedings, the State has the burden of proving that appellant violated the terms of his probation, as alleged in the revocation petition, by a preponderance of the evidence, and this court will not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Stinnett v. State*, 63 Ark. App. 72, 973 S.W.2d 826 (1998). This court defers to the superior position of the trial court to determine

questions of credibility and the weight to be given the evidence. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

When one of the bases for revocation is the failure to make payments as ordered, it is the State's burden to prove, by a preponderance of the evidence, that such failure to pay was inexcusable; once the State introduces evidence of nonpayment, the burden is then shifted to the defendant to provide a reasonable excuse for failing to make the payments. *Owens v. State*, 2009 Ark. App. 876, 372 S.W.3d 415. Although a defendant cannot be imprisoned solely because of a failure to pay restitution in the absence of a determination that the failure to pay is willful, the failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Gossett, supra*.

In this case, the State introduced evidence through Debra Wiseman, the collector of fines for the Crittenden County Sheriff, that no payments had been received from Stillwell on his \$1750 fine and costs assessment. Stillwell testified in his own defense, stating that he arrived in Illinois in August 2005¹ and was arrested in October for an offense committed in Illinois prior to being placed on probation in Arkansas. Stillwell said that he remained incarcerated in Illinois until July 2009, at which time he was transported to Arkansas to face the revocation charges that are the subject of this appeal. He testified that between August

¹Stillwell was attempting to have his probation from Arkansas transferred to Illinois for supervision, but evidence at the revocation hearing indicated that the Illinois Department of Parole denied the transfer.

and October 2005, prior to being incarcerated in Illinois, he did not pay any fines or costs because he was unemployed, but that his intentions were to make payments.

Stillwell failed to make any payments in September or October 2005, a violation of a condition of his probation, while he was not incarcerated in Illinois. Though Stillwell testified that he was unemployed during that time, the trial court was not required to believe this testimony or that Stillwell was unable to secure employment. Under our standard of review, we cannot say that the trial court's revocation of Stillwell's probation on this basis was clearly against the preponderance of the evidence.

II.

The second adverse ruling occurred when the trial court also revoked Stillwell's probation on the basis that he had failed to report to his probation officer as directed. Evidence of Stillwell's failure to report was provided by Daniel Scott, a probation officer with the Department of Community Correction. Scott testified that the Illinois probation office was unable to contact Stillwell. Stillwell's attorney objected to that testimony on the basis of the confrontation clause, but that objection was overruled.

Although the rules of evidence are not strictly applicable in revocation proceedings, including the hearsay rule, the right to confront witnesses is applicable. *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998). In *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989), this court held that a probationer's right to confront witnesses must be weighed against the State's reasons asserted for not requiring confrontation. While the trial court did

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not perform the balancing test required in *Goforth*, such error is harmless in this case because Stillwell's probation was properly revoked on another basis. The State need only show that the appellant committed one violation in order to sustain a revocation. See *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

III.

The third adverse ruling was the trial court's denial of an appeal bond after Stillwell's probation was revoked. This issue is moot because Stillwell failed to petition for a writ of certiorari challenging the denial of the appeal bond and thus waived this issue on direct appeal of the verdict. See *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

From a review of the record and the brief presented to this court, appellant's counsel has complied with the requirements of Rule 4-3(k) of the Arkansas Rules of the Supreme Court and Court of Appeals. Counsel's motion to be relieved is granted and appellant's revocation is affirmed.

Affirmed; motion granted.

HART and HENRY, JJ., agree.