Cite as 2024 Ark. App. 188

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-23-565

DEBRA FARRIS APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered March 13, 2024 APPEAL FROM THE SEARCY COUNTY CIRCUIT COURT [NOS. 65CR-19-90 & 65CR-20-193 & 65CR-20-198] HONORABLE H.G. FOSTER, JUDGE AFFIRMED AND REMANDED

RITA W. GRUBER, Judge

Debra Farris appeals the February 28, 2023 sentencing order that revoked her suspended imposition of sentence (SIS) in three separate cases and sentenced her to consecutive sentences totaling 300 months' imprisonment and 168 months' SIS. Farris contends that there was insufficient evidence to revoke each SIS and that her sentences as imposed were illegal. We affirm the revocations and remand for entry of a corrected sentencing order.

I. *Factual and Procedural Background*

On May 26, 2021, sentencing orders regarding Farris were entered in three separate Searcy County Circuit Court cases: 65CR-19-90, 65CR-20-198, and 65CR-20-193. In case 19-90, the sentencing order reflects that Farris pled guilty to probation revocation and was sentenced to 24 months' SIS on a felony paraphernalia-possession charge along with fines and fees. In case 20-193, the sentencing order reflects that Farris was sentenced to 36 months'

imprisonment and 24 months' SIS, having pled guilty to the use or possession of paraphernalia to manufacture methamphetamine or cocaine, a felony charge. She was also sentenced to costs and fees and given 48 days' jail-time credit. In case 20-198, the sentencing order reflects that Farris, pursuant to a guilty plea, was sentenced to (1) 36 months' imprisonment and 24 months' SIS for felony possession of a controlled substance; (2) 36 months' imprisonment and 24 months' SIS for felony possession of drug paraphernalia; (3) 36 months' imprisonment and 24 months' SIS for felony possession of a controlled substance; and (4) 36 months' imprisonment and 24 months' SIS for furnishing prohibited articles. Farris was also sentenced to costs and fees and given 48 days' jail-time credit.[1]

In each case, Farris was provided the same SIS conditions requiring in relevant part that she not violate any laws and refrain from the use of drugs and alcohol. On November 9, 2022, the State filed a motion in each case requesting that Farris's SIS be revoked. The motion alleged that Farris had violated the conditions of her SIS on October 30, 2022, by possessing fentanyl and drug paraphernalia as well as driving left of center.

A combined revocation hearing was held on February 28, 2023. Caleb Horn, a deputy with the Searcy County Sheriff's Office, testified that on October 30, 2022, he performed a traffic stop of a vehicle being operated by Farris, whom he identified in the courtroom. He performed the traffic stop because he observed the vehicle driving left of center. Two other people were also in the car: Farris's mother, Sue, and Brian Echols. Horn testified that he

[1]In case 20-198, amended sentencing orders were entered on September 27, October 29, and November 1, 2021.

knew Farris was on parole, and he asked her if he could search the car. Farris consented to the search, and Horn found a marijuana bud in a cigarette pack in the driver's-side door of the vehicle. He did not know what brand cigarettes Farris smoked. During the stop, Deputy Tharp located a lunchbox that Farris claimed as hers on the passenger-side floorboard under some dog food. Agent Lisa Wells arrived on the scene and asked the deputies to conduct a home visit with her, and they did.

Deputy Michael Tharp testified that he assisted in the traffic stop of Farris on October 30, and he identified Farris in the courtroom. Within the lunchbox, Tharp found a glass smoking device that had what he believed—on the basis of his training and experience—to be marijuana inside it. He assisted in the search of the house, and half of a "pressed pill" that tested positive for methamphetamine and fentanyl was found in Farris's bedroom. The half pill was inside a small bag in a basket on Farris's bedside table.

Agent Lisa Wells, the assistant area manager for the Department of Community Corrections, testified that she received a call about Farris, and she asked the deputies to assist her on a home visit. Wells found a glass smoking device with residue. The device was in a black knife holster on the top of the dresser in Farris's bedroom. There was another smoking device on a different table, a marijuana grinder that had some marijuana residue in it, and an orange device that looked like it was used for smoking substances, which also had residue on it. There were hemostat clips in a cabinet drawer and a container with a waxy residue substance, which is commonly found with marijuana wax. There was a pill bottle with the label scratched off that contained thirty .22-caliber bullets and white pills Wells was able to

identify as "mirtazaprine." There was also other drug paraphernalia located around the room. She did not request that any of the items she had located be tested for fingerprints or DNA analysis or be submitted for any other forensic examination.

