

Cite as 2010 Ark. App. 650

ARKANSAS COURT OF APPEALSDIVISION II
No. CACR09-1389

CRAIG DEON THOMAS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 29, 2010APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT,
[NOS. CR-04-1074 & CR-06-377]HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Craig Thomas appeals the revocation of his suspended sentences for possession of drug paraphernalia (CR-04-1074) and breaking or entering (CR-06-377). Thomas was sentenced to five years' imprisonment for the possession charge and received an additional three years' suspended sentence for the breaking or entering charge. He argues that the trial court erred by revoking his suspended sentence because 1) the State failed to introduce any evidence of his prior conditions and 2) the evidence was insufficient to support his revocation. We affirm.

Thomas's suspended sentences on these underlying charges were also revoked in July 2007. The revocation was upheld by this court on appeal.¹ He was paroled on October 29,

¹*Thomas v. State*, CR 07-1098 (Ark. App. May 14, 2008) (unpublished).

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2008. At the time of his parole, Thomas had a five-year suspended sentence on CR-04-1074 and a three-year suspended sentence on CR-06-377. The State filed an amended petition to revoke on July 2, 2009, alleging that Thomas had committed the offense of possession of drug paraphernalia, associating with others engaged in those activities and with known felons, and by committing the offense of breaking or entering.

Thomas's revocation hearing took place on September 16, 2009. Officer Brent Rogers of the Fort Smith Police Department testified that he came in contact with Thomas on June 6, 2009, at the 1500 block of Bell Avenue in Fort Smith. According to Officer Rogers, he and Officer Kelly Mask were on routine patrol when he observed Thomas putting on his seat belt as he was making a right hand turn.² Officer Rogers stated that he also noticed that Thomas's windshield had a bunch of cracks in it, and there were issues with Thomas's tail light. Officer Rogers initiated a traffic stop. At that point, Officer Rogers stated that the doors of the vehicle came open quickly and that both occupants attempted to get out of the vehicle. Officer Rogers said that he approached the driver's side of the vehicle and that Officer Mask approached the passenger's side. The officers made Thomas and his passenger, Ryland Thompson, sit back down in the vehicle. Officer Rogers asked Thomas for his license, insurance, and registration. Thomas handed Officer Rogers his identification, and when Thomas reached into his dashboard to retrieve his insurance card, Officer Mask saw a syringe in the glove compartment. Thomas's and Thompson's identifications were run and

²Officer Rogers knew Thomas from prior dealings.

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they both came back as parolees. Officer Rogers contacted Craig Robie, a parole officer, who told Rogers to place both Thomas and Thompson under arrest for parole violations. A search was performed incident to the arrest, which revealed a glass pipe and a cigarette box containing a large amount of crystalline substance under the passenger seat of the vehicle. Although both of the items were under the seat, they were not together. The glass pipe was wrapped in a bandana, and the crystalline substance was in a cigarette box.

On cross, Officer Rogers stated that he questioned Thomas and Thompson about the items after Officer Mask read them their rights. According to Rogers, Thompson stated that the crystalline substance belonged to him; however, neither Thomas nor Thompson claimed ownership of the glass pipe.

On re-direct, Officer Rogers stated that the vehicle belonged to Thomas.

Officer Mask testified that he was present at the time of the stop, and that he saw the syringe in the glove compartment of Thomas's car. However, he stated that he did not participate in the search of the car or the questioning of Thomas and Thompson.

Officer Daniel Casper of the Fort Smith Police Department testified that he came in contact with Thomas on June 27, 2009. According to Officer Casper, he was at the intersection of North A Street and North 13th Street at about 5:15 a.m. when he looked down the street and saw the driver's side of a vehicle open. Officer Casper said that he could only see legs underneath the door. He stated that he stopped in the middle of the intersection and backed up to check and see what was going on. As he was pulling up, the person in the

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vehicle looked up and saw his patrol car coming and jumped out of the car. Officer Casper testified that Thomas

literally just jumped himself out of the car and shut the door and then jumped on a bike and rode it about six feet into the front yard of where the car was parked and then walked up to the door and started to act like he was knocking on the door. He didn't ever actually knock on the door. Yes, he was making the motions like he was knocking on the door, but wasn't ever touching the door. After that, I made contact with him on the front porch of that house and asked if he knew who lived in that residence.

Thomas told Officer Casper that he was trying to get in touch with his cousin, Jerome. Officer Casper stated that he knew the people who resided there and had personal knowledge that no one by the name of Jerome lived there. At that point, Thomas was placed under arrest for breaking or entering. Thomas told Officer Casper that he was only trying to get his keys out of the vehicle. Officer Casper placed Thomas in the back of his patrol car and then made contact with Rafael Roberto, the resident of the house. Roberto told Officer Casper that he did not know Thomas.

At the end of the hearing, the court found that Thomas had violated the terms and conditions of his suspended sentence. Thomas was sentenced to five years' imprisonment with an additional three years' suspended. This appeal followed.

Thomas contends that since the State did not introduce the terms and conditions of his suspended sentence, the court had "no basis from which to conclude that [he] had violated a term of suspension." The State correctly notes that Thomas has waived this argument. An argument that the terms and conditions of probation were not introduced into evidence is a

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procedural one that is waived if not raised at the revocation hearing.³ Because Thomas failed to raise this argument at the trial level, we do not address it.⁴

As a sub-point, Thomas seems to argue that his revocation should be reversed because neither the underlying judgment and commitment orders nor the conditions of his suspended sentence appear in the record. However this argument is moot. The State filed a supplemental record in June 2010, which includes the orders and the conditions of suspension.

Finally, Thomas argues that the evidence was insufficient to support his revocation. A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence.⁵ The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions.⁶ We do not reverse the trial court's findings on appeal unless they are clearly against the preponderance of the evidence.⁷ Evidence that is insufficient to support a criminal conviction may be sufficient to support a revocation.⁸ Because the determination of a

³*Whitener v. State*, 96 Ark. App. 354, 241 S.W.3d 779 (2006).

⁴*Id.*

⁵Ark. Code Ann. § 5-4-309(d) (Repl. 2006).

⁶*Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

⁷*Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003).

⁸*Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006).

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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.⁹

Thomas was found to be in violation of the conditions of his suspended sentence by possessing drug paraphernalia. The State did not have to prove that Thomas physically possessed the contraband in order to sustain a conviction for possession if the location of the contraband was such that it could be said to be under the dominion and control of the accused.¹⁰ Rather, constructive possession is sufficient.¹¹ For constructive possession, the State must also prove that the accused knew the item possessed was contraband.¹²

Here, a preponderance of the evidence supports the court's finding that Thomas violated the terms and conditions of his suspended sentence by at least constructively possessing drug paraphernalia. The glass pipe was found under the passenger seat of a vehicle that Thomas owned. And both Thomas and Thompson attempted to exit the vehicle as soon as it was pulled over. Because the State is only required to prove one violation in order to support a revocation, we need not address Thomas's arguments regarding the court's finding that he violated the terms and conditions of his suspended sentences by associating with known felons and by committing the offense of breaking or entering.

⁹*Id.*

¹⁰*George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

¹¹*Loar v. State*, 368 Ark. 171, 243 S.W.3d 923 (2006).

¹²*E.g., Gamble v. State*, 82 Ark. App. 216, 105 S.W.3d 801 (2003).

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Affirmed.

ROBBINS and KINARD, JJ., agree.