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ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-23-299

JACK RAWLINS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 7, 2024

APPEAL FROM THE POLK
COUNTY CIRCUIT COURT
[NO. 57CR-21-24]

HONORABLE ANDY RINER,
JUDGE

AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Appellant Jack Rawlins appeals the order of the Polk County Circuit Court revoking his suspended imposition of sentence (SIS). On appeal, Rawlins argues that (1) the circuit judge lacked subject matter jurisdiction over the proceeding under Amendment 80; (2) there was insufficient evidence that Rawlins violated any conditions of his suspended imposition of sentence; and (3) that the state did not rebut Rawlins' testimony regarding his good faith efforts to comply with the conditions. We find no error and affirm.

Judge Andy Riner was the prosecuting attorney for Polk County when Rawlins was arrested for four counts of delivery of methamphetamine or cocaine, plus enhancements, for his being a one-to-four habitual felony offender and for committing the offenses within one thousand feet of a church in counts two and three. In 2020, Judge Riner was elected circuit judge and took the bench in January 2021. Judge Riner had signed an information charging

Rawlins for these offenses, but the information was not filed until January 19, 2021, after he took the bench. At a hearing on April 16, 2021, Rawlins filed a signed waiver of disqualification that was acknowledged by Rawlins; his attorney, Rex Chronister; the prosecuting attorney; and Judge Riner and was filed of record. The contents of the waiver of disqualification, signed by Rawlins, are as follows:

I [Rawlins] have been advised on the record by the court that Judge Riner has a conflict of interest in hearing the above noted case and he is disqualified from hearing this proceeding:

That Judge Riner previously served as a prosecuting attorney and in that capacity participated substantially and personally as a lawyer or public official concerning this case;

I have consulted with my attorney outside the presence of Judge Riner and court personnel whether to waive Judge Riner's disqualification.

Notwithstanding the fact that I have been advised that Judge Riner is disqualified from hearing my case, I knowingly, voluntarily, and intelligently waive the conflict of interest and agree Judge Riner can proceed to hear my case.

On October 20, 2021, the prosecutor amended the information to include a fifth count of maintaining a drug premises but dropped the allegation that the deliveries for counts two and three were within one thousand feet of a church and the habitual-criminal enhancements. On March 16, 2022, Rawlins pleaded guilty to four counts of delivery of methamphetamine or cocaine and one count of maintaining a drug premises. Rawlins was placed on 180 months' suspended sentence on each count and was ordered to pay fines and fees. Rawlins was given the conditions of his suspended sentence, which were admitted in this hearing by agreement of the parties. Rawlins was ordered not to commit any new crimes,

possess any controlled substance, or associate with persons who have been convicted of felonies or who are engaged in criminal activity. He was further ordered to be gainfully employed or enrolled as a student at all times, pay his share of household expenses, enter and pay for an eighteen-month drug-treatment facility within thirty days from his plea and complete the program, and undergo drug screens twice a week at his own expense and submit the results to the prosecuting attorney's office.

On April 14, 2022, probation and parole officers Terry Ford and Howard Watts with Arkansas Community Correction conducted a home visit at Rawlins's home, where Michelle Bice, a convicted felon on probation, was living. When the officers entered the residence, Rawlins was seated in the living room. Rawlins told the officers Michelle Bice lived in the home and that the only things Bice had in the house were her purse and clothes. The search revealed plastic baggies with white residue, needles, syringes, and baggies with marijuana residue throughout the house but primarily in the bathroom and living room areas where Rawlins was seated. Bice was arrested for possession of drug paraphernalia for having a methamphetamine pipe and baggie in her purse. Rawlins was not charged with an offense of possession of drug paraphernalia until later that year.

On September 12, 2022, the State filed a petition to revoke Rawlins's suspended sentence for failure to provide drug-test results to the prosecutor as ordered and failure to enter and complete the eighteen-month drug-rehabilitation program. On December 28, the petition to revoke was amended to include additional allegations of his failing to lead a law-

abiding life, associating with a known convicted felon or someone on probation or parole, and failing to maintain gainful employment.

On January 9, 2023, the court held a revocation hearing wherein the State produced evidence that Rawlins was living with Michelle Bice, whom he knew to be on probation for a felony; that he had not entered a drug-treatment facility or completed an eighteen-month drug program at this expense; and that plastic baggies with white residue, needles, and baggies with marijuana residue were located in Rawlins's home in plain sight in the living room. Rawlins admitted that he did not report to the prosecutor's office twice weekly with drug-test results, giving the excuse he didn't have the money for the tests, but he admitted he failed to take advantage of the free drug testing available to him by obtaining the proper forms from the prosecutor's office. He alleged that he had tried to enter Harbor House rehabilitation but never actually entered the program because he didn't have the money to board his puppy. At the time of the hearing, he still had not entered a drug-rehabilitation program. After the hearing, the court found that Rawlins had violated his suspended sentence by violating the conditions to live a law-abiding life and commit no offense punishable by imprisonment, associating with someone on probation or parole, failing to have gainful employment, failing to complete special conditions that he was to enter an eighteen-month rehabilitation facility within thirty days and complete the program at his expense, and to report to the prosecuting attorney's office twice weekly with drug-test results. The court then sentenced Rawlins on the first three counts of delivery of methamphetamine or cocaine to ten years in the department of corrections, with those counts to run

consecutively, for a total of thirty years; and ten years on the remaining counts—delivery of methamphetamine or cocaine and maintaining a drug premises—with those two counts to run concurrently with the previous three.

