

Cite as 2023 Ark. App. 110
ARKANSAS COURT OF APPEALS
DIVISION IV
No. CR-21-488

MACON CARTER, JR.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED MARCH 1, 2023

APPEAL FROM THE PHILLIPS
COUNTY CIRCUIT COURT
[NO. 54CR-16-92]

HONORABLE CHALK S. MITCHELL,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Macon Carter, Jr., appeals from a July 29, 2021 sentencing order of the Phillips County Circuit Court revoking his probationary sentence.¹ The circuit court found that he had inexcusably failed to comply with the conditions of his probation by simultaneously possessing drugs and firearms on February 10, 2021; by committing new crimes on April 4, 2020; and by failing “to report regularly as required to his probation officer.” Carter argues that there was insufficient evidence to support the revocation of his probation. We affirm.

¹On February 27, 2018, Carter pleaded guilty to committing a terroristic act for shooting into a house occupied by three people. Pursuant to a sentencing order filed on March 1, 2018, he was sentenced to sixty months’ probation with conditions including not committing any offense punishable by imprisonment or incarceration in jail, not possessing any controlled substance or firearm, and reporting to a probation officer as directed. Carter acknowledged in writing that he understood the conditions of his probation and that a violation of any of those conditions could result in a sentence not less than five and no more than twenty years’ imprisonment.

I. Facts and Procedural History

On February 10, 2021, Officer Carl Nelson of the Helena-West Helena Police Department encountered Carter while Carter was operating a motor vehicle that was speeding on Highway 49. Officer Nelson testified that he noticed a silver vehicle speeding and initiated a traffic stop. As he approached the vehicle from the passenger side, an individual later identified as Treve Shears jumped out of the vehicle and fled on foot. As Officer Nelson chased Shears, he noticed that Shears was wearing an empty gun holster. Shears attempted to jump a fence while running, and while doing so, he dropped a bag that was recovered by Officer Nelson. Officer Nelson opened the bag and discovered that it contained two bags of a controlled substance believed to be marijuana.

As Officer Nelson was pursuing Shears, Officer Tarbin Henderson arrived at the scene, and came to a stop in the center median of the highway. Officer Henderson handcuffed Carter and put him in the back of Officer Nelson's patrol car. Officer Henderson then went back to Carter's vehicle, and from "just a quick glance on the passenger side," he saw two pistols. "One was . . . directly in the middle of the floorboard, and the other one was partially pushed back, but [he] could still plainly see it, pushed under the seat a little bit but not a lot."

When Officer Nelson returned to the vehicle that had been operated by Carter, he looked inside the vehicle and noticed that a handgun was in plain view on the floorboard under the passenger's seat. Officer Henderson alerted Officer Nelson to a second pistol partially concealed under the seat. Officer Nelson called a detective to collect the evidence.

Officer Kelson Franklin also assisted during the arrest by photographing the crime scene. He photographed both the handgun on the floorboard and the handgun that was located wedged between the passenger seat and the console. The pistol in plain view on the front passenger floorboard was a red Glock .40-caliber handgun. Officer Franklin explained that Ms. Jackson, who identified herself as Carter's aunt, presented a receipt for that handgun and claimed it as hers. Officer Franklin collected the marijuana and the two pistols and handed all the items over to Evidence Officer Juanita Mills of the Helena-West Helena Police Department. Officer Mills photographed and weighed the marijuana, which weighed one pound.

Carter was charged with simultaneous possession of drugs and firearms and possession of a firearm by certain persons.

The State filed a petition to revoke Carter's probation on April 14, 2020, alleging that on April 4, Carter had committed the new crimes of (1) simultaneous possession of drugs and firearms, a Class Y felony, in violation of Ark. Code Ann. § 5-74-106 (Repl. 2016), in that he did unlawfully commit a felony in violation of Ark. Code Ann. § 5-64-419 to § 5-64-442 (Repl. 2016 & Supp. 2021), while in possession of a firearm, namely a micro Draco 7.62 x 39mm rifle; (2) possession of marijuana with purpose to deliver, a Class D felony, in violation of Ark. Code Ann. § 5-64-436 (Repl. 2016), in that he did unlawfully possess more than fourteen grams but less than four ounces of marijuana, or packaged in a manner to facilitate delivery, a Schedule VI controlled substance, with the purpose to deliver to another person; and, (3) possession of a controlled substance (methamphetamine/ cocaine), a Class

D felony, in violation of Ark. Code Ann. § 5-64-419 (Supp. 2021), in that he did unlawfully and feloniously possess less than two grams of methamphetamine or cocaine, a Schedule II controlled substance.

