

Cite as 2022 Ark. App. 486
ARKANSAS COURT OF APPEALS
DIVISION IV
No. CR-22-276

MARK FISH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 30, 2022

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. 17CR-19-934]

HONORABLE CANDICE A. SETTLE,
JUDGE

AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Mark Fish appeals from a Crawford County Circuit Court revocation of his suspended imposition of sentence (“SIS”) and sentence of six years in the Arkansas Department of Correction, arguing that there was insufficient evidence that he had violated the terms and conditions of his SIS. We affirm.

On September 30, 2019, Mr. Fish pled guilty to one count of first-degree terroristic threatening, a Class D felony, and one count of third-degree domestic battering. He was sentenced to five years’ SIS. Mr. Smith signed a conditions-of-SIS form detailing the conditions that would revoke his SIS, including that he not commit a criminal offense punishable by imprisonment.

On December 8, 2021, Deputy Matthew Hesson of the Crawford County Sherriff’s Office charged Mr. Fish with felony vehicular fleeing, and on February 17, 2022, the circuit

court held a revocation hearing with Deputy Hesson as the only witness. Deputy Hesson testified he was traveling westbound on a two-lane road to aid with a traffic stop when Mr. Fish drove past heading eastbound and flicked his headlights at Deputy Hesson. When Deputy Hesson arrived at the traffic stop, he learned it had been cleared by another deputy. Deputy Hesson then observed that the lights on Mr. Fish's vehicle had been turned off, and he engaged his lights and siren in pursuit of Mr. Fish. Deputy Hesson testified that once he began pursuing Mr. Fish, Mr. Fish accelerated his speed to approximately eighty-five to ninety-five miles an hour in a "forty or forty-five" speed-limit zone. However, Deputy Hesson admitted he did not clock Mr. Fish with his radar, so there was no way of knowing exactly how fast Mr. Fish was traveling, but he estimated Mr. Fish's speed on the basis of his own speed of ninety-five miles an hour to catch up to Mr. Fish from a "fifty to sixty yard distance." Deputy Hesson testified Mr. Fish briefly turned his vehicle's lights back on and then turned them back off before reaching an "S curve" in the road, where Mr. Fish went into a ditch and wrecked his vehicle, leaving skid marks on the road. After Mr. Fish wrecked, Deputy Hesson located Mr. Fish exiting from the passenger side of the vehicle and advised him to come up to the road because "it looked like [Mr. Fish] was going to take off through the field." Deputy Hesson testified that Mr. Fish told him he wrecked trying to avoid an animal, although Mr. Fish's description of the animal changed "four or five times." Deputy Hesson testified that his pursuit of Mr. Fish lasted approximately a mile, and no other vehicles were on the road at that time. Deputy Hesson immediately identified Mr. Fish because he "knew him very well" and placed him under arrest. After the close of the State's case, defense

counsel for Mr. Fish rested, and the circuit court revoked Mr. Fish's SIS. From that order comes this appeal.

The circuit court's findings regarding an alleged violation of a term or condition of probation will be upheld on appeal unless the findings are clearly against the preponderance of the evidence. *Scroggins v. State*, 2019 Ark. App. 346, 582 S.W.3d 853. Because a determination of the preponderance of the evidence turns heavily on questions of credibility and weight to be given to the testimony, this court defers to the circuit court's superior position in this regard. *Id.* Under Arkansas law, a circuit court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspended sentence if the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a term or condition. *Scroggins*, 2019 Ark. App. 346, at 1, 582 S.W.3d at 854; Ark. Code Ann. § 16-93-308(d) (Supp. 2021). The State carries the burden of proving a violation of a term or condition. *Id.*

The criminal offense of felony vehicular fleeing is codified at Ark. Code Ann. § 5-54-125(d)(2) (Supp. 2021), which states that fleeing by means of any vehicle or conveyance is considered a Class C felony if, under circumstances manifesting extreme indifference to the value of human life, a person purposely operates the vehicle or conveyance in such a manner that creates a substantial danger of death or serious physical injury to another person. Mr. Fish argues that the circuit court erred in revoking his SIS because there was insufficient evidence that he purposely operated his car in a manner that created a substantial danger of death or serious physical injury to another person. Mr. Fish contends there is no evidence

he ran a yield sign, a stop sign, or a streetlight; no evidence that he nearly collided with another driver or that any other driver had to act to avoid being hit; no evidence he drove through an area with other drivers or people; and no evidence he was speeding. Mr. Fish argues this lack of evidence is contrary to Arkansas case law where this court affirmed the charge of felony vehicular fleeing under circumstances where a defendant committed the above-mentioned acts in addition to erratic driving. See *Pierce v. State*, 79 Ark. App. 286, 86 S.W.3d 1 (2002); *Donaldson v. State*, 2016 Ark. App. 391, 500 S.W.3d 768; *Medley v. State*, 2016 Ark. App. 79.

However, there is not an exhaustive list of examples of conduct that constitutes purposely driving in a manner that creates a substantial danger of death or serious physical injury for purposes of the felony-fleeing statute. *Medley*, 2016 Ark. App. 79. Viewed in the light most favorable to the State, the record before us demonstrates there is substantial evidence to support Mr. Fish's conviction for felony vehicular fleeing. Deputy Hesson's testimony is sufficient to establish that Mr. Fish was operating a vehicle in such a manner as to create a substantial danger of serious physical injury or death to another. See *Sharpe v. State*, 2013 Ark. App. 436. Deputy Hesson's testimony established that Mr. Fish was driving with his lights off at a speed that caused Deputy Hesson to travel ninety-five miles an hour to catch up to Mr. Fish from a fifty- to sixty-yard distance. In addition to Deputy Hesson's testimony, Mr. Fish's excessive speed was evidenced by the skid marks his vehicle left at the crash site and by the photo exhibits produced by the State that show extensive damage to Mr. Fish's vehicle and the surrounding area. Further, Mr. Fish was made aware that an

authorized law enforcement officer was attempting his detention when Deputy Hesson engaged his lights and siren while pursuing Mr. Fish. Mr. Fish had a duty to refrain from fleeing but chose to engage in a high-speed pursuit instead. *See* Ark. Code Ann. § 5-54-125(a).

In light of the evidence before us, we hold that it was reasonable for the circuit court to find that Mr. Fish endangered others by his conduct and, in fleeing from law enforcement, operated his vehicle under circumstances manifesting extreme indifference to the value of human life and created a substantial danger of death or serious physical injury to another person. We affirm.

Affirmed.

VIRDEN and HIXSON, JJ., agree.

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

Leslie Rutledge, Att’y Gen., by: *Rebecca Kane*, Ass’t Att’y Gen., for appellee.