The defense then called Farris's mother, Sue Farris. Sue testified that Farris lived with her in her house in which Farris had her own room. She "guessed" everything that was in the bedroom belonged to Farris. While Farris was in rehab for six months, Sue went into Farris's room to make Farris's bed, but otherwise "left it alone because it was her stuff." Sue's adult granddaughter had stayed in Farris's bedroom "quite a bit" and had stayed last in the room about a week before Farris came home. Sue did not clean the room after her granddaughter vacated it. No one else stayed in the room while Farris was in rehab.

Sue testified further that the car belonged to her and "lots of people" used it. Prior to being pulled over, they—Sue, Farris, and Sue's adult nephew Brian Echols—had all been at a family member's birthday party at a house. It was a child's birthday party, and she was not aware of any drugs at that party. Farris had left a bag with "her dog stuff in it" at that same house a week or so prior. Farris put the bag in the backseat floorboard. Sue did not know if anyone looked in the bag after getting into the car. They stopped on the way home to get groceries. Echols handed Sue the bag, which was like a lunch bag, from the back seat, and Sue put it at the front of the car. She believes that while she and Farris were inside the store, Echols smoked something in the car because she smelled it when they got back to the car. Sue testified that Farris smokes "Montego's or something or other," and Sue does not smoke

anything. Sue did not know anything about a pipe, and they had no pipe on them, but she was sure that Echols did.

Farris testified next. She knew the cigarette box was in the driver's-side car door, but she never opened or touched it because it was not hers. She has two or three family members who smoke the brand that was found, but the cigarette box was not either of her brands, "Monos and Pall Mall." Other people drive the car. She, her mother, and Echols had been at a birthday party at a house, and she had previously left her dog with his food and "stuff" at that same house. When she left the lunch bag at the house, it contained items only for the dog. The bag was returned to her, and she put it on the back floorboard of the car. When she returned to the car after getting groceries, she noticed that her "doggy bag" was in the front floorboard where her mother had been sitting. The bag had been unzipped and half zipped back up. Farris had always lived and continued to live with her mother except when she (Farris) had been incarcerated. She had returned home about two to three weeks before the October traffic stop. She did not move back into her room but stayed on a couch in the front room because her mother had been ill. She did not go search her room. None of the items found were hers except the grinder, which she had had for probably ten or twelve years. She testified that she no longer has a drug habit but admitted having tested positive for methamphetamine since she "got out."[2]

[2]There was a colloquy between the court and the attorneys regarding the fact that failing a drug test was not one of the SIS conditions Farris was alleged to have violated. The court ruled that it was highly relevant to her credibility.

The circuit court ruled from the bench that based on its opportunity to observe the witnesses and determine their credibility and the reasonableness of their testimony, it believed there to be both direct evidence and circumstantial evidence from which the only reasonable inference that could be drawn was that Farris violated the terms of her SIS.

Further testimony—not specific to the issues on appeal—was given for sentencing purposes, and closing arguments were made. The circuit court asked Farris if she could pass a drug test that day, and Farris affirmed under oath that she could. The circuit court then specifically found Farris to have "very poor credibility," noting that she came in and offered "the most incredible testimony with regard to explanations that she absolutely is surrounded by controlled substances, paraphernalia and it appears to belong to everybody else even though it's in her room" and in the car she was driving. The court noted Farris's long history of drug use and ordered her to be drug tested. The hearing resumed after a lunch break. The drug test results reflected that Farris tested positive for methamphetamine and opioids.

On February 28, 2023, a combined sentencing order was filed in all three cases. In case 19-90—delineated as offense No. 1—Farris was sentenced to 72 months' incarceration, to run consecutively to "offense # 2, 3, 4, 5, 6." The sentencing order further reflects that Farris was being sentenced in that case on four criminal counts of possession of drug paraphernalia. In case number 20-193—delineated as offense No. 2—Farris was sentenced to 204 months' incarceration, to run consecutively to "offense # 1, 3, 4, 5, 6." The offenses delineated as 3, 4, 5, and 6 were with respect to case 20-198. There, Farris was sentenced to 24 months' incarceration and 12 months' SIS for offense No. 3; 36 months' SIS for offense

No. 4; 36 months' SIS for offense No. 5; and 84 months' SIS for offense No. 6. Those sentences were to run consecutively to all the others as well as to one another. Farris was given 19 days' jail-time credit. She was also sentenced to costs and fees. The sentencing order reflects that the "total time to be served for all offenses in months" is 300, which is equal to the number of months Farris was sentenced to incarceration but does not include the months she was sentenced to SIS.

