

Cite as 2023 Ark. App. 157  
**ARKANSAS COURT OF APPEALS**  
DIVISION IV  
No. CR-22-383

DUSTIN FOSTER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 15, 2023

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[NO. 17CR-16-102]

HONORABLE MICHAEL MEDLOCK,  
JUDGE

AFFIRMED

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**CINDY GRACE THYER, Judge**

Dustin Foster appeals from the order of the Crawford County Circuit Court revoking his suspended imposition of sentence (SIS) and sentencing him to six years in the Arkansas Department of Correction. On appeal, he does not challenge the sufficiency of the evidence supporting the revocation of his SIS. Instead, he argues that the circuit court erred in denying his motion to continue his revocation hearing until after his trial on the substantive criminal charges that prompted the revocation petition. In addition, he argues that the circuit court erred in denying his motion to exclude evidence of other acts of wrongdoing. We find no error and affirm.

*I. Factual and Procedural Background*

In February 2016, Foster was charged with three counts of second-degree sexual assault. In November of that year, he pled guilty to a single count of aggravated assault and was sentenced to six years' SIS. Among the conditions of his SIS was the requirement that he must not commit a criminal offense punishable by imprisonment.

In March 2021, the State filed a petition to revoke Foster's SIS, alleging that he had committed the new offense of rape, a Class Y felony. In an amended revocation petition, the State added an allegation that Foster had also committed the offense of second-degree sexual assault, a Class B felony. In addition, the State filed a substantive criminal information charging Foster with rape and second-degree sexual assault on the basis of the same conduct that prompted the revocation petition.

The circuit court scheduled a hearing on the revocation petition on April 14, 2022, and a jury trial on the substantive criminal charges was set for May 6. The day before the revocation hearing, Foster moved for a continuance, seeking to have the revocation hearing delayed until after his trial on the substantive charges. At the same time, he moved to exclude the testimony of several individuals on the State's witness list, arguing that their testimony would be inadmissible under both Rules 403 and 404(b) of the Arkansas Rules of Evidence. The court considered arguments on both motions at the beginning of the revocation hearing and denied them.

At the revocation hearing, the State presented testimony from the victim of the alleged rape and sexual assault. Because Foster does not challenge the sufficiency of the evidence supporting the court's revocation decision, we set out the facts briefly. The victim

testified that she spent the night at the home of Foster and his then-fiancée and awoke to find Foster touching her leg. He exposed his penis to her and asked her to perform oral sex. She refused and went to another room; Foster followed her, began groping her, and eventually pulled her shorts down and licked her vagina.

At the conclusion of the revocation hearing, the court found that Foster had violated the terms and conditions of his SIS, revoked his SIS, and sentenced him to six years in the Arkansas Department of Correction. The sentencing order was entered on April 18, 2022, and Foster filed a timely notice of appeal on May 17.

## II. *Postponement of Revocation Hearing*

In his first point on appeal, Foster argues that the circuit court should have deferred the revocation hearing until after the resolution of the underlying charges on which the revocation was based. Citing *Hawkins v. State*, 251 Ark. 955, 475 S.W.2d 887 (1972), Foster contends that permitting the State to pursue a revocation before trying the defendant on the substantive charges that prompted the revocation petition is unfair and inefficient.

In *Hawkins*, the supreme court noted in dicta a statement from the American Bar Association's "Standards Relating to Probation," § 5.4 (1970), that "a revocation proceeding based solely upon the commission of another crime ordinarily should not be initiated prior to the disposition of that charge." *Id.* at 956, 475 S.W.2d at 888.<sup>1</sup> Several years later, however,

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<sup>1</sup>Although Foster asks this court to adopt the logic of the dicta in *Hawkins*, he acknowledges that we cannot adopt what he terms "the *Hawkins* rule" on its own, as it would be in contravention of supreme court case law.

the supreme court expressly rejected the argument “that revocation of a suspension for a subsequent crime prior to conviction of that crime is an abuse of discretion in all circumstances.” *Ellerson v. State*, 261 Ark. 525, 530, 549 S.W.2d 495, 497 (1977). Although the *Ellerson* court acknowledged the dicta in *Hawkins*, it held that the American Bar Association’s standard cited therein had not been adopted in Arkansas. *Id.* at 531, 549 S.W.2d at 498.

