

ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-23-144

WILLIAM DAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 28, 2024

APPEAL FROM THE ASHLEY
COUNTY CIRCUIT COURT
[NO. 02CR-15-213]

HONORABLE ROBERT B. GIBSON
III, JUDGE

AFFIRMED

BRANDON J. HARRISON, Chief Judge

William Day appeals the circuit court’s denial of his petition to dismiss his case and seal the record pursuant to the First Offender Act, codified at Ark. Code Ann. §§ 16-93-301 et seq. (Repl. 2016). He argues that the circuit court erred in finding that he had not fulfilled the terms and conditions of his probation and thus did not qualify to have his record sealed. We affirm the circuit court’s order.

In October 2015, the State charged Day with possession of a Schedule VI-controlled substance with the purpose to deliver, possession of a Schedule III-controlled substance with the purpose to deliver, use or possession of paraphernalia to manufacture, and simultaneous possession of drugs and firearms. In May 2016, the State nolle prossed the charge of simultaneous possession of drugs and firearms, and Day pled guilty to the remaining charges. He was sentenced pursuant to the First Offender Act and placed on three years’ probation.

The conditions of his probation required that he not commit any felony, misdemeanor, or other criminal offense punishable by confinement in jail or prison.

In December 2017, Day moved for an early termination to his probation, to seal his arrest record, and to expunge his convictions. He asserted that there were “significant errors” in the prosecutor’s short report of circumstances, which had caused confusion as to the length of his supervised probation. He also stated that since he had been placed on probation, no violation papers had been filed, he had passed all drug tests,¹ and he had paid all fines and fees. The State responded that Day had alleged no lawful grounds for termination of his probation and that Day had been arrested on 23 September 2017 in Parker County, Texas, for another drug offense. The circuit court denied Day’s request for early termination of probation. In March 2019 Day filed a similar motion to terminate his probation; his motion was denied.

In July 2019, Day petitioned to dismiss his case and seal his record pursuant to Ark. Code Ann. § 16-93-303 and asserted that he had “satisfactorily fulfilled the terms and conditions of probation.” The State did not object to Day’s petition. The circuit court, however, denied Day’s petition, explaining, “There is a letter in the Clerk’s filed [sic] from Texas showing this Defendant was charged in 2017 with possession of controlled substance. This occurred during his probationary period here.”

¹Specifically, Day asserted that he had passed all drugs tests “except last two, but the defendant Medical Marijuana card which Probation Officer knew about, did not instruct not to use and recorded in file.”

In April 2022, Day again petitioned to dismiss his case and seal his record. This time the State objected to the petition, arguing that the court had already ruled that because Day was arrested during the period of his probation, the court would not seal his record.

The circuit court held a hearing on 26 September 2022, and Day's counsel explained that Day had been arrested for marijuana possession in Texas in 2017 but that the case had ultimately been dismissed. Counsel argued that, generally, when petitions to seal are denied, there has been an admission of guilt to the underlying conduct, but here, that was not the case. Counsel claimed the Texas case had been dismissed because Day had a medical-marijuana card and that the Arkansas probation office had been aware of his medical-marijuana card and did not have a problem with it.

Day testified that since being placed on probation in 2016, he had been arrested three times: once for possession of a controlled substance (Parker County, Texas, 2017), once for driving while intoxicated (DWI) (Harris County, Texas, 2021), and once on a warrant based on the DWI (Harris County, Texas, 2021). He said that the charges had all been dismissed without prosecution.

Day described his 2017 arrest for possession of a controlled substance as follows: "I was traveling from New Mexico to Arkansas to see a probation officer on this situation, that we're here today for, and was speeding on the interstate and got pulled over. Had medical cannabis with me." He also explained that in 2017, he had a medical-marijuana card issued in New Mexico and that Arkansas had not yet legalized medical marijuana, but he denied being told that Arkansas would not recognize his medical-marijuana card. Upon questioning by the court, Day admitted that he had been placed on three years' probation

in Parker County for the possession charge and that “it was a deferred adjudication similar to this one.”

Stephanie Harris, a probation and parole officer, testified that Day had tested positive for marijuana on 26 September 2017 and that he had been advised that state and federal laws prohibited him from the use of marijuana. He had also been told that he was not allowed to have the medical-marijuana card.

