ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CACR05-507

JUNE 27, 2007

HAROLD E. MERRIWEATHER APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-96-927 and CR-98-867]
V.	HON. J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED IN PART; REVERSED IN PART

Appellant Harold E. Merriweather appeals the revocation of his suspended imposition of sentences in two prior criminal convictions, as entered by the Sebastian County Circuit Court, for which he was sentenced to twelve years' and six months' incarceration in the Arkansas Department of Correction for a robbery conviction in case number CR 96-927 and a renewed six years' suspended imposition on the convictions for possession of drug paraphernalia and possession of cocaine in case number CR 98-867, to run concurrently, for a total term of twelve years and six months. On appeal, he argues that the circuit court's actions were illegal and void. We affirm in part and reverse in part.

The evidence leading up to the revocations is as follows. On June 23, 1997, appellant pled no contest to a charge of robbery in criminal case number CR 96-927, for which he was

sentenced to fifteen years in the Arkansas Department of Correction, with eleven and a half years suspended, pursuant to the judgment and commitment order entered on July 1, 1997. The terms and conditions of the suspended sentence included a boot camp recommendation by the circuit court, the payment of $1,519 in restitution, joint and several with co-defendant, payable at a rate of $100 per month beginning sixty days after appellant's release, and the requirement that he lead a law-abiding life and not commit an offense punishable by imprisonment. Appellant was paroled from boot camp on or about February 3, 1998, and on March 11, 1998, an order was entered requiring appellant to commence restitution payments in the amount of fifty dollars on April 1, 1998, and to continue on the first day of each month thereafter until paid in full.

The State filed a petition to revoke his suspended sentence on April 21, 1999, based upon appellant's possession of both drug paraphernalia and cocaine on October 1, 1998, which charges were pending in criminal case number CR 98-867. A hearing on the petition was held on May 28, 1999, and that suspended sentence was revoked pursuant to a judgment filed on June 10, 1999, and appellant was sentenced to serve four years in the Arkansas Department of Correction with an additional suspension of imposition of sentence of six years and two months.

On the possession of drug paraphernalia and cocaine charges in case number CR 98-867, appellant pled no contest on June 25, 1999, and was sentenced to four years in the Arkansas Department of Correction with a suspension of imposition of sentence of six years

to run concurrent with the sentence on the revocation in CR 96-927. Appellant was paroled on May 6, 2003.

Subsequently, on November 23, 2004, the State filed a petition to revoke, in both CR 96-927 and CR 98-867, alleging that appellant had committed several offenses justifying revocation, including: filing a false police report on January 12, 2004; theft by deception from January 12, 2004 through May 3, 2004; possession of cocaine with intent to deliver and possession of drug paraphernalia on May 4, 2004; possession of marijuana - second offense on November 20, 2004; and failure to pay restitution as ordered in CR 96-927, with a balance at that time of $1,224.32.

On February 2, 2005, a hearing was held on the petition to revoke, and appellant was found to be in violation of the conditions of his suspended imposition of sentence. On February 7, 2005, a judgment and commitment order was entered by which appellant was sentenced to twelve years and six months in the Arkansas Department of Correction for CR 96-927 and renewed the six-year suspended sentence for CR 98-867, for a total term of twelve years and six months to be served. A timely appeal was filed on February 14, 2005.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Supreme Court and Court of Appeals, appellant's counsel filed a motion to withdraw on the ground that an appeal was wholly without merit on October 12, 2005. This motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal, including all adverse rulings and a statement as to why counsel considers each point raised as being incapable of supporting a meritorious appeal. Appellant was provided a copy

of his counsel's brief and was notified of his right to file a list of points on appeal within thirty days. He filed no points. As a consequence, the State Attorney General declined to file a brief. This court ordered re-briefing on June 28, 2006, *see Merriweather v. State*, No. CACR 05-507, slip op. at 2 (Ark. Ct. App. June 28, 2006) (unpublished opinion). Subsequently, on July 14, 2006, appellant's counsel filed another "no-merit" brief, again with appellant filing no pro se points and the State declining to file a brief. On January 17, 2007, this court ordered re-briefing for appellant's counsel to present an adversarial brief on the issue of the legality of the two revocation proceedings and the resulting sentences. *See Merriweather v. State*, No. CACR 05-507, slip op. at 2, 3-4, 5 (Ark. Ct. App. Jan. 17, 2007) (unpublished opinion).

I. Sentencing Issues

While no objection to the legality of the first or second petition to revoke was ever raised at the trial level, we treat issues of void or illegal sentences similar to problems of subject-matter jurisdiction and review them even if not raised on appeal and not objected to in the trial court. *Gavin v. State*, 354 Ark. 425, 125 S.W.3d 189 (2003); *Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003). Appellant's suspended imposition of sentences were entered prior to Act 1569 of 1999, effective April 15, 1999, which amended Ark. Code Ann. § 5-4-301(d) to empower circuit courts to modify original sentences of suspension or probation even though a judgment order has been entered. Appellant's suspended imposition of sentence was controlled by the law in effect at the time of the crimes for which he pleaded no contest and not the 1999 Act. *See Gavin*, *supra*; *Bagwell v. State*, 346 Ark. 18, 53 S.W.3d

520 (2001) (holding that the General Assembly has made no statement regarding a retroactive application of Act 1569, and refusing to apply it to the case where the appellant's crimes occurred in 1997).

Currently, Arkansas Code Annotated section 5-4-309(f)(1)(A) provides that upon revocation, the trial court may impose any sentence on the defendant that might have been imposed originally for the offense for which he was found guilty, and Ark. Code Ann. § 5-4-104(e)(3) provides that "the court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment." However, the supreme court's decisions in *Gavin* and *Gates*, *supra*, under previous provisions, permit an argument to be made that suspension following imprisonment, in the context of revocation, is an illegal modification.

