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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-737

RODNEY SCOTT REESE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** October 21, 2009 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NO. CR-2004-459/460/461, CR-2005-861, CR-20060595] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

This case is once more before us after we ordered rebriefing due to deficiencies in appellant Rodney Scott Reese's addendum. Once again, Reese appeals from an order of the Sebastian County Circuit Court revoking his suspended imposition of sentence (SIS) for overdraft, theft of property, theft by deception, and two counts of failure to appear. The trial court found that Reese violated the terms and conditions of his SIS due to his failure to pay restitution as ordered. The trial court sentenced Reese to ten years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in finding that he willfully failed to pay restitution as ordered. We affirm.

In a revocation proceeding, the State must prove the violation of a condition of the SIS by a preponderance of the evidence. Ark. Code Ann. § 5-4-309 (Repl. 2006). 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, the State's case consisted of the introduction of four restitution ledgers and the testimony of two victims who had lost money in Reese's theft-by-deception offenses. The ledgers showed that Reese was ordered to pay more than $82,000 in restitution, and although he had paid approximately $11,000, recently he had been paying approximately half of the court-ordered monthly payments of $591. Larry Murry testified that he incurred his loss when, unlike in previous satisfactory transactions, Reese failed to bring him the money for a large diamond that he had taken to sell. Ronnie Capps testified that he had given Reese $32,000 to buy a Denali, but Reese failed to deliver the vehicle.

Reese testified that he was employed as a truck driver, which required him to be away from home five nights a week. He stated that his take-home pay was approximately $620 per week, out of which he had to pay $100 per week in daycare for one of his children who was living with him, and $400 per month in child support for two other children. He claimed that he was doing the best that he could, but could not afford to make the full restitution payment.

On appeal, Reese argues that the trial court's decision to revoke his SIS was clearly against the preponderance of the evidence because there was no evidence introduced that

proved that his failure to pay as ordered was "willful." He asserts that he is supporting a family plus making child-support payments to support children who do not live with him. Further, he notes that he has not acquired any substantial amount of property or lived an extravagant lifestyle. While we agree that this is a close case, under our standard of review, we must affirm.

Pursuant to Arkansas Code Annotated section 5-4-205 (Repl. 2006), 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. 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;
> ©) 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. In *Reese v. State*, 26 Ark. App. 42, 44, 759 S.W.2d 576, 577 (1988), we held that 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. We reasoned that to hold otherwise would place a burden upon the State which it could never meet—it would require the State, as part of its case in chief, to negate any possible excuses for non-payment. *Id.*

We are mindful that the payment ledgers that the State introduced showed that Reese

had made a significant effort to pay his restitution—more than $10,000 of the $82,000 he owed. Furthermore, it was not disputed that Reese was actively supporting three minor children. In this regard, we believe the instant case is analogous to *Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990), where we found support of other family members to be "excusable circumstances" that would justify a defendant's failure to pay restitution as ordered. We believe that Reese's child-support obligations—which he is apparently making—constitute a special circumstance bearing on his ability to pay, as contemplated by Arkansas Code Annotated section 5-4-205.

However, we cannot ignore Reese's testimony that he did not attribute his partial payments to his inability to pay, but rather to his mistaken understanding that he was required to make more than the $100 payment he remitted. The trial judge was not required to find Reese's explanation credible, and under our standard of review, we must defer to the trial court on matters of credibility. Moreover, Reese's further testimony that he began making $300 payments when he learned of his mistake undercuts his argument that he was unable to make the full payment. We acknowledge that the trial court, following revocation, was at liberty, pursuant to Arkansas Code Annotated section 5-4-303 (Repl. 2006), to fashion an alternative remedy that did not involve incarceration and would have allowed Reese to continue to work and make payments, as well as support his children. Nonetheless, we cannot say that Reese's willful failure to pay his restitution as ordered was clearly against the preponderance of the evidence. Therefore, we affirm.

GLOVER and MARSHALL, JJ., agree.