On March 4, 2023, Farris timely filed a notice of appeal in case 20-198 only, appealing the February 28, 2023 sentencing order. On June 20, Farris filed an amended notice of appeal with respect to all three cases, which was untimely as to cases 19-90 and 20-193. Farris filed a motion to file belated appeals with respect to cases 19-90 and 20-193 on August 21, which this court granted on September 6.

II. *Standard of Review and Law*

To revoke an SIS, the circuit court must find by a preponderance of the evidence that the defendant has inexcusably violated a condition of the probation or suspension. *Springs v. State*, 2017 Ark. App. 364, at 3, 525 S.W.3d 490, 492. The State's burden of proof in a revocation proceeding is lower than that required to convict in a criminal trial, and evidence that is insufficient for a conviction may be sufficient for a revocation. *Id.* The State does not have to prove every allegation in its petition, and proof of only one violation is sufficient to sustain a revocation. *Mathis v. State*, 2021 Ark. App. 49, at 3, 616 S.W.3d 274, 277. A defendant's admission to violating a term or condition of a suspended sentence, standing alone, is sufficient evidence to support the revocation. *E.g.*, *Maxwell v. State*, 2009 Ark. App.

533, at 3, 336 S.W.3d 881, 882. The fact-finder may infer a defendant's guilt from false or improbable statements explaining suspicious circumstances. *Goff v. State*, 329 Ark. 513, 519, 953 S.W.2d 38, 41 (1997).

We will uphold the circuit court's findings unless they are clearly against the preponderance of the evidence. *Mathis*, 2021 Ark. App. 49, at 3, 616 S.W.3d at 277. Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the circuit court's superior position to do so. *Burgess v. State*, 2021 Ark. App. 54, at 6.

The State is not required to prove literal physical possession of the contraband; we look to see whether the contraband was in a place under the accused's dominion and control. *Terry v. State*, 2018 Ark. App. 435, at 4, 559 S.W.3d 301, 304. To prove constructive possession, the State must establish that the accused exercised "care, control, and management over the contraband." *Id.* Additionally, there must be some evidence that the accused had knowledge of the presence of the contraband. *Id.* Control over and knowledge of the contraband can be inferred from the circumstances, such as the fact that it is in plain view, the ownership of the property where the contraband is found, and the accused's suspicious behavior. *Id.* at 4–5. Location of the contraband in close proximity to the accused and the improbable nature of the accused's explanations can also be sufficient linking factors to support constructive possession. *Id.* at 5. There is no requirement that all or even a majority of the linking factors be present to constitute constructive possession of the contraband. *McCastle v. State*, 2012 Ark. App. 162, at 4–5, 392 S.W.3d 369, 372.

III. *Discussion*

A. The Revocation

Farris first contends that the State did not provide sufficient evidence to revoke her SIS in the three cases. She argues that there are insufficient factors linking her to the contraband to show that she constructively possessed any of the illegal items located in either the car or the house. Farris relies primarily on *Walker v. State*, 77 Ark. App. 122, 72 S.W.3d 517 (2002), and *Baltimore v. State*, 2017 Ark. App. 622, 535 S.W.3d 286. She argues that under *Walker* and *Baltimore*, the mere fact that the contraband was in a vehicle being operated—but not owned—by her and in proximity to her, was insufficient to prove that she was in constructive possession of it. She emphasizes that no contraband was located on her person, the vehicle was jointly occupied and used by others, none of the contraband was in plain view, and she did not smoke the cigarette brand of the pack in which contraband was found. She further emphasizes that the lunchbox had been at someone else's home and had been left in the car with Echols, who she contends moved it while she and her mother were in the grocery store. She also emphasizes that she never acted suspiciously, having consented to the search of the vehicle.

Regarding the contraband located in her bedroom, Farris argues that she did not exercise care, control, or management over any it. Farris relies on *McCarley v. State*, 2019 Ark. App. 222, 575 S.W.3d 603, and *Gwatney v. State*, 75 Ark. App. 331, 57 S.W.3d 247 (2001), in support of these arguments. In support of her argument, she emphasizes that the house was jointly occupied; she had only recently returned home, and other family members

had resided in and accessed her bedroom while she was away; she had been sleeping in the living room, not her bedroom; and none of the contraband located in Farris's bedroom was in her possession, proximity, or plain view. Thus, she concludes that there was insufficient evidence linking her to any of the contraband. In support of her arguments regarding both the vehicle and the house, she contends that law enforcement's failure to request that any of the contraband be submitted for any fingerprint, DNA, or forensic analysis further strengthens her position.

