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ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 10-119

Opinion Delivered SEPTEMBER 15, 2010

MICHAEL WAYNE ALSTON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR 07-1424]

HONORABLE J. MICHAEL FITZHUGH, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Michael Wayne Alston appeals the revocation of his suspended imposition of sentence (SIS) by the Sebastian County Circuit Court. Alston was on SIS after pleading guilty to possession of cocaine. The SIS term was to be five years, commencing October 31, 2007. Alston agreed to abide by certain conditions to remain on SIS. On July 23, 2009, the State filed a petition to revoke alleging that Alston violated the conditions to which he had agreed by (1) being charged on July 15, 2009, with felon in possession of a firearm, and (2) failing to pay fines, costs, and fees as ordered by monthly payments beginning January 2008. After a hearing on the petition, his SIS was revoked, and he was sentenced to four years in prison with an additional six years suspended. Alston appeals, contending that the trial judge clearly erred in finding by a preponderance of the evidence that he willfully failed

to pay, and that the trial judge clearly erred by not suppressing the firearm evidence gained through an improper investigatory stop. We affirm.

A trial court may revoke a defendant's suspension at any time prior to the expiration of that period if it finds by a preponderance of the evidence that the defendant inexcusably failed to comply with a condition of his SIS. *See* Ark. Code Ann. § 5-4-309(d) (Supp. 2009). We will not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *Owens v. State*, 2009 Ark. App. 876. Determination of the preponderance of the evidence turns largely on questions of credibility and the weight of the testimony, and for that reason we will defer to the trial judge's superior position. *Id.* We will affirm a trial court's revocation even if only one ground for revocation is supported by the evidence. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

Here, the proceedings revealed the following. Prior to the commencement of the revocation hearing, defense counsel asked for a continuance for a mental examination. It was reported that thirty-seven-year-old Alston quit school at tenth grade, received a disability check each month, did not work, and purportedly lived with his mother. After considering these stated circumstances and the State's resistance to a continuance, the judge denied the motion for continuance, and the hearing proceeded.

The State introduced into evidence a certified ledger sheet, showing that $55 per month installments were due commencing in January 2008. The ledger sheet reflected only one payment of five dollars and an outstanding balance of over a thousand dollars. The State

also introduced into evidence a copy of Alston's conviction for possessing cocaine. Alston did not offer any evidence or testimony.

The State presented the testimony of Fort Smith police officer Chris George, who stated that on July 15, 2009, he was with Corporal George Colton when dispatch advised of an anonymous caller stating that two black males, one dressed all in black and one dressed all in orange, were at the Flash Market gas station at 1549 North Greenwood Road planning to rob the store. Notes on the call stated that the man in orange could have a firearm. Officer George stated that their patrol car was a half block away when the dispatch was made.

Defense counsel objected to the officer's actions taken in response to an unreliable anonymous caller. This was characterized by defense counsel as a motion to suppress. The trial judge overruled the objection.

Officer George continued to explain that they pulled into the gas station lot and observed two men matching the description. Officer George said the men saw the patrol car and began walking away. Officer George exited the patrol car and asked the men to stop, but they did not stop. The man in orange, later identified as Alston, turned around to look at Officer George several times but kept walking away. As Alston walked through a front yard and onto the porch of a house, Officer George saw that Alston had a small black handgun that he had taken from his waist area. Alston then tossed the gun into a flower pot on the porch. The gun was retrieved; it was loaded with six rounds. Alston was arrested for being a felon in possession of a firearm. Corporal Colton corroborated Officer George's testimony.

At this point, the State and defense rested. The judge stated that he found Alston to be "a bit more savvy than he tried to lead the Court to believe" and found him to have violated the terms of his SIS.

Alston contends first that the revocation must be reversed because even if he failed to pay as ordered, it was not proved by the prosecution to be "willful." The State counters correctly that once the State has introduced evidence of non-payment, then the burden shifts to the defendant to offer some reasonable excuse for the failure to pay. *Owens v. State*, *supra*. Factors to be considered include employment status, earning ability, financial resources, the willfulness of the failure to pay, and any other special circumstances bearing on the ability to pay. Ark. Code Ann. § 5-4-205(f)(3) (Supp. 2009). Failure to seek employment or to make bona fide efforts to borrow money to pay may support a finding that the failure to pay was willful. *Tyson v. State*, 2009 Ark. App. 856.

Here, Alston did not testify or offer any evidence during the revocation hearing. Although Alston made statements to the trial judge relevant to his motion for a continuance, this was not evidence, much less a reasonable excuse for the failure to pay any more than five dollars in the nineteen months he was ordered to pay. The trial court did not clearly err in finding that there was no reasonable excuse for failing to make payments as ordered.

The second point advanced in this appeal is whether the trial court erred in failing to suppress the evidence gained (the firearm) from the investigatory stop and search near the Flash Market. Alston contends that they lacked any reasonable suspicion to stop him based

upon an unreliable anonymous phone call to the police. With certain exceptions not relevant here, the rules of evidence do not apply to revocation proceedings. Ark. Code Ann. § 5-4-310(c)(2) (Repl. 2006). The exclusionary rule does apply in a revocation hearing if the defendant demonstrates that the officers conducted the search in bad faith. *Sherman v. State*, 2009 Ark. 275, 308 S.W.3d 614. "Bad faith" includes official misconduct that shocks the conscience of the court or officer's actions where the primary purpose is to seek revocation or harass a defendant. *Id.* Here, Alston did not allege, much less put on any evidence to support, bad faith on the part of the officers. Therefore, we hold that the trial court did not err in failing to suppress evidence gained as a result of the investigatory stop.

For the foregoing reasons, we affirm the revocation of Alston's SIS.

Affirmed.

KINARD and BROWN, JJ., agree.