Rawlins argues on appeal that Judge Riner was disqualified pursuant to Amendment 80, section 12 of the Arkansas Constitution and Ark. Code Jud. Conduct R. 2.11(A)(6)(a). These arguments are made for the first time on appeal. Nonetheless, this court has made it clear that subject-matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and is a matter this court is obliged to raise on its own when the parties do not. *Pederson v. State*, 354 Ark. 716, 128 S.W.3d 818 (2003); *Priest v. State*, 322 Ark. 673, 912 S.W.2d 902 (1995). We review the pleadings to make a de novo determination of whether a court has subject-matter jurisdiction. *Tripcony v. Ark. Sch. for the Deaf*, 2012 Ark. 188, 403 S.W.3d 559. Thus, we first consider the issue of whether Judge Riner had subject-matter jurisdiction to hear this case pursuant to amendment 80, section 12 of the Arkansas Constitution. Rawlins argues that Judge Riner did not have subject-matter jurisdiction to hear the case because amendment 80, section 12 disqualified him. Amendment 80, section 12 states, “[N]o . . . judge shall preside or participate in any case . . . in which he or she may have been counsel.” Here, it is undisputed that Judge Riner was the prosecuting attorney who prepared the original information against Rawlins prior to taking the bench. Subject-matter jurisdiction, however, is determined from the pleadings, and once a proper charge is filed in circuit court, that court may exercise jurisdiction over that subject matter. *Walker v. State*, 309 Ark. 23, 827 S.W.2d 637 (1992). Moreover,

jurisdiction is granted to a particular position, that is, to a particular court, and not to the person who fills it. *Nation v. State*, 283 Ark. 250, 674 S.W.2d 939 (1984). Here, there is no question that the Circuit Court of Polk County had subject-matter jurisdiction over the criminal case pending before it based on the petition to revoke Rawlins's suspended sentence. Circuit courts have exclusive jurisdiction over criminal prosecutions. Ark. Const. amend. 80, § 6(A); Ark. Sup. Ct. Admin. Order No. 14.

Rawlins also argues that disqualification under section 12 cannot be waived because there is no language authorizing waiver of disqualification in amendment 80. Because appellant failed to raise his claim before the circuit court, the argument was waived. It is well settled that this court will not address an issue raised for the first time on appeal, even a constitutional argument. *Scudder v. Ramsey*, 2013 Ark. 115, 426 S.W.3d 427. Even if it had been argued below, waiver is a voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something that is inconsistent with the right or his intention to rely upon it. *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992). For example, there is no waiver language in the Fourth, Fifth, or Sixth Amendments. Yet, fundamental rights secured by them nevertheless may be waived. Where a party presents no convincing argument nor cites any supporting legal authority, this court will not reach the merits of that point on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

Rawlins's current attorney then argues he did not agree to waive Judge Riner's disqualification with respect to the revocation proceeding. Rawlins did not move to disqualify Judge Riner for bias below, so his argument is not preserved for appellate review. See, e.g., *Rayford v. State*, 2020 Ark. 298, at 5; *Morgan v. State*, 2021 Ark. App. 344, at 8, 632 S.W.3d at 764; *Graham v. State*, 2019 Ark. App. 88, at 10, 572 S.W.3d 29, 35; *Huskey v. Husky*, 2015 Ark. App. 639, at 9-11. It is well settled that this court will not address an issue raised for the first time on appeal, even a constitutional argument. *Baker v. State*, 2014 Ark. 467, 448 S.W.3d 197. However, even if raised below, a revocation proceeding is a continuation of the initial case. *Shaffer v. State*, 2018 Ark. App. 581, 566 S.W.3d 522. The inclusion of "lawyers" in the waiver provision of Ark. Code Jud. Conduct Rule 2.11(C) ensures that a client does not decide to waive a judge's disqualification without the advice of counsel, but it doesn't empower a lawyer to override his client's wishes. The lawyer is the client's agent, and Rawlins cites no convincing arguments or supporting legal authority that would allow a criminal defense lawyer to override his client's waiver of a constitutional right like the one at issue here. Constitutional rights are guaranteed to the defendant, not to the attorney, and as such, the attorney may provide his opinion to advise his client as to what, in his opinion, is the best course an accused should or should not take in his trial. Ultimately, it is for the accused to make the decision whether to waive those rights. Moreover, Rawlins makes a new and untested argument and fails to cite convincing authority to support it. We have made it exceedingly clear that we will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing

argument in its support, and it is not apparent without further research that the argument is well taken. *Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996); *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Rawlins alleges that the circuit judge made critical comments about him during the revocation hearing that “could be viewed as indicative of bias against him.” Rawlins did not move to disqualify Judge Riner for bias below, nor did he object when his alleged comments were made, so his argument is not preserved for appellate review. It is well settled that this court will not address an issue raised for the first time on appeal, even a constitutional argument. *Scudder*, 2013 Ark. 115, 426 S.W.3d 427. Further, Rawlins does not quote the statements, cite the record, or provide any authority in support of this allegation. We have repeatedly emphasized that the party asserting error has the burden to produce a record sufficient to demonstrate prejudicial error, and this court does not consider evidence not included in the record on appeal. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). However, even if the argument were preserved, a review of the record transcript shows that the court made several comments to Rawlins, directing him to lower his voice because the court could hear everything he said to his lawyer from the bench. These comments demonstrated nothing more than the judge’s attempts to get Rawlins to lower his voice and the judge’s attempt to maintain the decorum and dignity of the court proceeding. This exchange was brief, and it was not done in the presence of a jury. Therefore, it cannot

constitute bias or prejudice requiring disqualification. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2001).

A circuit court may revoke a defendant's probation prior to expiration if the court finds that the defendant inexcusably failed to comply with a condition of his or her probation. Ark. Code Ann. § 16-93-308 (Supp. 2023); *Miller v. State*, 2011 Ark. App. 554, at 11, 386 S.W.3d 65, 71. To revoke probation or a suspended sentence, the burden is on the State to prove a violation of a condition by a preponderance of the evidence, and on appellate review, the circuit court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992). The State bears the burden of proof, but it need only prove that the defendant committed one violation of the conditions. *Lewis v. State*, 2015 Ark. App. 222. Evidence that is insufficient to support a criminal conviction may be sufficient to support a revocation of probation. *Richard v. State*, 2018 Ark. App. 362, 553 S.W.3d 783. Our court has noted that "even de minimis violations may support revocation[.]" *Scroggins v. State*, 2019 Ark. App. 346, at 5, 582 S.W.3d 853, 856. On appeal, we will defer to the circuit court's superior position in evaluating the credibility and weight of testimony presented at the hearing. *E.g., Clark v. State*, 2019 Ark. App. 158, at 6, 573 S.W.3d at 555. A circuit court's finding in revocation proceedings will not be reversed on appeal unless it is clearly against the preponderance of the evidence. *Mosley v. State*, 2016 Ark. App. 353, 499 S.W.3d 226; *Ruffin v. State*, 2020 Ark. App. 179, at 5-6, 597 S.W.3d 151, 154-55.

Rawlins challenges the sufficiency of the evidence to support his conviction and argues he made a good-faith effort to comply with the conditions of his suspended sentence. Rawlins chose to testify on his own behalf at the hearing and maintained there was no proof that he violated any condition of his suspended sentences. Rawlins denied each allegation and argued that the State did not rebut his explanations as to why each condition was not complied with during his period of suspended sentence. The court found that he had violated five different conditions of his suspended sentence. Although Rawlins's testimony was unrebutted, the circuit court could simply not have believed him. *Burris v. State*, 2017 Ark. App. 386. The circuit court is not required to believe the testimony of the defendant because he is the person most interested in the outcome of the hearing. *Rhoades v. State*, 2010 Ark. App. 730, 379 S.W.3d at 661.

The court found by a preponderance of the evidence that Rawlins had violated the conditions of his suspended sentence to live a law-abiding life and not commit an offense punishable by imprisonment. Officer Ford testified that when he went to Rawlins's home to arrest Michelle Bice, a convicted felon on probation, Rawlins was in the living room where some drug paraphernalia was found. A search of the house found drug paraphernalia scattered throughout the house but primarily in the bathroom and the living room where Rawlins was seated. The paraphernalia consisted of plastic baggies with white powder residue, needles, syringes, and plastic baggies with marijuana residue. To prove constructive possession, the State must establish that the defendant exercised "care, control, and management over the contraband." *Block v. State*, 2015 Ark. App. 83, at 6, 455 S.W.3d 336,

340. The location of the contraband in close proximity to the defendant has been held to be a sufficient linking factor to support a constructive-possession conviction. *Id.* Here, the paraphernalia was found in the common area of the home where Rawlins was seated and in the bathroom. Rawlins admitted to the officers that everything in the house except Michelle's purse and clothes belonged to him. Arkansas Code Annotated section 5-64-443(a) (Supp. 2023) makes it illegal for a person to possess drug paraphernalia with the purpose to use the drug paraphernalia to ingest, inhale, or otherwise introduce into the human body a controlled substance, such as needles and syringes. Clearly, Rawlins's possession of drug paraphernalia is an offense punishable by imprisonment. There was no showing by Rawlins that he had attempted in good faith to comply with this condition of his suspended sentence. Because only one ground is needed to support revocation, we need not address Rawlins's remaining challenges to the revocation of his suspended sentence. *Lamb v. State*, 2019 Ark. App. 494, 588 S.W.3d 409. We hold that Rawlins's possession of the drug paraphernalia was proved by a preponderance of the evidence, and we affirm the circuit court's decision.

Affirmed.

KLAPPENBACH and MURPHY, JJ., agree.

Ben Motal, for appellant.

Tim Griffin, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.