The petition also alleged that on February 10, Carter had committed the new crimes of (1) simultaneous possession of drugs and firearms, a Class Y Felony, in violation of Ark. Code Ann. § 5-74-106, in that he did unlawfully commit a felony violation of Ark. Code Ann. § 5-64-419 to § 5-64-442, while in possession of firearms, namely a Glock 22 40-caliber handgun and a Ruger 45-caliber handgun; (2) possession of firearms by certain persons, a Class B felony, in violation of Ark. Code Ann. § 5-73-103 (Supp. 2021), in that he did unlawfully possess a Glock 22 40-caliber handgun and a Ruger 45-caliber handgun, after being convicted of committing a terroristic act in Phillips County Circuit Court case No. CR 2016-92; and (3) possession of marijuana with purpose to deliver, a Class C felony, in violation of Ark. Code Ann. § 5-64-436, by unlawfully possessing more than four ounces but less than twenty-five pounds or packaged in a manner to facilitate delivery of marijuana, a Schedule VI controlled substance, with the purpose to deliver to another person. The petition also alleged that Carter's possession of the drugs and firearms on those dates violated the condition of his probation requiring him not to possess those items.

Finally, the petition alleged that Carter "failed to participate in supervised probation, failed to report to his probation officer, failed to pay the required probation fee, and failed to comply with the instructions given by his probation officer."

At the hearing on the petition held on May 16, Officers Nelson and Henderson testified, and the circuit court also heard testimony from Carter's probation officer, Princess Burnside. Although she testified that Carter was compliant with his reporting requirements, she did note that he had failed several drug tests and had admitted using marijuana while he was on probation. She also testified that Carter had been arrested for two felonies during the probation period, but she did not offer specifics concerning either of the arrests. Officer Mills also testified regarding the marijuana collected.

At the close of the hearing, after hearing arguments from counsel, the circuit court ruled that "the defendant has inexcusably failed to comply with the conditions of his probation" and sentenced him to ten years' imprisonment. In response to Carter's argument that he was not in constructive possession of the contraband, the circuit court noted that he was driving the vehicle and that one of the pistols apparently belonged to his aunt. The circuit court focused on the time between when Carter was stopped for speeding and when Shears ran from the car. The court found it "incredible" that Carter did not know that the pistol and the pound of marijuana were in the car at the time of the stop.

On July 29, the circuit court filed a written order revoking Carter's probation. The circuit court reiterated its ruling from the bench that Carter had inexcusably failed to comply with the conditions of his probation by (1) simultaneously possessing drugs and firearms on February 10; (2) failing to leading a law-abiding life by committing the alleged new crimes on April 4, 2020; and (3) failing "to report regularly as required to his probation officer." Carter filed a timely notice of appeal on August 5.

II. *Standard of Review and Applicable Law*

A circuit court may revoke a defendant's probation at any time prior to its expiration if the "court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her . . . probation." Ark. Code Ann. § 16-93-308(d) (Supp. 2021). A preponderance of the evidence is convincing evidence that is more probably accurate and true when weighed against the evidence opposed to it. *E.g., Sivils v. State*, 2021 Ark. App. 198, at 3, 623 S.W.3d 138, 140. The State has the burden of proving the defendant violated a condition of probation; however, it is required to establish only one violation to sustain the revocation. *E.g., id.* Because the preponderance of the evidence turns on questions of credibility and weight to be given testimony, this court defers to the superior position of the circuit court to decide those matters. *E.g., Webb v. State*, 2015 Ark. App. 257, at 6, 460 S.W.3d 820, 824. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation. *E.g., Allen v. State*, 2020 Ark. App. 84, at 4, 596 S.W.3d 518, 521.

A person commits the offense of simultaneous possession of drugs and firearms if the person unlawfully possesses a controlled substance while in possession of a firearm. *See* Ark. Code Ann. § 5-74-106 (Repl. 2016); *Mathis v. State*, 2010 Ark. App. 665. Arkansas Code Annotated section 5-1-102(15) (Supp. 2021) defines "possession" as "to exercise actual dominion, control, or management over a tangible object." The State does not have to prove that the defendant physically held the contraband. *Gill v. State*, 2017 Ark. App. 22, 511 S.W.3d 865. Constructive possession, which is the control or right to control the

contraband, is sufficient. *Id.* A showing of constructive possession is sufficient to prove possession of a firearm. *Jones v. State*, 2022 Ark. App. 511, at 4, 656 S.W.3d 219, 222. Constructive possession can be implied where the contraband was found in a place immediately and exclusively accessible to the accused and subject to his control. *Id.* Constructive possession may be established by circumstantial evidence, but when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. *Id.*

III. Discussion

Carter argues that the revocation of his probation was not supported by the evidence because he never possessed the controlled substance or firearms found in his vehicle on February 10, 2021. The circuit court found that Carter was “the driver of the vehicle not only directed by him, but he was in control of that vehicle, and that makes him responsible for what goes on there.” Carter maintains that this statement of the law is not consistent with current law in the State of Arkansas.

