

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-534

LASHAWN HEATH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered DECEMBER 15, 2010

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT

[NOS. CR 2007-1007, CR 2007-1017]

HONORABLE RALPH E. WILSON,
JR., JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

The issue appellant seeks to present in this revocation case is whether the trial court erred in allowing testimony related to the burglary and theft charge, despite appellant's Confrontation Clause objection to it. However, we affirm the revocation based upon appellant's failure to challenge the sufficiency of the evidence to support the State's allegation of a separate violation.

On May 14, 2008, appellant LaShawn Heath pled guilty in Crittenden County Circuit Court to two counts of burglary and received a negotiated sentence of sixty months' supervised probation and sixty months' suspended imposition of sentence, accompanied by a fine and costs.¹ On December 31, 2009, the State filed a petition for revocation of probation

¹Appellant pled guilty to burglary in two separate cases at the same hearing, CR07-1007 and CR07-1017.

and suspension, alleging that appellant had violated the terms and conditions of his probation and suspension by (1) failing to notify the sheriff and probation office of his current address and employment and (2) committing burglary and theft.

During the revocation hearing held February 16, 2010, appellant objected based on “confrontation” to testimony from two witnesses. The first witness was Vicki Lynn Smith, who was asked if she knew who had broken into her house. Her response was, “Well, they informed me of who it was.” Appellant’s counsel responded, “Objection, confrontation.” The trial judge did not rule, and the witness was not questioned further.

West Memphis Police Officer Stacy Allen, who was asked what action he took in investigating a residential burglary and theft-of-property complaint, testified stating, “I was advised that one of the officers earlier that day had made contact with a LaShawn Heath, earlier part of that morning from a neighbor [sic] called about a suspicious person being over in that area.” Appellant’s counsel objected, stating, “Your Honor, I object to confrontation on the other officer that he’s talking about. Need to call him to testify.” The trial court did not rule on this objection.

Finally, when Officer Allen testified that he and another officer went to the jewelry store and the owner told the officer that he “remembered Mr. Heath actually coming by that same day on that Sunday wanting to get in the business but he wasn’t open to him, that he come [sic] back that Monday morning and pawned the jewelry, and he stated that he gave

him \$150 for the jewelry.” Appellant’s counsel again objected “on confrontation,” and the trial court did not state a ruling.

After the revocation hearing, the trial court found that the State had met its burden of proof and sentenced appellant to ten years’ imprisonment in the Arkansas Department of Correction for each burglary conviction, to be served consecutively. A timely notice of appeal was filed on March 3, 2010, and this appeal followed.

This court stated in *Goforth v. State*, 27 Ark. App. 150, 152, 767 S.W.2d 537, 538 (1989), as follows:

Although in a revocation hearing a defendant is not entitled to the full panoply of rights that attend a criminal prosecution, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *United States v. Strada*, 503 F.2d 1081 (8th Cir. 1974), he is entitled to due process. Because due process is a flexible concept, each particular situation must be examined in order to determine what procedures are constitutionally required. *Id.*

In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court held that in a revocation proceeding the accused is entitled to “the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” This holding has been codified at Ark. Code Ann. § 5-4-310(c)(1) (1987) which states:

The defendant shall have the right to confront and cross-examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation.

In a probation revocation proceeding the trial court must balance the probationer’s right to confront witnesses against grounds asserted by the State for not requiring confrontation. *United States v. Bell*, 785 F.2d 640 (8th Cir.1986). First, the court should assess the explanation the State offers of why confrontation is undesirable or impractical. *Id.* at 643. A second factor that must be considered, and one that has been focused on by a number of courts, is the reliability of the evidence which the government offers in place of live testimony. *Id.* at 643.

Denial of an accused's right to confront witnesses may be harmless error. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). We held in *Brock* that, because the State had to prove only one violation to establish that Brock violated his suspended sentence, *see Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998), and because Brock did not challenge the sufficiency of the evidence to support a separate allegation made by the State, we could also affirm the revocation of his suspended sentence on the basis that any error committed was harmless.

Appellant contends that with each of the objections, the trial court had the immediate responsibility to initiate the balancing test set forth in *Goforth, supra*. Because the trial court did not inquire and balance the probationer's right to confront witnesses against any grounds that might have been asserted by the State for not requiring confrontation, appellant claims that the trial court committed error.

The State had to prove only one violation of the terms and conditions of appellant's probation and suspension. *E.g., Brock, supra*. However, appellant only challenges the testimony regarding the burglary and theft violation. He does not address the State's allegation that he violated the terms and conditions of his probation and suspension by failing to notify his probation officer or the sheriff of his current address and employment. Where a defendant fails to challenge each basis for revocation, any error that is related to any basis that he does challenge is considered harmless error. *See Brock*, 70 Ark. App. at 109–10, 14 S.W.3d at 910.

Affirmed.

PITTMAN and ABRAMSON, JJ., agree.