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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-21-393

	Opinion Delivered May 11, 2022
JEFFERY DUNLAP APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63CR-19-77]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE BRENT DILLON HOUSTON, JUDGE
	AFFIRMED

BRANDON J. HARRISON, Chief Judge

The Saline County Circuit Court revoked Jeffery Dunlap's probation, and he has appealed that decision, arguing that (1) there was insufficient evidence that he had violated his probation conditions, (2) the probation officer's testimony violated the Confrontation Clause, and (3) he satisfied the terms of his probation as a matter of course of performance. We affirm the revocation.

In January 2019, the State charged Dunlap with failure to appear and two counts of theft of property. In January 2020, the information was amended to include an additional charge of failure to appear. In February 2020, Dunlap pled guilty to one count of theft of property and one count of failure to appear (the other charges were nolle prossed), and he was sentenced to five years' probation on each count, to run concurrently.

In June 2020, the State petitioned to revoke Dunlap's probation, asserting that he had violated his probation conditions by failing to report as directed and failing to pay

supervision fees. In May 2021, an amended petition alleged additional violations by failing to provide a current address to his supervising officer; possessing a controlled substance; and committing the offenses of possession of a controlled substance, obstructing governmental operations, driving on a suspended license, and failure to appear.

The circuit court convened a hearing on 5 May 2021. Before testimony commenced, the State asked the court to "take judicial notice of the filing of 21-115, which contains two failure to appears."[1] The court did so without objection from the defense. Richard Perry, a probation and parole officer, testified that Dunlap's probation officer, Cambryn Rhinehart, was unavailable due to illness, so he (Perry) volunteered to testify based on Dunlap's records. Perry stated that Dunlap had not been consistent with reporting and described approximately eighteen instances in which Dunlap had failed to report. Perry also noted that Dunlap had been charged with possession of a controlled substance, obstructing government operations, driving on a suspended license, and two counts of failure to appear in April 2021. He was also behind on his supervision fees, had tested positive for THC in October 2020, and had tested positive for meth and amphetamines in December 2020. Finally, Perry confirmed that Dunlap had not informed his supervising officer of a change of address after a home visit to his listed address revealed he had not lived there for three weeks.

Dunlap testified that he currently lived with his grandfather in Pulaski County, that he had spoken to Rhinehart on the phone every day, and that he had made payments on

[1]In January 2021, Dunlap was charged with theft by receiving and fraudulent use of a credit card (63CR-21-115).

his fines and costs whenever he could. He acknowledged that he had "missed some court dates." He said that he had just started a job selling cars in Hot Springs but that he had no driver's license so had to catch rides to Hot Springs. On cross-examination, he denied he had been in possession of a controlled substance but admitted he had previously failed to appear. He also admitted that he had tested positive for drugs in October and December 2020. He agreed he had been charged with theft by receiving and fraudulent use of a credit card but said he was not guilty of those charges. He also agreed he had given a false name to a police officer when he was arrested.

The court reviewed the testimony and noted that Dunlap had failed to report; failed to appear; been charged with new offenses, some of which involve controlled substances; had tested positive for marijuana once and methamphetamine once; and had failed to pay his financial obligations. The court found that Dunlap had violated the terms of his probation and stated that Dunlap would receive a sentence of three years in a regional punishment facility. Dunlap filed a notice of appeal on 17 May 2021; the sentencing order was filed on 20 May 2021, so the notice of appeal is treated as filed on May 21. Ark. R. App. P.–Crim. 2(b)(1) (Supp. 2021).

To revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of the probation or suspended sentence by a preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). The State need only prove one violation of the terms and conditions of probation to sustain a revocation. *Clark v. State*, 2016 Ark. App. 383. On appellate review, the circuit court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Jones*, *supra*. Because the

burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended sentence. *Id.* Furthermore, 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 circuit court's superior position. *Id.*

For his first point, Dunlap argues that the circuit court's findings were against the preponderance of the evidence because the State failed to prove that he inexcusably violated any condition of his probation. Regarding the allegation that he had committed new criminal offenses, he asserts that the only evidence to support this allegation was Perry's testimony that Dunlap had been charged with possession of a controlled substance, obstructing governmental operations, driving on a suspended license, and failure to appear. Dunlap contends that mere testimony that someone was booked for charges is insufficient to prove that the individual actually committed those crimes, even by a preponderance of the evidence. *See Baney v. State*, 2017 Ark. App. 20, 510 S.W.3d 799 (noting that being charged with a crime is not in and of itself evidence of committing a crime).

However, Dunlap admitted having committed both failure to appear and obstructing governmental operations.[2] These admissions are sufficient evidence to support the revocation of Dunlap's probation. *See Pugh-Hayes v. State*, 2017 Ark. App. 54, 511 S.W.3d 336 (holding that defendant's admission that she committed probation violations supported revocation). Because only one violation is necessary for the revocation of probation, we

[2]A person commits the offense of obstructing governmental operations if the person falsely identifies himself or herself to a law enforcement officer or a code enforcement officer. Ark. Code Ann. § 5-54-102(a)(4) (Repl. 2016).

need not address Dunlap's arguments pertaining to the other bases for revocation.

Second, Dunlap argues that Perry's testifying in the place of Rhinehart violated the Confrontation Clause, citing *Pope v. State*, 2020 Ark. App. 413, 607 S.W.3d 512 (holding that the defendant's Confrontation Clause rights had been violated at his probation-revocation hearing when he asserted his right to confront his reporting officer, and the circuit court did not make a finding regarding whether the State had shown good cause for not allowing confrontation). This argument is not preserved, however, because unlike the defendant in *Pope*, Dunlap failed to raise any objection to the circuit court. Issues raised for the first time on appeal, even constitutional ones, will not be considered. *Nichols v. State*, 2019 Ark. App. 317. Dunlap attempts to circumvent this preservation issue by arguing that an error can be addressed when "the error is so great that the trial court was under a duty to correct it immediately and no objection or admonition could have undone the damage or erased the effect of the error[.]" *Wilson v. State*, 261 Ark. 820, 824, 552 S.W.2d 223, 225 (1977). The issue in *Wilson* involved an error prejudicial to a jury; Dunlap has failed to develop any argument to explain how this standard of prejudice was met in his case.

Finally, Dunlap claims that under contract law, he fulfilled the requirements of his probation. Citing the Uniform Commercial Code, he explains that a contract can be modified as a course of performance when "the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party [and] the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance . . . without objection." U.C.C. § 1-303(a). Dunlap argues that he consistently performed his reporting duties as required by reporting both in person and

by phone to Rhinehart and by continuing to take and pass his drug tests after December 14, 2020. Because Rhinehart accepted this performance of Dunlap's responsibilities and chose not to petition for revocation, Dunlap asserts that he satisfied the terms of his probation as a matter of course of performance. This argument was also not raised below; therefore, we hold that it is not preserved for appellate review. *Nichols*, *supra*.

Affirmed.

ABRAMSON and GRUBER, JJ., agree.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.