

Cite as 2009 Ark. App. 861

ARKANSAS COURT OF APPEALSDIVISION II
No. CACR 09-785

BRODERICK J. COOPER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 16, 2009APPEAL FROM THE CLARK
COUNTY CIRCUIT COURT,
[NO. CR-2008-46]HONORABLE ROBERT
McCALLUM, JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Appellant, Broderick J. Cooper, appeals from the revocation of his probation, arguing that the circuit court committed reversible error by denying his motion to dismiss the revocation petition because the hearing was not held within sixty days of his being served with the revocation petition. We find no error and affirm.

In November 2007, appellant was arrested and charged with possession of a controlled substance in Clark County. Because he was unable to make bond, he was incarcerated on that charge pending trial when he was charged with aggravated assault upon an employee of a correctional facility on March 16, 2008. A jury found him guilty of the assault, and he was sentenced to a \$2000 fine and four years' probation, conditioned in part on his not committing any new criminal offenses or possessing controlled substances.

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On October 23, 2008, the State filed a motion to revoke appellant's probation based on his alleged violation of the terms and conditions of his probation by possessing marijuana and committing criminal mischief on September 11, 2008. The bench warrant on the revocation petition reflects that it was served on appellant on November 3, 2008.¹ The revocation hearing was set for January 5, 2009, but was continued at appellant's request until February 2, March 2, and finally March 4, 2009. On March 4, 2009, appellant filed a pro se motion to dismiss charges of violating probation for failure to bring a hearing within a reasonable time under Arkansas Code Annotated section 5-4-310(b)(2). At the revocation hearing, the court heard argument from counsel on the motion to dismiss and denied it. The court reasoned that the fact that appellant was incarcerated when the marijuana possession charge was brought meant that the motion to dismiss the revocation petition should be denied under *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980). The revocation hearing proceeded, and the court revoked appellant's probation. The court, in its April 29, 2009 judgment and commitment order, sentenced appellant to forty-eight months' imprisonment. Appellant filed a timely notice of appeal on April 29, 2009.

For his sole point on appeal, appellant argues that the trial court committed reversible error by denying his motion to dismiss the revocation because the hearing was not held within sixty days of his being served with the revocation petition. Arkansas Code

¹ There is some dispute as to whether appellant was first served on October 23 or November 3, 2008; however, January 5, 2009, is more than sixty days from either date.

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Annotated section 5-4-310(b)(2) (Repl. 2006) provides that a “revocation hearing shall be conducted by the court that suspended imposition of sentence on the defendant or placed him or her on probation within a reasonable period of time after the defendant’s arrest, not to exceed sixty (60) days.”

First, the State contends that appellant’s motion to dismiss the revocation petition was untimely because it was not raised until the day of the hearing, which by appellant’s own argument was beyond the sixty-day limit. The State is correct. In *Haskins v. State*, 264 Ark. 454, 572 S.W.2d 411 (1978), our supreme court held that the sixty-day limitation was not jurisdictional and thus could be waived by failing to object. While *Haskins* is distinguishable from the present case in that Haskins made no objection to the delay to the lower court, that distinction is of no consequence. Our supreme court has stated that “failure to demand a hearing within the sixty-day period waived the right to insist on a timely hearing.” *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991). Some cases premise the rejection of a motion to dismiss a revocation petition under the sixty-day rule on lack of notice to the State because the motion was not made until the parties were at the hearing. See *Cook v. State*, 59 Ark. App. 24, 952 S.W.2d 677 (1997) (citing *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987)). Here, the State received appellant’s motion via fax before the hearing, and the motion was filed the day of the hearing. Under the reasoning of *Haskins*, we affirm because appellant failed to raise his argument before the expiration of the sixty days and thus waived his right to insist on a timely hearing.

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If the merits of the case were reached, we would still affirm. The purpose of the sixty-day requirement is to assure that a defendant who has been arrested for violating the terms of his probation or suspended sentence is not held in jail for an unreasonable time awaiting his revocation hearing. *Lindsey v. State*, 86 Ark. App. 297, 302, 184 S.W.3d 458, 461 (2004). In light of this purpose, a defendant who would be incarcerated regardless of whether a hearing on a revocation petition is pending is not prejudiced by an alleged violation of the sixty-day rule because the defendant would remain confined no matter what the outcome of the revocation hearing. *See, e.g., Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994). Here, as he did before the trial court, appellant attempts to distinguish his case from *Boone* and its progeny by pointing out that he was not *serving time* on another charge based on a conviction, but was instead *awaiting trial* on another charge. We do not see that this distinction has any significance in light of the purpose of the sixty-day requirement. *See, e.g., Bilderback v. State*, 319 Ark. 643, 893 S.W.2d 780 (1995) (where the appellant was incarcerated following her arrest on separate charges when served with an arrest warrant for probation violation).

Affirmed.

ROBBINS and GRUBER, JJ., agree.