

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-22-51

JOSHUA BRYANT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 21, 2022

APPEAL FROM THE CONWAY
COUNTY CIRCUIT COURT
[NO. 15CR-19-128]

HONORABLE JERRY DON RAMEY,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Joshua Bryant appeals after the Benton County Circuit Court revoked his suspended imposition of sentence (SIS) on four counts of possession of a firearm by certain persons and sentenced him to serve an aggregate sentence of sixty months' imprisonment in the Arkansas Department of Correction. Appellant argues on appeal that the circuit court erred in finding that he willfully violated the conditions of his SIS. We affirm.

I. Relevant Facts

On October 7, 2019, appellant entered a negotiated plea of guilty to four counts of possession of a firearm by certain persons, a Class D felony, in violation of Arkansas Code Annotated section 5-73-103 (Supp. 2021). A sentencing order was filed on October 8, 2019. Appellant was sentenced to forty-eight months' SIS conditioned on the payment of his fines and fees at the rate of \$60 per month beginning thirty days after release with subsequent payments made on the first day of each month thereafter.

On January 26, 2021, the State filed a petition to impose appellant's SIS based on its allegation that appellant had violated the terms and conditions of his SIS in that he had failed to pay his court-ordered fines and fees as directed by the sentencing order. After multiple continuances, a revocation hearing was held on July 21, 2021.

At the revocation hearing, the State admitted into evidence without objection copies of appellant's previous sentencing order, his guilty-plea statement, and the terms and conditions of his SIS. A certified copy of a ledger from the Conway County Circuit Clerk reflecting the payments appellant made toward his fines and fees was also admitted without objection. The ledger reflected that appellant had paid only \$100 on April 19, 2021, and \$40 on May 19, 2021. Therefore, appellant had an accumulated unpaid balance of \$1,740.

Appellant was the only witness to testify. He testified that he did not fully read the terms and conditions of his SIS, but he admitted that he understood he was required to make monthly payments toward his fines and fees. He also admitted that he had not made regular or even substantial payments since he had entered his negotiated plea in October 2019. He acknowledged that he had owed \$1,880 and that he only recently paid a total of \$140 in April and May 2021, four months after his arrest for violating the terms and conditions of his SIS. He further admitted that he did not make any further payments in June or July 2021, leaving an unpaid balance of \$1,740.

In his defense, appellant claimed that he had been unable to pay his monthly financial obligations. He explained that he had been sporadically employed since October 2019 but that he had been "pretty much working for room and board, and, like, a place to live, and food in my belly." He testified that he had initially worked for a pawn shop but stated that

he was paid only “\$20 every other day or something like that, just for spending money and for cigarettes.” He also testified that he had been homeless for the last year, that his driver’s license had been suspended, and that he did not have a vehicle. Appellant further explained that he had been hospitalized approximately a month and a half before the revocation hearing after he had been hit in the head with a pipe by the son of his former codefendant and former coworker. He also stated that he had contracted COVID-19 around July 10, 2021.

Despite his failure to pay his monthly financial obligations, appellant promised that he would begin making payments. Appellant alleged that he had recently moved in with his uncle and had “mend[ed] some bridges to get back into a stable environment.” He testified that he was starting a new job the next day that would pay him \$12 an hour and that he was enrolled in online technical classes starting that fall. He stated that his current expenses included only clothing and a monthly phone bill of \$50. Further, he was awarded a grant to pay for his classes. Therefore, he estimated that he would be able to pay the remainder of his fines and fees within ten weeks if given the opportunity.

On cross-examination, appellant admitted that he had spent approximately \$30 to \$40 a week at times on cigarettes. Appellant further admitted that he previously had a job at a Twin Rivers Foods plant for two months before he voluntarily quit after his former coworker and roommate quit. He finally admitted that he had not tried to relocate somewhere near one of those plants to obtain further work.

After hearing oral argument, the circuit court issued the following relevant oral findings:

It has special considerations when you are looking at [payment issues] being the only element.

How it breaks down is after evidence of nonpayment, the burden shifts to the defendant to provide a reasonable excuse.

Looking at Arkansas Code Annotated 5-4-204, which states, “that the Court must consider the defendant’s employment status, earning ability, financial resources, willingness, and other circumstances regarding the ability to pay.”

What the Court then looks at is the factors involving those matters. So, I am going to start off with credibility.

One of the jobs of the Court is to judge credibility. And I think the relevant matter to the Court was that it took the request by the State to determine that he had actually worked at Twin Rivers and had quit on his own decision. I understand there’s the argument that there was a ride or whatever.

But I know that this morning I graduated a guy from Drug Court that rode his bicycle from Adkins to come to Court here, and to do things and participate in Drug Court. And made it through the Drug Court and graduated and expunged his stuff. So I know that a bicycle is possible in this area.

Then I look at modified effort to seek employment or borrow money. I don’t have any evidence in front of me that all of these people you have talked about that would support you, that you have asked to borrow any money.

So then, I look at the effort to seek employment. When I’m looking at the testimony. The plea was accepted on October 7, 2019. The testimony to the Court was you were off work for a year and a half.

Well, if you have been off work for a year and a half backward, then there was a period that you were working from October 7, ’19. And the record clearly reflects there are no payments made to during that period of time. Also, during the period of time he was working at Twin Rivers, there’s no payments.

