ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 08-1274

LANELLE DEAN HOLMES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 20, 2009 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NO. CR-98-3] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Lanelle Holmes appeals the revocation of her suspended sentence for which she received a two-year term of imprisonment. For reversal, she contends that the State failed to prove that she violated the terms and conditions of her suspended sentence. We affirm.

On April 9, 1998, appellant pled guilty to the offenses of possession of cocaine with intent to deliver, possession of drug paraphernalia, and maintaining a drug premises. The trial court sentenced appellant to eight years in prison with an additional twelve-year suspended imposition of sentence for possession with intent to deliver, eight years with an additional two-year suspended imposition of sentence for possession of drug paraphernalia, and six years in prison for maintaining a drug premises. Additionally, the court ordered appellant to pay $150 in court costs at the rate of $50 per month commencing sixty days after her release from prison.

Appellant's release from the department of correction occurred on April 16, 1999. Nine years later, the State filed a petition to revoke appellant's remaining suspended imposition of sentence for her conviction of possession of cocaine with intent to deliver. In its petition, the State alleged that appellant failed to abide by the conditions of her suspended sentence by engaging in criminal conduct. Specifically, the State alleged that appellant committed the offenses of possession of cocaine with intent to deliver, possession of drug paraphernalia, maintaining a drug premises, simultaneous possession of drugs and firearms, felon in possession of a firearm, and possession of marijuana. The State also alleged that appellant had failed to pay court costs as ordered.

At the revocation hearing, the State elicited the testimony of Detective Wayne Barnett, who was assigned to the narcotics unit of the Fort Smith Police Department. On the afternoon of March 27, 2008, Barnett and other officers executed a search warrant of appellant's small, one-bedroom apartment. When the officers entered the apartment, appellant and her son, Marquis Holmes, were the only persons present. In the search, the officers found no controlled substances on appellant's person. However, they seized a plastic bag, which contained hydrocodone residue, that was sitting on an end table near appellant. The officers found a large number of plastic sandwich bags in a kitchen trash can. The corners of these bags had been removed, and other bags, which were also missing corners, were found scattered about the kitchen. Detective Barnett testified that drug traffickers used the corners of plastic bags to package controlled substances for purposes of sale. Also in the kitchen, the officers found a piece of Chore Boy, which is a copper scouring pad. Barnett explained that

such pads are torn apart and used for smoking crack cocaine. In the dining area, the officers found a set of digital scales and an open box of sandwich bags sitting on a microwave shelf.

In the bedroom, the officers found a 9mm handgun with a loaded clip in the closet. The officers also found $720 in the closet. The officers seized 4.5 grams of cocaine from Marquis Holmes's pocket, along with $85 in cash. They also found 3.2 grams of marijuana in Marquis's vehicle. Detective Barnett testified that Marquis admitted that he was selling drugs and that he was responsible for all of the drugs, money, and the gun that the officers seized.

The State also introduced the payment ledger for appellant's court costs. The ledger showed a balance due of $150, which included an assessment for paying the costs by installment.

Appellant also testified at the hearing. She said that she lived alone in the apartment and that Marquis lived in Oklahoma. She stated, however, that Marquis spent several nights each week with her and that, on those occasions, she slept in the living room while he slept in the bedroom. Appellant testified that Marquis was visiting but not spending the night on the day of the search. Appellant professed to know nothing about the gun, the scales, the plastic bags, or the drugs found in Marquis's pocket or his vehicle. Appellant further testified that she worked and received disability benefits. She said that she made two payments of $25 toward her court costs and thought that she did not owe any additional money.

After hearing the evidence, the trial court revoked appellant's suspended imposition of sentence. This appeal followed the trial court's entry of judgment sentencing her to two

years in prison. For reversal, appellant asserts that the State failed to prove that she possessed any of the contraband. She also argues that her failure to pay court costs was not willful.

To revoke probation or a suspended sentence, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). The State bears the burden of proof but need only prove that the defendant committed one violation of the conditions in order to sustain a revocation. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). The State's burden is not as great in a revocation hearing as it is in a criminal proceeding; therefore, evidence that is insufficient for a criminal conviction may be sufficient for revocation. *Bedford v. State*, 96 Ark. App. 38, 237 S.W.3d 516 (2006). We do not reverse a trial court's findings on appeal unless they are clearly against the preponderance of the evidence. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003). 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 court's superior position to resolve those matters. *Peterson*, *supra*.

Arkansas Code Annotated section 5-64-403(c)(1)(A)(i) (Supp. 2007) provides in part that it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to pack, store, contain, ingest, or inhale, or otherwise introduce into the human body a controlled substance. The term "drug paraphernalia" is defined in part as any equipment, product, and material of any kind that is used, intended for use, or designed for use in packaging, inhaling, or otherwise introducing into the human body a controlled substance.

Ark. Code Ann. § 5-64-101(14)(A) (Supp. 2007). Drug paraphernalia includes a scale that is used or intended for use in weighing a controlled substance, a container that is used or intended for use in packaging a small quantity of a controlled substance, and any object that is used or intended for use in inhaling or otherwise introducing a controlled substance into the human body. Ark. Code Ann. § 5-64-101(14)(B)(v), (ix), and (xii).

In order to prove possession of contraband, constructive possession is sufficient. *Gamble v. State*, 82 Ark. App. 216, 105 S.W.3d 801 (2003). Constructive possession may be established by circumstantial evidence. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004). While constructive possession can be implied when the contraband is in the joint control of the defendant and another, joint occupancy alone is not sufficient to establish constructive possession. *Holt v. State*, 104 Ark. App. 198, ___ S.W.3d ___ (2008). In joint-occupancy cases, the State must also prove that the accused exercised care, control, and management over the contraband and knew the matter possessed was contraband. *Gamble*, *supra*. Such control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and ownership of the property where the contraband is found. *McKenzie v. State*, 362 Ark. 257, 195 S.W.3d 370 (2005).

After examining the record, we are satisfied that the trial court's decision to revoke appellant's suspended sentence is not clearly against the preponderance of the evidence. Appellant leased the apartment, and she was present at the time of the search. The officers discovered items of drug paraphernalia, such as a set of scales, a smoking device, sandwich bags, and bags with their corners removed. These items of drug paraphernalia were in plain

view and in the common areas of the apartment. Therefore, appellant's knowledge and control of these things can be inferred from the circumstances. Accordingly, we hold that there was sufficient evidence to support the revocation of appellant's suspended sentence for possessing items of drug paraphernalia. Because only one violation need be sustained, we do not address the other alleged transgressions, including appellant's failure to pay court costs.

Embedded within appellant's sufficiency-of-the-evidence argument is the contention that she was denied the right of confrontation. Appellant argues that the violation occurred when Detective Barnett testified that officers applied for a search warrant based on a controlled drug sale made by appellant to a confidential informant. Appellant objected to this testimony on hearsay and confrontation grounds, but the trial court overruled the objection after the following discourse with the prosecuting attorney:

> THE COURT: Is this being offered for the truth of it or why he did what he did?
>
> PROSECUTOR: I would like the Court to know why Detective Barnett obtained the search warrant for that address.
>
> THE COURT: All right. Your objection is overruled.

We have observed that, although the rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings, the right to confront witnesses does apply. *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998); *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989). An out-of-court statement is not hearsay if it is offered, not for the truth of the matter asserted, but to show the basis of action. *Dednam v. State*, 360 Ark. 240, 200 S.W.3d 875 (2005). Testimony that is not hearsay raises no confrontation-clause

concerns. *Id.*; *see also Crawford v. Washington*, 541 U.S. 36, 59-60 n.9 (2004) (observing that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted); *United States v. Tucker*, 533 F.3d 711 (8th Cir. 2008) (noting that testimonial statements offered for purposes other than their truth do not implicate the Confrontation Clause). Here, appellant complains of testimony that was not hearsay because it was not offered for the truth of the matter asserted. From the colloquy between the court and the prosecutor, it is evident that the court allowed this testimony for the limited purpose of establishing the reason why the officers applied for a search warrant. Because the testimony was not offered for its truth, the trial court's ruling did not offend the Confrontation Clause. Therefore, we find no merit in appellant's argument.

Affirmed.

PITTMAN and MARSHALL, JJ., agree.