In November 2022, the circuit court issued a written order denying the petition to seal. The court found,

The Defendant was charged in 2017 with possession of controlled substance in Texas. The Defendant claimed the charges were dismissed. The Court questioned the Defendant about the charges. The Defendant’s responses on the witness stand were evasive, but it was eventually revealed the Defendant was placed on probation for three (3) years. This occurred during his probationary period here. The Defendant is not eligible to have his record sealed.

Day has timely appealed the circuit court’s order.

Day contends that this appeal involves the interpretation of Ark. Code Ann. § 16-93-303. Issues of statutory interpretation are reviewed de novo. *Barker v. State*, 2014 Ark. 467, 448 S.W.3d 197. Moreover, we strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Blackwell v. State*, 2015 Ark. App. 96, 455 S.W.3d 848 (citing *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993)). The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* If the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation. *Id.*

The State, on the other hand, says that Day’s argument hinges on the term “commit,” which is contained in his conditions of probation, not the governing statutory scheme. The State denies that this case should be reviewed de novo; it thinks the proper standard of review is abuse of discretion. Ark. Code Ann. § 16-90-1415(f)(3) (Repl. 2016) (standard of review on appeal of denial of a petition to seal is abuse of discretion). Further, when evaluating whether a defendant violated the terms and conditions of probation, the appellate court defers to the circuit court’s determinations regarding the credibility of witnesses and the weight to be given testimony. *Daniels v. State*, 2019 Ark. App. 473, 588 S.W.3d 116. We agree that this is not an issue of statutory interpretation, so we review the circuit court’s decision for an abuse of discretion.

The First Offender Act, as codified, states in relevant part that

[w]hen an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the circuit court or district court, in the case of a defendant who previously has not been convicted of a felony, without making a finding of guilt or entering a judgment of guilt and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the circuit court or district court.

Ark. Code Ann. § 16-93-303(a)(1)(A)(i). If his probation is successful, he will be discharged without an adjudication of guilt, his case will be dismissed, and his record will be expunged.

Ark. Code Ann. § 16-93-303(b).

Day contends that the circuit court erred in denying his petition to seal because he had not committed any felony, misdemeanor, or other criminal offense while on supervised probation. He concedes that if he had pled guilty to the 2017 possession offense without utilizing a deferred-adjudication procedure, the circuit court would have been legally

justified in denying his petition. But, he argues, the State failed to prove that he “committed”² a new offense because legally, the offense in Texas did not occur. In both Texas and Arkansas, a guilty plea tendered under a deferred-adjudication procedure is not a conviction. And without evidence of a conviction, Day asserts, there is no evidence an offense was “committed.” He further argues that neither the conditions of his probation nor Arkansas law prohibited him from taking advantage of another state’s deferred-adjudication procedure while he was on supervised probation in Arkansas.

The State responds that by entering a guilty plea in Texas to possessing marijuana, Day verified that every element of the offense had occurred. The State also disagrees that without a conviction there is no evidence that an offense was “committed”; the State contends that the plea itself is the evidence. *See Kimbrell v. State*, 2016 Ark. App. 17, 480 S.W.3d 206 (holding that defendant failed to fulfill terms and conditions of probation where State instituted revocation proceedings based on allegations of criminal offenses, and even though defendant was not convicted of such offenses, defendant confessed to having used marijuana). In addition, Day’s testimony was an admission that he purchased marijuana, transported marijuana across state lines, consumed marijuana, and entered a marijuana dispensary in New Mexico, all of which constitute violations of his probation.

Contrary to Day’s argument, a conviction is not necessary proof of committing an offense. Day’s own testimony confirmed that he had committed at least one offense punishable by confinement in jail or prison during his probationary period. Therefore, the

²According to the Arkansas Code, an offense is committed when every element of that offense occurs. Ark. Code Ann. § 5-1-109(e)(1)(A).

circuit court did not abuse its discretion in denying Day's petition.

Affirmed.

WOOD and MURPHY, JJ., agree.

James Law Firm, by: *William O. "Bill" James, Jr.*, and *Drew Curtis*, for appellant.

Tim Griffin, Att'y Gen., by: *Walker K. Hawkins*, Ass't Att'y Gen., for appellee.