The State first responds that because it also alleged that Farris broke the law by driving left of center, which went unaddressed by Farris in her brief, this court may and should affirm because Farris failed to challenge each ground on which the circuit court based the decision to revoke. The State then emphasizes Farris's admission regarding the grinder bowl with marijuana residue, citing *Garner v. State*, 2020 Ark. App. 101, at 4, 594 S.W.3d 145, 149, which identifies a grinder as drug paraphernalia, and Arkansas Code Annotated § 5-64-101(12) (Supp. 2021), which defines "drug paraphernalia." Finally, the State argues that there were sufficient linking factors to show that Farris constructively possessed the contraband located in both the car and the house. Regarding the car, the State argues that the marijuana was found in a cigarette pack in the driver's-side door of a vehicle Farris was driving, which illustrates proximity and control. The State further argues that Farris's admission that the lunchbox in which the glass smoking device was found belonged to her, Farris's suspicions regarding the lunchbox, and her mother's testimony that she smelled marijuana in the car illustrate that the contraband was found in Farris's personal effects, in

proximity to her, and while under her control. The State then distinguishes *Walker* and *Baltimore*. Regarding the contraband located in the house, the State argues that all the contraband was found in Farris's bedroom, and the pill was found in plain view, as was the smoking device on the table under the TV. The State once more emphasizes Farris's admission that the marijuana grinder was hers. It then distinguishes *McCarley* and *Gwatney*.

On reply, Farris concedes that she did not challenge the proof that she drove left of center. However, she argues that she did not have to because the circuit court's finding that she violated her SIS conditions in each case was specifically based on the discovery of contraband in the car and bedroom.

In *Walker*, *supra*, the appellant, Walker, was driving a vehicle that belonged to the passenger, Darlene Ables. A ball of tinfoil with methamphetamine inside it was discovered in a pair of gloves under the driver's seat. While contraband was located on Ables's person, none was found on Walker. Walker was convicted in a bench trial of possession of a controlled substance and possession of drug paraphernalia. This court reversed the conviction, holding that while the glove was found on Walker's side of the vehicle and Walker was the driver, neither of those factors raised a reasonable inference that Walker had knowledge of the presence of the contraband. We pointed out that although Walker was the driver, the vehicle belonged to passenger Ables; no contraband was found on Walker's person; and Walker was cooperative and did not act suspiciously. *Baltimore* presented a factually similar set of circumstances as *Walker* as well as the same result on appeal—reversal of the conviction.

Walker and *Baltimore* are distinguishable. Here, the vehicle did belong to the passenger—Farris's mother—and was occupied by multiple people: Farris, Farris's mother, and Echols. However, Farris was operating the vehicle, and the cigarette box containing the contraband was found in the driver's-side door in her immediate vicinity in plain view. Unlike *Walker*, no drugs were found on *any* of the occupants. Farris admitted seeing the cigarette pack that contained the contraband; no other vehicle occupant claimed ownership of the cigarette box—Farris's mother testified that she did not smoke at all; and Farris admitted smoking—albeit a different brand. Farris did claim ownership of the lunchbox in which the contraband was located, i.e., the contraband was located in her personal effects, but she denied knowledge of its contents. More importantly, neither *Walker* nor *Baltimore* is a revocation case—there, the State had to meet the much higher burden of proof for guilt on the underlying charge. Thus, neither *Walker* nor *Baltimore* mandates reversal.

In *McCarley*, *supra*, McCarley was convicted by a jury of multiple charges, including simultaneous possession of a controlled substance and firearms, which was the only conviction he appealed. He argued that there was insufficient evidence to prove that he was in constructive possession of a firearm. We agreed and reversed, noting that the firearms at issue had been located in a back bedroom under the bed within arm's reach of someone other than McCarley, who was hiding in the living room. We further noted that the firearm was not found in a common area of the home, and there was no evidence that the bedroom in which the firearms were located belonged to McCarley. We held that the State failed to prove that McCarley constructively possessed the firearms because the State failed to show

they were in his care, control, or management. In *Gwatney*, *supra*, Gwatney was convicted in a bench trial of possession of drug paraphernalia. On appeal, he argued that the State failed to prove that he constructively possessed the contraband because it did not show that he exercised care, control, or management over it. We reversed, noting that the contraband was found in a chest in Gwatney's girlfriend's bedroom where Gwatney happened to be when law enforcement arrived at the house. The house belonged to Gwatney's girlfriend, where Gwatney sometimes stayed but did not live, and was frequented by a great many people.

Again, neither *McCarley* nor *Gwatney* is a revocation case, and the evidence here is stronger. All the contraband was in Farris's bedroom, some of which was in plain view. Farris admitted that the grinder bowl—which no one disputes meets the definition of drug paraphernalia—with marijuana residue was hers. And the circuit court specifically found Farris to have "very poor credibility," noting that she had offered "the most incredible testimony with regard to explanations that she absolutely is surrounded by controlled substances, paraphernalia and it appears to belong to everybody else," even though the contraband was in her bedroom and the car she was driving.

