

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-1249 (Monongalia County 08-F-169)

**Jabbar Justin Harper,
Defendant Below, Petitioner**

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jabbar Justin Harper, by counsel Holly Turkett, appeals the Circuit Court of Monongalia County's order dated July 29, 2011, revoking petitioner's probation. The State of West Virginia, by counsel Michele Duncan Bishop, has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner pled guilty to one count of burglary and one count of sexual abuse in 2009, and was sentenced to one to five years in the penitentiary on the sexual abuse conviction and one to fifteen years in the penitentiary on the burglary conviction. However, petitioner's sentence for the burglary was suspended, and once petitioner discharged his sexual abuse prison term, he was to be placed on probation for five years for the burglary conviction. Petitioner was released from prison and began serving his term of probation in December of 2010.

At a probation review hearing on March 7, 2011, petitioner testified at length regarding certain incidents he feared may affect his probation. Petitioner testified that his child's mother was essentially stalking him, and that she and two of her friends had assaulted him. He also testified that his child's mother was attempting to get his probation revoked by seeking a restraining order against him and claiming domestic violence. Petitioner was then ordered to have no contact, direct or indirect, with his child's mother. Petitioner asserts that when he called 911 to report his child's mother for the assault incident, her friends threatened him with a gun and shot the gun while he was on the telephone with police.

In May of 2011, the State filed a motion to revoke petitioner's probation, alleging petitioner's testimony at the hearing on March 7 was false, and that petitioner had tested positive for alcohol on March 14, 2011, in violation of the rules of his probation. Petitioner's revocation hearing was held on July 28, 2011, at which time petitioner was incarcerated on charges of second offense domestic violence and violation of a protective order. The mother of petitioner's child testified as to the incident of domestic violence perpetrated against her by petitioner, and the mother's friend testified that the alleged assault against petitioner never occurred. Further, the recordings of the 911 telephone calls and police testimony showed that petitioner's account of the events of that evening were not supported by the evidence. Petitioner did not dispute his use of alcohol. The circuit court then revoked petitioner's probation in an order dated July 29, 2011. The circuit court found that petitioner provided false, deceptive, and "unbelievable" testimony at his prior probation review hearing. The circuit court also found that petitioner had violated the terms of his probation through his arrest and his positive alcohol test.

Petitioner now appeals the revocation of his probation and the reinstatement of his prison sentence. As this Court has previously stated:

"When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syllabus Point 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).

Syl. Pt. 1, *State v. Inscore*, 219 W.Va. 443, 634 S.E.2d 389 (2006).

On appeal, petitioner argues that the circuit court erred in finding that the State proved that he violated his probation by a clear preponderance of the evidence. Petitioner argues that the State did not prove that he was deceptive in his March 7, 2011, testimony, nor did the State prove that petitioner made false allegations against innocent people to divert attention from his own crimes, as alleged by the motion to revoke probation. Petitioner argues that the State presented no evidence that he lied during his testimony, other than the testimony of two women who disputed that they assaulted the petitioner. The testifying officer stated that he had not done an independent investigation into petitioner's claims that he was assaulted. Further, petitioner points out that his probation officer testified that he had been compliant with the rules of his probation.

Petitioner also argues that the circuit court erred in finding that he had violated his probation based on the evidence presented at the probation revocation hearing. Petitioner had a specific list of conditions to follow during his probation, but he argues that the State moved to revoke his probation on the grounds that he had not been honest and had not been using the resources available to him. Petitioner argues that the State failed to prove those allegations, and that the circuit court abused its

discretion in revoking his probation. Petitioner further argues that the circuit court's application of the underlying facts to the law was clearly erroneous.

The State responds and argues that while the State articulated in its motion that petitioner had provided false testimony, it also very clearly stated that petitioner had been arrested for domestic battery and for violating a protective order, and that petitioner had tested positive for alcohol. These were all probation violations. Further, the evidence showed that petitioner was not truthful in his March 7, 2011, testimony based on the testimony given at the hearing on July 28, 2011, and based on the 911 tapes.

Petitioner's probation was revoked for his violations of the terms thereof. West Virginia Code § 62-12-10 reads, in relevant part:

If it shall then appear to the satisfaction of the court or judge that any condition of probation has been violated, the court or judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed, and order that sentence be executed. In computing the period for which the offender is to be imprisoned, the time between his release on probation and his arrest shall not be taken to be any part of the term of his sentence.

Here, it is undisputed that petitioner tested positive for alcohol and was arrested on two different charges. Given the testimony at the probation review hearing and the probation revocation hearing, this Court does not find reversible error in the circuit court's determination that petitioner's testimony was not credible. Therefore, this Court declines to find that the circuit court abused its discretion in revoking petitioner's probation.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh