Cite as 2019 Ark. App. 244

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-18-506

COLBY BULLINGTON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered: May 1, 2019 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NOS. 66FCR-14-483, 66FCR-15-386, AND 66FCR-16-1146] HONORABLE JAMES O. COX, JUDGE AFFIRMED

RITA W. GRUBER, Chief Judge

Appellant Colby Bullington appeals from the revocation of his suspended sentences in three separate cases.[1] The Sebastian County Circuit Court found by a preponderance of the evidence that he had violated the conditions of his suspended sentences by committing the offense of rape, revoked the suspended sentences, and sentenced him to serve a total of twenty-six years' imprisonment. For reversal, appellant argues that he "did not waive the burden of proof of reasonable doubt and he did not waive a jury trial to which he was entitled for proof that he violated the law." We affirm.

[1]This case was originally submitted as a no-merit appeal, and we ordered rebriefing. *See Bullington v. State*, 2019 Ark. App. 2. Appellant has now filed a merit brief.

On December 10, 2014, appellant pleaded guilty to delivery of oxycodone, a Class C felony, in case No. CR-2014-483 and was sentenced to ten years' suspended imposition of sentence (SIS). On June 3, 2015, appellant pleaded guilty to possession of drug paraphernalia, a Class D felony, in case No. CR-2015-386, and he was sentenced to two years' imprisonment plus an additional four-year SIS. On December 16, 2016, appellant pleaded guilty to three charges in case No. CR-2016-1146: (1) possession of methamphetamine, a Class D felony; (2) possession of drug paraphernalia, a Class D felony; and (3) possession of marijuana, Class A misdemeanor. He was sentenced to five years' SIS. In each case, the terms and conditions of the SIS included that appellant shall not violate any federal, state, or municipal law.

On November 1, 2017, the State filed a petition to revoke in all three cases, alleging numerous violations of the terms and conditions of his suspended sentences, including the allegation that appellant committed the offense of rape in April 2017. The revocation hearing took place on April 26, 2018.

Appellant does not challenge the sufficiency of the evidence; therefore, only a brief recitation of the facts and evidence is necessary. The victim testified that appellant, the son of her friend and neighbor, came to her back door on the evening of April 20, 2017. She stated that when she opened the door, appellant grabbed her arm, walked her backward to the front door, and pinned her against the wall. She recalled that appellant tried to kiss her and put his hand underneath her nightgown. When she told him to stop, he became rougher with her, picked her up, carried her to an upstairs bedroom, threw her down on

the bed, and put his hands around her throat with enough pressure that it scared her. She testified that he let go of her throat, grabbed her underwear, and put his penis inside her. When she stopped fighting him out of fear he was going to hurt her, appellant stopped, told her that she was not making it fun for him, lit a cigarette, and acted like nothing had happened.

The victim did not report the incident for a couple of months but did so after discussing it during treatment at a hospital following a suicide attempt. The victim had saved the partially torn underwear that she had been wearing at the time of the incident, which she gave to the investigating officer. The officer interviewed appellant, who denied both going inside the victim's home that night and ever having sex with her. Appellant consented to giving a DNA sample. Witnesses from the Arkansas State Crime Laboratory testified that both semen and blood were found on the underwear and that the underwear contained a mixture of DNA from two people, who were identified as appellant and the victim.

Upon finding by a preponderance of the evidence that appellant violated the conditions of his suspended sentences by committing the charge of rape, the circuit court revoked his suspended sentences and sentenced him to serve a total of twenty-six years'

imprisonment—ten years in CR-2014-483, four years in CR-2015-386, and twelve years in CR-2016-1146, with the sentences to run consecutively.[2]

We start with a brief summary of the principles relating to revocations. At a revocation hearing, a defendant is entitled to fundamental fairness and an opportunity to be heard. *Turman v. State*, 2015 Ark. App. 383, at 5, 467 S.W.3d 181, 184–85 (citing *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Phillips v. State*, 40 Ark. App. 19, 23, 840 S.W.2d 808, 810 (1992)). The revocation of a suspended sentence is not a stage of a criminal prosecution. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996) (citing *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990)). Arkansas Code Annotated section 16-93-308(d) (Repl. 2016) provides that the burden of proof in a revocation case is a preponderance of the evidence. Further, the State's burden of proof in a revocation proceeding is less than is required to convict in a criminal trial, and evidence insufficient for a conviction at a criminal trial may be sufficient for revocation. *Collins v. State*, 2018 Ark. App. 563, at 2, 566 S.W.3d 139, 140. As we explained in *Billings*, *supra*, revocation of a suspended sentence results in punishment for the original offense; it is not a separate punishment for behavior that was the catalyst for the revocation proceedings. *See also* Ark. Code Ann. § 16-93-308(g)(1)(A). In this case, the sentences imposed upon appellant when his suspended sentences were revoked were for his original offenses.

[2]While there was testimony regarding other grounds for revocation, the circuit court revoked only on the basis that appellant committed the offense of rape in violation of the conditions of his suspended sentences.

With these principles as a backdrop, we turn to appellant's argument that a revocation based on a violation of law should require proof beyond a reasonable doubt rather than a preponderance of the evidence. He suggests that our supreme court's holding in *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977), and its progeny requiring proof by only a preponderance in a revocation case are inconsistent with the U.S. Constitution, the Arkansas Constitution, and the Arkansas Code. Appellant contends that *Ellerson* does not apply, and his revocation should therefore be reversed and dismissed.

The State responds that appellant's argument was not raised below and thus is not preserved for appeal. We agree. In fact, appellant's counsel conceded below that the standard of proof was preponderance of the evidence in his request for the circuit court to withhold sentencing until the pending rape case was completed. Our law is well settled that issues raised for the first time on appeal, even constitutional ones, will not be considered because the circuit court never had the opportunity to rule on them. *Callaway v. State*, 368 Ark. 412, 414, 246 S.W.3d 889, 890 (2007).

Appellant also contends that "his probation revocation should have been tried by a jury on the limited basis of the commission of a crime." He asserts that he did not waive this right in the conditions of his suspended sentences or at the revocation hearing, citing *Warwick v. State*, 47 Ark. 568, 2 S.W. 335 (1886) (defendant's failure to object to the denial of the right to a jury trial does not constitute a waiver of that right).

Whether a defendant is constitutionally entitled to a jury trial in a revocation case has previously been decided by our supreme court. In *Hughes v. State*, 264 Ark. 723,

725–26, 574 S.W.2d 888, 889 (1978), appellant argued that he "was denied the equal protection of the law by the use of evidence of conduct . . . to revoke his suspended sentence, thereby denying him the right to a jury trial, the presumption of innocence, and a right to require the State to prove its case beyond a reasonable doubt." In response to this point on appeal, the supreme court found no merit to appellant's argument that he was denied a right to a jury trial. *Id*. (citing *Ellerson*, *supra*). This question was also presented to this court in *Smith v. State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). In *Smith*, the appellant contended that he was constitutionally entitled to and denied a jury trial and that the burden of proof was wrongfully reduced to a preponderance of the evidence. We found no merit to these arguments, holding that this argument had been decided by *Ellerson* and *Hughes*. We are bound by the precedent of our supreme court. *King v. State*, 2012 Ark. App. 94. Accordingly, we affirm.

Affirmed.

KLAPPENBACH and MURPHY, JJ., agree.

Dusti Standridge, for appellant.

One brief only.