

Cite as 2010 Ark. App. 540

**ARKANSAS COURT OF APPEALS**

DIVISION I

No. CACR09-1056

DONALD HENRY ELMORE  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE**Opinion Delivered** JUNE 30, 2010APPEAL FROM THE CRITTENDEN  
COUNTY CIRCUIT COURT,  
[NO. CR-2006-1495A]HONORABLE RALPH WILSON, JR.,  
JUDGEAFFIRMED; MOTION TO  
WITHDRAW GRANTED**ROBERT J. GLADWIN, Judge**

Donald Henry Elmore appeals the June 17, 2009 revocation of his probation in the Crittenden County Circuit Court, and at the same time, his counsel seeks withdrawal, urging this court to find no merit to Elmore's appeal. We affirm the revocation and grant the motion to withdraw.

Elmore had been sentenced to seventy-two months' probation and a fine of \$1145 to be paid at the rate of seventy-five dollars per month after he pled guilty on May 14, 2007, to possession of a controlled substance with intent to deliver, a Class Y felony. A petition for revocation of probation was filed by the State on November 2, 2007, wherein it was alleged that Elmore had violated the terms of his probation by (1) failing to pay fines and costs; (2) failing to report to probation as directed; (3) failing to pay probation fees; (4) failing to notify

Cite as 2010 Ark. App. 540

the sheriff and probation of his current address and employment; and (5) absenting himself from the jurisdiction of the court without probation's permission.

After a revocation hearing on March 4, 2009, Elmore was found guilty of failure to maintain contact with his probation officer, failure to pay fines and costs as directed, and failure to pay probation fees. On June 15, 2009, Elmore was sentenced to ten years' imprisonment, followed by a sixty-month suspended imposition of sentence. He filed a notice of appeal on June 25, 2009. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) (2009) of the Rules of the Arkansas Supreme Court and Court of Appeals, Elmore's counsel filed a motion to withdraw on the ground that Elmore's appeal is wholly without merit. The motion is accompanied by an abstract and addendum of the proceedings below, including all objections and motions decided adversely to Elmore, and a brief in which counsel explains why there is nothing in the record that would support an appeal. The clerk of this court provided Elmore with a copy of his counsel's brief and notified him of his right to file a pro se statement of points for reversal within thirty days.<sup>1</sup> He filed pro se points, and as a consequence, the State Attorney General filed a brief in response, as required by Arkansas Supreme Court Rule 4-3, in which it concurs that Elmore's appeal is without merit.<sup>2</sup>

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<sup>1</sup>Elmore initially failed to file pro se points for reversal within the thirty days allotted, but this court subsequently granted his motion to file belated points, which were filed on April 19, 2010.

<sup>2</sup>The State points out that the no-merit brief does not cite *Anders* or claim specifically that any appeal would be wholly without merit. However, the motion does state that the appeal is wholly without merit, citing Rule 4-3(j), and requests that appellant's counsel be allowed to withdraw. The brief concludes that the trial court's

Cite as 2010 Ark. App. 540

In a hearing to revoke a probation or suspended imposition of sentence, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). 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 (Repl. 2006); *Haley, supra*. The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Haley, supra*. When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* Since 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. *Id.*

Elmore's counsel argues that at the close of the State's case, Elmore moved for a directed verdict, addressing the charges of failing to report, failing to notify the sheriff and probation of his current address, and absencing the jurisdiction without permission. Counsel claims that sufficient evidence of Elmore's violation was admitted, and the trial court committed no error in denying the motion. Elmore testified that he reported to his probation officer in Illinois and that officer told him that his Arkansas probation had been sent back, but

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decision should be affirmed.

Cite as 2010 Ark. App. 540

he did not know why. He testified that he paid ten dollars per month probation fee in Illinois and claimed that he did not know what he was supposed to pay in Arkansas.

Counsel contends that Elmore did not provide a reasonable excuse for not paying his fines and costs as directed. Therefore, he argues that the trial court was correct in finding that he had violated the conditions of reporting and paying fines and fees. Further, because the State need only prove one violation, counsel claims that the probation conviction should be affirmed.

Elmore filed twenty pro se points for reversal. He submits that Ms. Montgomery testified that his probation had been transferred to Illinois, and that he was authorized to be in Illinois. She further testified that he stayed in touch with her while he was in Illinois. She also said that he was released from jail on July 9, 2008, to report to Illinois. He claims that there is nothing in the record to support that he violated his obligation to report in Illinois. He asserts that he paid \$200 on June 11, 2009, and \$100 on February 19, 2009, to the Crittenden County Sheriff's Department. He claims that he was incarcerated from December 5, 2006, through May 22, 2007; from May 28, 2008, through July 15, 2008; and from February 8, 2009, through June 15, 2009. He claims that because he was incarcerated during these periods and he had a felony conviction, he was prohibited from sustaining employment. Finally, he claims that there was a mix-up in obtaining his transfer to Illinois, that the document entitled "Conditions of Probation or Suspended Imposition of Sentence" indicates

Cite as 2010 Ark. App. 540

that he was to transfer to Minnesota, and that the address he gave to his probation officer has never changed.

Elmore's points can be categorized into three groups: (1) the transfer to Illinois, which he claims allowed him to discontinue contacting probation in Arkansas; (2) his submission of payments in February and June 2009, which he claims satisfied his obligation to pay his fines and costs; and (3) his failure to make payments from June 20, 2007, until February 19, 2009, which he contends was excusable because of his incarcerations and status as a felon.

However, these points do not demonstrate that his revocation should be reversed. The State met its burden of proving that Elmore's failure to pay was inexcusable. The State introduced documentary evidence in the form of a ledger sheet reflecting Elmore's nonpayment of court costs and fines. When the burden shifted to Elmore to prove a reasonable excuse for not paying, he submitted that he was confused. Confusion about a sentence does not constitute a reasonable excuse. *E.g., Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). Therefore, the trial court's revocation of Elmore's probation was not clearly against the preponderance of the evidence.

Affirmed; motion to withdraw granted.

ROBBINS and BAKER, JJ., agree.