And the testimony in front of the Court that you could start tomorrow, and start earning money and making a job. Well, the question is, why didn’t you do that yesterday? Why didn’t you start yesterday? Why didn’t you start last week? If it is so easy to start tomorrow, why hadn’t that been done?

Then I’m looking at whether there was money spent on nonessential items. You spent money on cigarettes, and a telephone.

So clearly there's these issues in which the Court is going to find that you are willing -- that you had the ability to pay and to work. You just decided not to.

So the Court is going to find that you inexcusably violated the conditions of Suspended Imposition of Sentence.

I also show that you paid in April or May in 2021, but not in June. I understand the COVID issue was in July, but you skipped a month at that point, already.

So what I am going to do is, as I stated earlier, I am going to find that you -- I am going to find that the Court has carefully considered totality of the evidence before it. The credibility of the witnesses and arguments of counsel.

The Court hereby finds that the State of Arkansas has proven its case by the preponderance of evidence. That you have willfully violated your conditions of your Suspended Imposition of Sentence.

Thereafter, the circuit court filed a written sentencing order and an amended sentencing order sentencing appellant to serve sixty months' imprisonment. This appeal followed.

II. *Analysis*

Appellant argues that the circuit court erred in finding that he inexcusably failed to comply with a condition of his SIS. Specifically, appellant contends that the revocation should be reversed because his failure to pay restitution was not willful but instead the result of his inability to afford to do so. He argues that he offered the circuit court several reasons for his inability to pay and alleges that he was forced to choose between living and paying his fines and fees. We disagree.

A challenge to the sufficiency of the evidence may be raised for the first time in an appeal of a revocation in the absence of a motion for a directed verdict or motion to dismiss. See *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001). In a revocation proceeding, the circuit court must find by a preponderance of the evidence that the defendant has

inexcusably failed to comply with a condition of his or her suspension or probation, and on appellate review, we do not reverse the circuit court's decision unless it is clearly against the preponderance of the evidence. *Flemons v. State*, 2014 Ark. App. 131; Ark. Code Ann. § 16-93-308(d) (Supp. 2021). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation or suspended-sentence revocation. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the circuit court's superior position. *Id.* Furthermore, the State need only prove that the appellant committed one violation of the conditions in order to revoke appellant's sentence. *Peals v. State*, 2015 Ark. App. 1, 453 S.W.3d 151.

The circuit court may revoke a defendant's probation or SIS if the defendant has not made a good-faith effort to make the court-ordered payments. *Williams v. State*, 2019 Ark. App. 437, 586 S.W.3d 208; see *Ruffin v. State*, 2020 Ark. App. 179, at 6, 597 S.W.3d 151, 155. When the alleged violation is a failure to make payments as ordered, it is the State's burden to prove that the failure to pay was inexcusable; once the State has introduced evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for failing to pay. *Turner v. State*, 2019 Ark. App. 534, 590 S.W.3d 158; *Lamb v. State*, 2019 Ark. App. 494, 588 S.W.3d 409. If the defendant asserts an inability to pay and provides evidence to demonstrate that inability, then the State must demonstrate that the defendant did not make a good-faith effort to pay. *Turner, supra*.

Factors to be considered in determining whether to revoke a probation or suspension for failure to pay include the defendant's employment status, earning ability, and financial

resources as well as the willfulness of the failure to pay and any other special circumstances. Ark. Code Ann. § 5-4-205(f)(3) (Supp. 2021). Despite the shifting of the burden of production, the State shoulders the ultimate burden of proving that the defendant's failure to pay was inexcusable. *Williams, supra*. In *Hanna v. State*, 2009 Ark. App. 809, 372 S.W.3d 375, we explained that the State can carry its burden of proving willful nonpayment in several ways: (1) by undermining the defendant's credibility; (2) by showing the defendant's lack of effort; (3) by showing that a defendant failed to make a bona fide effort to seek employment or borrow money; or (4) by showing that the defendant is spending money on something nonessential or illegal instead of paying restitution. *See also Joseph v. State*, 2019 Ark. App. 276, 577 S.W.3d 55.

Applying these standards, we conclude that the circuit court did not err in determining that the State met its burden of proving that appellant's nonpayment was inexcusable. It is clear from the record that the circuit court considered appellant's employment status, earning ability, financial resources, and willfulness. Here, the circuit court specifically relied on evidence of both his expenditures on nonessentials, such as cigarettes and a cell phone, and his voluntary resignation from Twin Rivers Foods to support its finding that he inexcusably failed to pay his court-ordered fines and fees. In light of the deference we afford to the superior opportunity of the circuit court to determine the credibility of a witness's testimony and the weight of the evidence, we cannot say that the circuit court clearly erred in finding that appellant inexcusably failed to comply with a condition of his SIS. *See Joseph*, 2019 Ark. App. 276, 577 S.W.3d 55; *Bohlman v. State*, 2013 Ark. App. 162. Accordingly, we affirm.

Affirmed.

HARRISON, C.J., and ABRAMSON, J., agree.

K. “Presley” Hager Turner, for appellant.

Leslie Rutledge, Att’y Gen., by: *Clayton P. Orr*, Ass’t Att’y Gen., for appellee.