In this case, the State’s main witness, Officer Nelson, first saw a silver vehicle drive past him. It is undisputed that the vehicle was operated by Carter. Officer Nelson initiated a traffic stop on the vehicle. As he exited his vehicle, the passenger in the silver vehicle, Shears, got out and ran. Officer Nelson testified that as Shears ran and jumped a fence, he dropped a black-and-white bag. The incident was recorded on Officer Nelson’s body camera. Officer Nelson returned from unsuccessfully pursuing Shears and approached the vehicle

from the passenger side of the vehicle. As he opened the passenger door, he noticed a handgun on the passenger-side floor.

Officer Franklin was called out to the scene of the stop and arrest to photograph the vehicle, inside and out. He took photos of a firearm that he described as a red Glock that was found on the passenger floorboard. He also photographed a second firearm that he described as being located between the passenger seat and the console. Officer Franklin also photographed the bag dropped by Shears as well as items found in the bag, one of which was believed to be marijuana.

The marijuana and two firearms constituted the evidence relied on by the State to allege that Carter was guilty of simultaneous possession of drugs and firearms. But Carter maintains that the alleged marijuana was exclusively within the custody and control of Shears. It was sealed in his bag that he took with him when running from Officer Nelson. Carter also argues that the firearms were exclusively within the custody and control of Shears. Both firearms were on the passenger side of the vehicle. One firearm was located on the floorboard while the other was between the seat and the console. He submits that the firearms belonged to Shears, which is corroborated by the fact that Shears was wearing a holster when he fled. The confiscation reports completed by Officer Nelson stated that both firearms belonged to Shears. Carter urges that there was no evidence presented to indicate that he had any knowledge of the drugs and firearms; moreover, the impressions of the officers at the scene clearly indicate that they believed Shears to be acting alone.

We hold that the circuit court did not clearly err by finding that Carter inexcusably violated the terms of his probation by simultaneously possessing drugs and firearms found during the February 10 traffic stop. Possession means to exercise actual dominion, control, or management over a tangible object. Ark. Code Ann. § 5-1-102(15). In order to prove possession of contraband, the State does not have to establish actual physical possession; constructive possession can suffice. *E.g.*, *Dishman v. State*, 2011 Ark. App. 437, at 5, 384 S.W.3d 590, 593; *Newborn v. State*, 91 Ark. App. 318, 319, 210 S.W.3d 153, 155 (2005).

Constructive possession may be inferred when contraband is in the joint control of the accused and another. *Phounsavath v. State*, 2016 Ark. App. 65, at 4, 482 S.W.3d 332, 334. Joint occupancy alone is insufficient to establish possession or joint possession; the State must also prove that the accused exercised care, control, and management over the contraband and that the accused knew the matter possessed was contraband. *Id.* There must be some other factor linking the accused to the contraband. *Id.*

Factors to be considered in cases involving automobiles occupied by more than one person are (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the vehicle seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspiciously before or during the arrest. *E.g.*, *Dishman*, 2011 Ark. 437, at 6, 384 S.W.3d at 594.

After reviewing the testimony, we hold that the circuit court did not err in finding that Carter constructively possessed the firearm wedged between the passenger seat and the console. On the evening of February 10, 2021, Carter was driving the vehicle that was stopped. Officer Nelson testified that, after the stop but before Shears ran from the vehicle with the marijuana, there was suspicious activity—Shears and Carter “were moving around a lot” inside the car. Moreover, one of the two firearms recovered was found in plain view wedged between the passenger seat and console, within Carter’s sight and reach. Accordingly, we hold that the preponderance of the evidence supports the revocation of his probation for inexcusably failing to comply with the condition of his probation that required him not to commit new crimes, specifically, the possession of firearms by certain persons, a Class B felony.

Giving deference to the circuit court in determining the credibility of the witnesses, we hold that the circuit court did not clearly err in finding that Carter was in constructive possession of a firearm and that his possession of a firearm was a violation of a condition of his probation. Because only one ground is needed to support revocation, we need not address Carter’s remaining challenges to the revocation of his probationary sentence.² *Davis v. State*, 2022 Ark. App. 130, at 5, 642 S.W.3d 636, 639.

²We do note that there was no evidence presented at the hearing related to any act occurring on April 4, 2020, that would support the circuit court’s specific finding that Carter possessed a firearm and a controlled substance on that date. Moreover, Carter’s probation officer, Ms. Burnside, specifically testified that Carter was compliant with his supervised probation and was “sufficient in his reporting time.” Despite that unequivocal testimony,

Affirmed.

HARRISON, C.J., and KLAPPENBACH, J., agree.

Don R. Etherly, for appellant.

Leslie Rutledge, Att’y Gen., by: *Jacob H. Jones*, Ass’t Att’y Gen., for appellee.

the circuit court found that Carter had failed to report, in direct conflict with Ms. Burnside’s testimony.