

Cite as 2010 Ark. App. 542

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR 09-1057

STEVEN CODY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 30, 2010APPEAL FROM THE CLARK
COUNTY CIRCUIT COURT,
[NOS. CR-2007-122, CR-2007-158,
CR-2007-166]HONORABLE ROBERT MCCALLUM,
JUDGE

AFFIRMED; MOTION GRANTED

JOHN B. ROBBINS, Judge

On January 28, 2008, appellant Steven Cody pleaded guilty to forgery, criminal impersonation, theft of property, and a hot-check violation. For these offenses, Mr. Cody received seven years' probation. Among his conditions of probation, Mr. Cody was ordered not to commit a criminal offense punishable by imprisonment. On April 14, 2008, the State filed a motion to revoke appellant's probation alleging the following violations: (1) committing the offenses of failing to register as a sex offender, second-degree criminal mischief, theft of property, and residential burglary; (2) failure to report a change of address as directed; and (3) failure to pay supervision fees as ordered. After a hearing, the trial court found that Mr. Cody had violated the terms of his probation and sentenced him to a total

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of twenty-five years in prison. Mr. Cody now appeals from his probation revocation. We affirm.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k)(1) of the Rules of the Arkansas Supreme Court, appellant's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. Mr. Cody's counsel's motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal, including the adverse rulings by the trial court, and a statement of the reason each point raised cannot arguably support an appeal. Mr. Cody was provided with a copy of his counsel's brief and notified of his right to file a list of pro se points within thirty days, but has declined to file any points.

Probation or a suspended sentence may be revoked upon a finding by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the probation or suspension. *McKenzie v. State*, 60 Ark. App. 162, 961 S.W.2d 775 (1998). Therefore, evidence that is insufficient to convict a person of the offense may be sufficient to revoke. *Id.* On appeal of a revocation, the revocation will not be overturned unless the decision is clearly against the preponderance of the evidence. *Id.* We must give due regard to the trial court's superior position in determining the credibility of witnesses and weight to be given their testimony. *Id.*

Rhonda Ware is Mr. Cody's probation officer. She testified that during his probation Mr. Cody was living with Johnny Harris, and that at some point Mr. Harris called her and

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told her he had put Mr. Cody out of his residence. After Mr. Cody was arrested for probation violations, Ms. Ware asked about his residence and Mr. Cody said that he was no longer living with Mr. Harris. Ms. Ware further testified that upon his arrest Mr. Cody was \$95 behind on his supervision fees.

Rose Marie Simmons testified that she was acquainted with Mr. Cody through her late husband, James Briggs, who died in February 2007. Ms. Simmons stated that she received a phone call from the police in March 2008 advising her that Mr. Cody was in possession of James Briggs's credit card. Ms. Simmons went to the police station and identified the card, and the police gave it to her. Ms. Simmons testified that Mr. Cody did not have permission to have the credit card.

Ms. Simmons also testified about a burglary and theft that occurred at her home later that month. When she returned from a trip, she found her door kicked in and her house ransacked, with a stereo and beer missing. Ms. Simmons indicated that she found a bag containing items belonging to Mr. Cody outside the door on the porch.

Johnny Harris, a pastor, allowed Mr. Cody to live with him after Mr. Cody was placed on probation. On one occasion in March 2008, Mr. Harris received a call from the police advising that Mr. Cody was arrested and had in his possession a camera inscribed with Mr. Harris's name. The camera was returned to Mr. Harris, and Mr. Harris testified that Mr. Cody did not have permission to have it. Later that month when Mr. Harris was out of town, he locked his house and told Mr. Cody he could not stay there while Mr. Harris

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was gone. Somehow Mr. Cody obtained a house key and entered the house, and subsequently found Mr. Harris's car keys and took his car. According to Mr. Harris, appellant wrecked the car and it was totaled. Although insurance covered part of the loss, Mr. Harris stated that the incident cost him about \$7000, and it was then that he told Mr. Cody he could no longer live there.

Officer Johnny Campbell testified that he had advised Mr. Cody to stay off the Henderson State campus as a result of Mr. Cody looking at inappropriate things on the library computer. Despite that warning, in March 2008 Officer Campbell found Mr. Cody in the campus library. Mr. Cody initially gave a false name, and he was arrested for trespassing. Upon searching Mr. Cody's belongings, Officer Campbell found the camera as well as credit cards bearing the names James Briggs and Ruth Thornton. The police contacted Ms. Thornton, and she told them that Mr. Cody did not have permission to have her credit card.

Mr. Cody waived his *Miranda* rights and gave statements to the police. In his statements, he admitted to taking the credit cards without permission. Mr. Cody also admitted that he unlawfully entered Mr. Harris's home without permission, and drove the car and wrecked it.

In Mr. Cody's counsel's brief, appellant's counsel correctly asserts that there can be no meritorious challenge to the sufficiency of the evidence supporting the revocation. While the State presented proof of numerous probation violations, it was only necessary that the

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State prove one violation. See *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). In this case, the State offered sufficient proof that Mr. Cody committed theft of property, which is committed when a person exercises unauthorized control over the property of another person with the purpose of depriving the owner of the property. See Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2009). There was ample testimony at the hearing to establish by a preponderance of the evidence that Mr. Cody committed theft of a camera, a car, and credit cards. Thus, the trial court's determination that appellant violated a condition of his probation was not clearly against the preponderance of the evidence.

A second adverse ruling occurred after Mr. Cody was revoked and sentenced, when the trial court denied his motion for an Arkansas Department of Correction bed-space bond.

Arkansas Code Annotated section 16-90-122(a) (Supp. 2009) provides:

- (a) Except as provided in subsection (b) of this section, any circuit judge may authorize the temporary release of an offender in the sheriff's custody who has:
 - (1) Been found guilty of or pleaded guilty or nolo contendere to a nonviolent felony offense in circuit court; and
 - (2) Been sentenced to a term of imprisonment and committed to the Department of Correction or the Department of Community Correction and is awaiting transfer to the Department of Correction or the Department of Community Correction.

As appellant's counsel asserts, there can be no nonfrivolous argument on appeal under this point because this statute is permissive rather than mandatory, providing only that the trial court may authorize the temporary release of an offender.

The third and final adverse ruling occurred when the trial court denied Mr. Cody's motion to consider suspending some of his twenty-five-year sentence. The trial court ruled:

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No, I'm going to deny that. I think this is a fair treatment of this whole package. As I said at the probation revocation, it just starts to pile up on you after a while, Mr. Cody, and that's what has happened here. There are just too many problems, and I'm going to stick with this sentence.

In *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982), we held that a criminal defendant has no right to a suspended sentence or to have his sentences run concurrently, and that these matters are within the sound discretion of the trial court. Mr. Cody had no right to have any part of his sentence suspended, and the trial court properly exercised its discretion in denying the request.

Based on our review of the record and the brief presented, we conclude that there has been compliance with Rule 4-3(k)(1) and that the appeal is without merit. Appellant's counsel's motion to be relieved is granted, and the revocation and sentence are affirmed.

Affirmed; motion granted.

GLADWIN and BAKER, JJ., agree.