More recently, in *Geeslin v. State*, 2017 Ark. App. 571, 533 S.W.3d 132, this court explicitly rejected an argument identical to that presented by Foster in the instant case. In doing so, we noted that Arkansas Code Annotated section 16-93-308(d) (Supp. 2021)<sup>2</sup> provides that the circuit court may “revoke the suspension or probation of a defendant *at any time prior to the expiration of the period of his suspension or probation.*” *Id.* at 10, 533 S.W.3d at 138 (emphasis in original); *see also Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992) (noting that the supreme court has consistently upheld a circuit court’s decision to revoke probation on the basis of a subsequent crime *prior to* conviction for that crime). Taken together, both a plain reading of the statute and our appellate jurisprudence make clear that Arkansas has long rejected that *Hawkins* dicta.

Thus, we find no error in the circuit court’s refusal to delay Foster’s revocation hearing until after his scheduled jury trial. The order sentencing Foster to six years’ SIS was entered on November 18, 2016; the State’s revocation petition was filed on March 29, 2021;

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<sup>2</sup>The *Geeslin* court cited the statute in effect at the time of sentencing in that case, Arkansas Code Annotated section 5-4-309(d) (Repl. 2006).

and the order revoking Foster's SIS was entered on April 18, 2022. This date was prior to the expiration of the period of Foster's suspension. Under our statutes and case law, the circuit court did not abuse its discretion in denying Foster's motion. *See Ellerson, supra*. We therefore affirm on this point.

### III. *Evidence of Other Wrongdoing*

As noted above, before the revocation hearing, Foster moved to exclude the testimony of two witnesses whom the State intended to call in order to introduce evidence of prior bad acts. The court denied Foster's motion, and the State called C.B. and M.C., who both testified about instances in which Foster had sexually assaulted them. In his second argument on appeal, Foster argues that the circuit court abused its discretion when it allowed C.B. and M.C. to testify about "other crimes, wrongs, or acts."

In his argument before the circuit court, Foster asserted that this evidence should have been inadmissible under Rules 404(b) and 403 of the Arkansas Rules of Evidence. On appeal, however, Foster concedes that the rules of evidence do not apply in revocation proceedings and that an alleged violation of the rules of evidence cannot form the basis for exclusion of evidence at a revocation hearing. We agree. *See Ark. R. Evid. 1101(b)(3)* (providing that the rules of evidence do not apply to revocation proceedings); *see also Whitmore v. State*, 2018 Ark. App. 44, 539 S.W.3d 596; *Humphrey v. State*, 2015 Ark. App. 179, 458 S.W.3d 265 (both holding, in no-merit cases, that there could be no merit to an appeal of an adverse evidentiary ruling in a revocation proceeding because the rules of evidence to not apply in such proceedings).

For the first time on appeal, Foster now contends that allowing these witnesses' testimony violated the common-law "basic principle" underlying Arkansas Rule of Evidence 404(b)--that is, that allowing evidence of bad character cannot be used to prove that a person acted in conformity with that character. He asserts that if the rules do not apply, the State should not be allowed "to avoid the basic common-law principle that character cannot be used to support a conclusion that a defendant acted in a particular way in a particular instance."

We agree with the State that Foster failed to raise his argument concerning these "common-law" principles in his motion and arguments before the circuit court; it is therefore not preserved for appellate review. *See Gilliland v. State*, 2010 Ark. 135, 361 S.W.3d 279 (noting that the appellate courts will not address arguments raised for the first time on appeal). Accordingly, we affirm on this point as well.

Affirmed.

ABRAMSON and GLADWIN, JJ., agree.

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