

Cite as 2019 Ark. App. 317
ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-18-942

JOSEPH L. NICHOLS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: May 29, 2019

APPEAL FROM THE MISSISSIPPI
COUNTY CIRCUIT COURT,
OSCEOLA DISTRICT
[NO. 47OCR-17-82]

HONORABLE RALPH EDWIN
WILSON, JR., JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Joseph Nichols appeals the revocation of his suspended imposition of sentence (SIS) by the Mississippi County Circuit Court for the underlying charge of first-degree terroristic threatening. He argues on appeal that his revocation should be reversed because the court erred in admitting his prior DWI convictions. We affirm.

Appellant negotiated a plea of guilty on August 7, 2017, for terroristic threatening and DWI. He was sentenced to three years' SIS for terroristic threatening. As a condition of his SIS, he was ordered "not to commit a criminal offense punishable by imprisonment," and to "not drink or possess intoxicating or alcoholic beverages." The State filed a petition to revoke on May 7, 2018, alleging that appellant had violated the terms and conditions of his SIS on May 5, 2018, by committing the offenses of DWI fourth, having an open container, driving on

a suspended driver's license third, refusal to submit to a chemical test, and driving left of center.

Appellant's revocation hearing took place on September 21, 2018. At the hearing, the State introduced certified copies of appellant's three prior DWI convictions. Appellant's attorney objected to the introduction of the convictions, stating, "I would object in that it appears like it may be certified. It's certainly not exemplified. I believe the Rules and the Statutory Authority require exemplification, not merely certification, in order for it to be authenticated." When asked what exemplification was, the attorney responded that it "is a statutory ~ it's in the Statutory Code that says it's supposed to be exemplified, is my understanding." Appellant's attorney further stated, "Well, I have to have something to appeal." Appellant subsequently moved for a directed verdict, contending that the State failed to prove a crime that could be punishable by imprisonment and arguing that imprisonment means prison. The court denied the motion. The court granted the State's revocation petition, and sentenced appellant to six years' imprisonment. The sentencing order was filed on September 21, 2018. Appellant filed a timely notice of appeal on September 26, 2018. This appeal followed.

Pursuant to Arkansas Code Annotated section 16-93-308(d),¹ a circuit court may revoke a defendant's SIS at any time prior to the expiration of the period of suspension if a preponderance of the evidence establishes the defendant inexcusably failed to comply with a condition of the suspension.² Appellant does not argue that the evidence was insufficient to

¹(Supp. 2017).

support a revocation. Instead, he argues that the court erred by admitting his prior DWI convictions into evidence. More specifically, he contends,

The trial court abused its discretion in admitting State's Exhibits 5, 6, and 7, which are certified records reflecting Appellant Nichols' prior convictions for driving while intoxicated. The prior convictions are for conduct occurring before Mr. Nichols was placed on probation, served no evidentiary purpose, and their prejudicial nature far outweighed their probative value.

Appellant further argues,

Here, there was a preponderance of the evidence that Mr. Nichols was driving while intoxicated as well as driving on a suspended driver's license on the date of May 5th 2018. Jail time is an authorized sentence for each of these. Accordingly, this evidence standing alone supports a finding that Mr. Nichols violated a condition of his suspended sentence.

Admitting proof of prior convictions solely to establish the events of May 5th constitute a felony rather than a misdemeanor served no legitimate purpose. Such evidence is cumulative and unnecessary during the guilt phase. By its nature, this prejudiced the appellant.

Given that the court cited the felony driving when intoxicated as a reason justifying a sentence of the maximum authorized term of six years in the Arkansas Department of Correction, it cannot be considered harmless.³ For this reason this court should reverse and remand for further proceedings.

The State contends, and we agree, that appellant's argument was not raised below and thus is not preserved for review. 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.⁴ Therefore, we affirm.

Affirmed.

²E.g., *Vanglider v. State*, 2018 Ark. App. 385, 555 S.W.3d 413.

³Appellant failed to abstract the court's decision in the revocation hearing.

⁴*Callaway v. State*, 368 Ark. 412, 414, 246 S.W.3d 889, 890 (2007).

VIRDEN and MURPHY, JJ., agree.

The Lane Firm, by: *Jonathan T. Lane*, for appellant.

Leslie Rutledge, Att’y Gen., by: *Jason Michael Johnson, Ass’t Att’y Gen.*, for appellee.