The State is correct that the circuit court did not expressly base the revocation on any one violation; the motion to revoke Farris's SIS alleged that she had violated the conditions of her SIS by driving left of center; and Deputy Horn's uncontroverted testimony was that he initiated the traffic stop for that reason. However, the circuit court's oral ruling was specific to the contraband located in both the vehicle and the house as well as Farris's history of drug use and does not reference the reason for the traffic stop at all.

Given the totality of the evidence presented with respect to both the car and the house, the State's lowered burden of proof in a revocation proceeding, and the circuit court's specific credibility determinations and our deference to them as well as Farris's admission that the grinder belonged to her, it cannot be said that the circuit court's findings were clearly against the preponderance of the evidence. Accordingly, we affirm the revocations.

B. The Sentencing Order

Farris contends that she was sentenced illegally because her suspended impositions of sentence on separate crimes were ordered to run consecutively to one another as well to the terms of imprisonment. She argues that this court must correct her sentences. The State agrees that the sentencing order needs correcting but contends that the case should be remanded to do so. On reply, Farris contends that this court should reverse and remand for resentencing on all counts. The circuit court sentenced Farris to an aggregate of 300 months' imprisonment followed by 14 years' SIS across the three cases. All the sentences—both for imprisonment and SIS—were imposed consecutively to each other.

"In Arkansas, sentencing is entirely a matter of statute." *Reyes v. State*, 2015 Ark. App. 55, at 5, 454 S.W.3d 279, 281. We have consistently held that sentencing shall not be other than in accordance with the statute in effect at the time of the commission of the crime. *Walden v. State*, 2014 Ark. 193, at 3, 433 S.W.3d 864, 867. A sentence is void or illegal when the circuit court lacks the authority to impose it. *Id.* "Whether pronounced or entered at the same or a different time, multiple periods of suspension or probation run concurrently." Ark. Code Ann. § 5-4-307(b)(1) (Supp. 2021). "The period of a suspension . . . also runs

concurrently with any . . . term of imprisonment . . . to which a defendant is or becomes subject to during the period of the suspension . . . . Ark. Code Ann. § 5-4-307(b)(2). In *Walden, supra*, our supreme court interpreted Arkansas Code Annotated section 5-4-307(b)(2) to provide that suspended sentences for one or more crimes must run concurrently with terms of imprisonment imposed for separate crimes. *Norton v. State*, 2018 Ark. App. 507, at 2, 563 S.W.3d 584, 585.

This court has the prerogative either to remand for resentencing by the circuit court or to correct the sentence itself. *Cf. Anthony Walker v. State*, 2015 Ark. 153, at 3, 459 S.W.3d 300, 302 (remanding for resentencing when trial court ordered suspended sentence to be served consecutively to term of imprisonment) *with Norton v. State*, 2018 Ark. App. 507, at 2–3, 563 S.W.3d 584, 585 (affirming as modified and holding that when a circuit court's sentence is illegal and the error has nothing to do with guilt but only with the illegal sentence, we can correct the sentence in lieu of remanding).

The State contends that individual imprisonment sentences, imposed consecutively, are not illegal. Ark. Code Ann. § 5-4-403(a) (Repl. 2013); *Skaggs v. State*, 2023 Ark. App. 325, at 10, 670 S.W.3d 811, 817. That is correct. The State further contends that a term of imprisonment followed by an additional suspended imposition of sentence for the same crime is not illegal. Ark. Code Ann. § 5-4-307(c); *Todd v. State*, 2016 Ark. App. 270, at 4, 493 S.W.3d 350, 352. That is also correct. However, the States concedes that our precedent and Arkansas Code Annotated section 5-4-307(b) mandate that suspended sentences imposed with terms of imprisonment for different crimes run concurrently, not consecutively, as do

multiple periods of suspension pursuant to Arkansas Code Annotated section 5-4-307(b)(1). Thus, Farris's sentences, such as they are, cannot stand.

The sentencing order also contains what appears to be at least one scrivener's error. The section of the sentencing order addressing case 19-90 (offense No. 1) shows that Farris was convicted of four counts of felony possession of drug paraphernalia; however, the record reflects she was convicted of only one count. Accordingly, we remand for the circuit court to correct Farris's sentence as well as any scrivener's errors contained therein.

Affirmed and remanded.

GLADWIN and BARRETT, JJ., agree.

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

Tim Griffin, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.