

Cite as 2009 Ark. App. 620

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR08-1064TYRONE D. THOMPSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** September 30, 2009APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CR-06-1220, CR-06-1221, CR-
07-729]HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

After we ordered rebriefing in an unpublished May 13, 2009 opinion,¹ Tyrone D. Thompson has again submitted his appeal from an order of the Sebastian County Circuit Court revoking his suspended sentences for second-degree forgery, third-degree domestic battery, second offense, and Class D felony nonsupport. The trial court granted the State's petition to revoke based on Thompson's failure to regularly make restitution payments on the arrearage following his June 6, 2007 guilty plea in the felony nonsupport case. It sentenced Thompson to two years in the Arkansas Department of Correction, followed by an additional

¹ Thompson failed to include in his addendum the original disposition order in this case, the terms and conditions of his suspended sentence, and the payment ledger that was introduced into evidence. Inexplicably, his revised brief contains the ledger, but still omits the other documents.

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eight-year suspended imposition of sentence (SIS). On appeal, Thompson argues that the State failed to prove by a preponderance of the evidence that he willfully and inexcusably failed to pay the full amount of child support and restitution. We affirm.

If payment of restitution is made a condition of an SIS, a trial court may revoke if the defendant has not made a “good-faith effort” to comply with the order to pay restitution. Ark. Code Ann. § 5-4-205 (Repl. 2006). The trial court is required by the statute to consider the following factors before revoking:

- (A) The defendant's employment status;
- (B) The defendant's earning ability;
- (C) The defendant's financial resources;
- (D) The willfulness of the defendant's failure to pay; and
- (E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

Id. While it is always the State’s burden to prove by a preponderance of the evidence that the failure to pay was inexcusable, once the State has introduced evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for his failure to pay. *Reese v. State*, 26 Ark. App. 42, 44, 759 S.W.2d 576, 577 (1988). The *Reese* court reasoned that to hold otherwise would place a burden upon the State which it could never meet, as it would require the State, as part of its case in chief, to negate any possible excuses for nonpayment. *Id.*

Here, the State’s entire case consisted of the testimony of a single witness, Thompson’s ex-wife, Donna Howard. She stated that Thompson was behind in his child support for the three children born of the marriage and that she had no knowledge of any disability that

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afflicted Thompson since 2006. Howard claimed that she had come before the court “three or four times” on the matter of delinquent support. According to Howard, she had remarried and was not presently working, so her new husband was supporting the children. The State also introduced a May 21, 2005 court order finding Thompson \$828.34 in arrears in child support. The order continued his support at \$85 per week and added an additional twenty percent to amortize the arrearage. The State also introduced payment logs showing that Thompson made child-support payments nearly every month in 2006, but no payments until October in 2007, and five payments as of the June 4 hearing for 2008.

Thompson testified in his defense. He stated that his “seasonal” employment at a nursery had ended and that he was looking for other employment. He stated that his efforts to find employment were hampered by his lack of job training and only having a high school education. Further, he explained that the suspension of his driver’s license due to his failure to pay child support and his status as a convicted felon drastically hindered his ability to find work. He also claimed to have health problems, noting that he had been hospitalized for pneumonia and was currently seeking treatment for undiagnosed fainting episodes. Thompson professed to having no significant possessions and depended on his fiancée for his living expenses. Thompson’s fiancée had recently posted a \$1500 cash bond, which was applied to his child-support obligation.

On cross-examination, however, Thompson conceded that while he was working as a cook for Sonic and earning up to \$9.50 an hour, he did not make payments. Further, he

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had not filed for any disability payments. He also admitted that before he began living with his fiancée, he had lived with his parents. Additionally, he stated that his job-hunting efforts had been fairly limited, as he only recently applied to a lumber company and a septic company in his current city of residence. Thompson also admitted that he had three additional children that he had fathered, but was not supporting.

The trial court granted the State's revocation petition. It found that in the last year, aside from the \$1500 cash bond that had been paid by his fiancée, he had only paid \$821.67 "which won't do."

On appeal, Thompson argues that the State failed to show by a preponderance of the evidence that he willfully and inexcusably failed to pay the full amount of child support and restitution. He concedes that there were several months in which he did not pay support, but attributes his spotty payment history to the fact that he was ill, incarcerated, or unable to find gainful employment. Thompson asserts that he simply did not have the money, as shown by the fact that he did not have any significant possessions such as a house, car, boat, or ATV. We find this argument unconvincing.

On appeal, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Furthermore, in our review, we defer to the trial judge's superior position to judge the credibility of the witnesses. *Id.*

Here, Thompson admitted that, even when he was earning \$9.50 per hour as a cook

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at Sonic and therefore had the ability to pay, he had not made child-support payments. Moreover, while he testified to some health problems, he admitted that he was not disabled. Finally, even if we accept his assertion that his job-hunting efforts were hampered by his felony convictions and lack of a driver's license, he does have a history of successful employment. Moreover, the record indicates that he had submitted only a few applications. We do not believe that his submitting so few applications constitutes a bona fide effort to seek employment. In *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997), our supreme court stated that such a failure to seek employment may support a finding that his failure to pay was a willful act warranting imprisonment.

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.