ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 08-720

	Opinion Delivered FEBRUARY 11, 2009
JENNIFER LYNN CHEATER APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, [NO. CR-2006-317-B]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

In this appeal, appellant Jennifer Lynn Cheater contends that the Sebastian County Circuit Court's decision to revoke her suspended imposition of sentence is not supported by a preponderance of the evidence. We disagree with her and affirm the revocation.

Appellant was placed on a suspended imposition of sentence for three years commencing in May 2007. This was the result of her entering a plea of guilty to a single count of possession of methamphetamine, although she had originally been charged with three criminal counts related to drug activity. She agreed to certain conditions, including that she (1) not violate any law, (2) work at suitable employment and support any dependents, and (3) pay $50 monthly beginning in July 2007 toward court costs, a fine, and fees. The State filed a petition to revoke in December 2007, alleging that appellant had failed to pay as ordered and

had also committed the criminal offense of endangering the welfare of a minor, her two-year-old son, Kaiden.

The evidence at the hearing conducted in March 2008 included the testimony of a Fort Smith police officer, Eric Fairless, who stated that he responded to a "found person" call at approximately 8:30 p.m. on December 7, 2007, at 716 North 12th Street. Fairless took custody of a little boy appearing to be two years old who had wandered away from his home. One of the people standing with the child was a male who reported that the child's mother was appellant, who lived at 1118 North J Street, Apartment Two. The child was clothed in jeans, sandals, a tee-shirt, and light jacket, but was not wearing a coat. It was below freezing that night. Fairless called the Department of Human Services (DHS), wrapped the child in his coat, and placed the child in his patrol car. The boy was not old enough to communicate. He fell asleep in the car shortly thereafter.

Fairless went to the apartment and knocked on the door, but no one answered. The apartment was unlocked, and Fairless went inside, finding no one home. DHS took custody of the child. A DHS caseworker testified that appellant did not make contact with DHS by phone or any other means for more than a week after they had taken custody of Kaiden. When this particular case worker actually spoke with appellant, it was January 9 when the caseworker called a cousin of appellant's. Even then, appellant did not ask about visitation nor would appellant give a current address. The case worker testified that appellant had earlier had her parental rights terminated as to another child.

Appellant testified that on the evening her son was found, she had left him with a man named Marcos in their apartment so she could go to the store for fifteen or twenty minutes. Appellant did not know Marcos's last name, although she said she had known Marcos for four years. Appellant said she returned from the store to find her son gone. Appellant made contact with her cousin, who informed appellant that DHS had her son. Appellant said she had left telephone messages long before January 9 asking about her son and had tried to see if DHS would allow her cousin to take custody, but that was not permitted.

The State introduced the fines and costs ledger, showing that appellant owed $1000 with no payments whatsoever. Appellant explained that she was a stay-at-home mother without employment. She said she depended upon her boyfriend to pay for the apartment and other necessities. Appellant agreed that she lost her parental rights to her first son "because I didn't finish everything they wanted me to do and didn't get a job and get a house."

Defense counsel argued that appellant did not act criminally, and certainly not "purposefully," in leaving her son with a friend to go to the store, and further that her failure to pay was excusable. The trial judge found that the State proved by a preponderance of the evidence that appellant had willfully failed to pay as agreed and had also endangered the welfare of her son. The trial judge sentenced her to ten years in prison, and this appeal followed.

To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or

suspension. Ark. Code Ann. § 5-4-309(d) (Supp. 2006); *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Haley, supra*; *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). A defendant appealing from a revocation determination has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Haley*, *supra*. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position to resolve those matters. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

When the allegation is failure to pay as ordered, the State has the burden of proving that failure to pay was inexcusable, but once the State introduces evidence of non-payment, then the burden of presenting a reasonable excuse for failure to pay shifts to the defendant. *See Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). Arkansas Code Annotated section 5-4-205 (f)(3) (Repl. 2006) sets forth several factors to be considered by the trial court, particularly with regard to restitution, including the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. The State may seek revocation for nonpayment when the defendant has willfully failed to pay or failed to make bona fide efforts to do so. *See Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

These efforts may include seeking employment or borrowing money. *Compare Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997).

Appellant restates her arguments to us on appeal. We do not find them convincing. First, we consider whether there was sufficient evidence, by a preponderance standard, that appellant endangered the welfare of her son. Our criminal code defines first-degree endangering the welfare of a minor in Ark. Code Ann. § 5-27-205, and it states in relevant part:

> (a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:
> (1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor[.]

Here, the question boiled down to the sufficiency of the evidence to show "purpose" to engage in conduct that created substantial risk of death or serious physical harm to Kaiden. Given that this was a revocation proceeding turning in large measure upon the credibility of appellant, we hold that such evidence exists in this instance. Appellant had already had her parental rights terminated as to a sibling of Kaiden. Appellant claimed to have left her two-year-old son with a man whose last name she did not know. Appellant did not stay with her son, or take him to the store with her, although she was purportedly a stay-at-home mother. Appellant did not make immediate contact with DHS when she learned of Kaiden's whereabouts. Taken as a whole, we hold that there was sufficient evidence from which the trial court could find, by a preponderance standard, that appellant endangered the welfare of her son.

With regard to failure to pay as agreed, the relevant factors were that appellant was a young woman in her twenties, who had completed only the eighth grade. She agreed with the State that she would make $50 in monthly payments beginning in July 2007, but she paid nothing as of the revocation hearing in March 2008. While she may have been without a job, she was by her testimony on her way to a store to shop when she left her son. Given the credibility determination made by the trial court, we hold that there was sufficient evidence that appellant's failure to pay anything toward her agreed amounts due was willful.

For the foregoing reasons, we affirm the revocation of appellant's suspension.

Affirmed.

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