Appellant argues that the applicable statute regarding the most recent sentencing is the version of Ark. Code Ann. § 5-4-301(d) in effect prior to April 15, 1999, which stated that a trial court lost jurisdiction to modify or amend an original sentence once that sentence was put into execution. Pursuant thereto, he argues that the circuit court lost jurisdiction over case number CR 96-927 after June 24, 1997, and that any subsequent sentences were void and/or illegal, including the February 2, 2005, sentence of twelve and a half years. He contends that the same law has application to appellant's revocation and sentence under case number CR 98-867, in which his theory would provide that the circuit court lost jurisdiction over appellant on June 9, 1999, with any subsequent sentences also being void and/or illegal.

He requests that this court find that both the sentences imposed on February 2, 2005, were void and illegal.

The State concedes that the trial court did not have jurisdiction in 2005 to modify the original sentence for CR 96-927 in 2005; however, no concession is made with respect to the trial court's jurisdiction over all aspects of the case in the initial revocation in 1999. The State contends that the trial court retained jurisdiction to revoke the suspended sentence under the law prior to Act 1569; what it did not have authority to do was to modify or amend the terms of the original sentence. *See Gates*, *supra*. The original sentence in CR 96-927 was fifteen years, eleven and a half years' suspended, together with an order awarding restitution and fees. The initial revocation on this case occurred on May 28, 1999, at which time appellant was sentenced to four years' incarceration, with an additional term of six years and two months suspended, which was the amount of appellant's exposure remaining from the originally ordered suspended sentence. We hold that it was at that point that the trial court lost jurisdiction for sentencing in that particular case. *See Moseley v. State*, 349 Ark. 589, 80 S.W.3d 325 (2002) (distinguishable because events occurred after passage of Act 1569). Accordingly, the twelve-and-a-half-year term ordered at the February 2, 2005, revocation hearing, with respect to CR 96-927, was erroneous.

The State asserts, however, and appellant does not specifically argue otherwise, that the trial court retained jurisdiction to order payment of the balance of the restitution originally ordered in the case, which at the time had a balance of $1,224.32. *See Smith v. State*, 83 Ark. App. 48, 115 S.W.3d 820 (2003) (holding that a trial court retains jurisdiction over restitution

until the full amount of the ordered restitution is paid, even beyond the time period originally allowed). We agree. Although restitution was not addressed as part of the original revocation order on this case, the initial order did not include a suspension of any fine or restitution; accordingly, we affirm with respect to the payment of the balance of the initial restitution ordered by the circuit court in CR 96-927.

With respect to the second case, the State maintains that the trial court did not lose jurisdiction in CR 98-867, despite appellant's allegations. The February 2, 2005 revocation hearing was the first such hearing on violations of conditions in that case, and the six-year suspended sentence should be allowed to stand as it did not modify or amend the original sentence but was simply the consequence of the first revocation in that particular case. This case can be distinguished from *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998), where the State erroneously attempted to modify or amend an original sentence during a second revocation proceeding. We agree with the State and reverse with respect to the twelve-and-a-half-year sentence in CR 96-927, but affirm the six-year suspended sentence for CR 98-867 and order appellant to pay the balance of the restitution originally ordered in CR 96-927.

II. Sufficiency of the Evidence

The evidence presented at the February 2, 2005, hearing on the final petition to revoke in both cases CR 96-927 and CR 98-867 was sufficient to support the order of revocation. At the February 2, 2005 revocation hearing, appellant was found to have violated the conditions of his probation on several grounds listed in the petition for revocation and was

sentenced to a total of twelve years' and six months' imprisonment in the Arkansas Department of Correction. A revocation of suspended sentence requires a finding that the defendant has inexcusably failed to comply with a condition of that suspended sentence. *See* Ark. Code Ann. § 5-4-309(d). The burden is on the State in a revocation proceeding to prove by a preponderance of the evidence the violation of a condition, but it need prove only that the defendant violated one of those conditions. *Wade v. State*, 64 Ark. App. 108, 983 S.W.2d 147 (1998). On appellate review, the circuit court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a revocation. *Id.* The appellate court does not attempt to weigh the evidence or to determine credibility of witnesses, as that determination lies within the realm of the trier of fact. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

There was sufficient evidence to support the circuit court's finding by a preponderance of the evidence that appellant had inexcusably failed to comply with the conditions set forth in his conditions of suspended sentence: (1) Detective Wayne Barnett, part of the team that executed a search warrant and dealt with appellant at the scene, testified that he discovered drug paraphernalia and crack cocaine pursuant to the search, as well as a jacket with two glass pipes in it that appellant identified as belonging to him; (2) Tom Judkins, a detective with the Fort Smith Police Department assigned to investigate appellant's report that his checks had been stolen, testified that some of the approximately thirty checks had been written in

amounts over $500 had appellant's fingerprints[1] on them indicating that he had to have been physically present to present the checks for cashing; (3) the testimony of Sandy Williams, an employee at the Pic-N-Tote Store who handles their Authentiprint procedures, which confirmed that of Detective Judkins about appellant presenting a check for cashing; (4) Detective Buddy Snell, a fingerprint analyst for the Fort Smith Police Department, testified that fingerprints on three checks that had undergone the Authentiprint process belonged to appellant.

Appellant testified at the hearing and denied the charges presented by the State. Although appellant's account of the circumstances differed from the State's witnesses and he denied the charges, the circuit court was not required to believe his version of the events because he is the person most interested in the outcome of the trial. *Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

Affirmed in part, reversed in part.

MARSHALL and MILLER, JJ., agree.

[1]The fingerprints are put on checks at the time a person presents a check for cashing as part of the Authentiprints process.