

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-1015

JEFFERY M. NELSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 30, 2010

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CR-07-1181-1]

HONORABLE BERLIN C. JONES,
JUDGE

AFFIRMED; MOTION GRANTED

KAREN R. BAKER, Judge

On July 16, 2008, appellant Jeffery Nelson pled guilty to two counts of residential burglary and the offense of theft by receiving and was placed on probation for a period of thirty-six months, subject to certain conditions. Among the conditions of his probation, appellant was not to commit any offense punishable by imprisonment, was to notify his probation officer within twenty-four hours of any arrest, was not to use any controlled substances, was to report to his probation officer as directed, was to perform one hundred and twenty hours of community services, and was to make monthly payments to satisfy his fine and court costs totaling \$2,463.75.

On January 12, 2009, the State of Arkansas filed a petition to revoke appellant's

probation, alleging that appellant had violated certain terms and conditions of his probation, including but not limited to, being arrested for being a felon in possession of a firearm; testing positive for use of a controlled substance (marijuana); failing to pay fines, costs, and fees as directed; and failing to complete his community-service hours. After a hearing on the State's petition, the trial court found that appellant had violated the terms and conditions of his probation, revoked his probation, and sentenced him to eighty-four months in the Arkansas Department of Correction.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on grounds that the appeal is without merit. The motion is accompanied by counsel's brief in which counsel explains why there is nothing in the record that would arguably support an appeal.

The clerk of this court provided appellant with a copy of his counsel's brief and notified him of his right to file a pro se list of points on appeal within thirty days. Appellant filed one pro se point on appeal, alleging that his "probation officer lied on the stand about several things about [him] being on probation[.]" In making our review, we defer to the trial court's superior position to determine the credibility of witnesses who testify at probation-revocation hearings. See *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004). As set forth below, the question of whether the testimony of appellant or his probation officer at the hearing was credible was an issue for the trial court to determine, and we cannot say that the

trial court clearly erred.

The only objection made during the revocation hearing resulted in the State's withdrawal of its question; therefore, the only ruling adverse to appellant was the revocation of his suspended sentence. In revocation proceedings, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of probation. Ark. Code Ann. § 5-4-309(d) (Supp. 2003). Evidence that may not be sufficient to convict can be sufficient to revoke due to the State's lower burden of proof. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002); *Newborn v. State*, 91 Ark. App. 318, 210 S.W.3d 153 (2005). A circuit court's finding in revocation proceedings will not be reversed on appeal unless it is clearly against the preponderance of the evidence. *Newborn*, 91 Ark. App. at 318-19, 210 S.W.3d at 154-55.

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. *See Bradley*, 347 Ark. at 521, 65 S.W.3d at 876. The State need only prove that the appellant inexcusably committed one violation of the conditions of probation in order to revoke appellant's probation. *Id.*; *see also Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001).

At the revocation hearing, appellant's probation officer testified that appellant tested positive for marijuana use on four separate occasions in 2008, while under the probation conditions. She also stated that he had an outstanding balance in his account with the sheriff's

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office, although this was disputed by appellant's counsel. She testified that appellant failed to complete his community-service hours and violated his probation condition to refrain from criminal activity because new charges had been filed against him.

The State must only show by a preponderance of the evidence that appellant violated a single term of the conditions of his probation and suspended sentence. *See Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998). From our review of the record and the briefs presented to us, we find compliance with Rule 4-3(k) and hold that the appeal is wholly without merit. Accordingly, we grant counsel's motion to withdraw and affirm the revocation of appellant's suspended imposition of sentence.

Affirmed; motion to withdraw granted.

GLADWIN and ROBBINS, JJ., agree.