ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION II

CACR 06-1368

SEPTEMBER 19, 2007

ANTHONY JACKSON	APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR-2004-172]
V.		HONORABLE PHILLIP THOMAS WHITEAKER, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Appellant Anthony Jackson appeals the revocation of his probation as entered by the Lonoke County Circuit Court. Appellant had pleaded guilty to felony non-support in 2004, and in exchange for that plea, he received a ten-year probationary term. In 2006, the State filed a petition to revoke on the basis that he had failed to abide by certain conditions to which he agreed. The trial court revoked his probation and sentenced appellant to a five-year prison term. Appellant contends that the State did not prove that he was provided written conditions under which he was being given a probated sentence in accordance with Ark. Code Ann. § 5-4-303 (Repl. 2006). This, he asserts, deprived the trial court of the authority to revoke his probation. We disagree and affirm.

In *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980), the supreme court held that:

> All conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revokable. Therefore, courts have no power to imply and subsequently revoke [for violation of] conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence. This result not only comports with any due process requirements owed to a defendant upon the imposition of a suspended sentence but may serve to deter criminal conduct which a defendant might otherwise commit but for a full appreciation of the extent of his jeopardy.

268 Ark. at 191, 594 S.W.2d at 853; *see also Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983).

If a probationer is given written conditions of behavior, then under Ark. Code Ann. § 5-4-309(d) (Repl. 2006), a circuit court may revoke a defendant's probation at any time prior to the expiration of the probation period if it finds by a preponderance of the evidence that the defendant had inexcusably failed to comply with a condition of his probation. *See also Davis v. State*, __ Ark. __, __ S.W.3d __ (Jan. 4, 2007). In the probation revocation proceedings, the State had the burden of proving that Jackson violated the terms of his probation, as alleged in the petition, by a preponderance of the evidence, and this court will not reverse that decision unless it is clearly against the preponderance of the evidence. *Id.*

In this case, appellant was summoned to a probation-revocation hearing on August 29, 2006, wherein his probation officer testified that he was familiar with the conditions of probation "attached to the Judgment and Commitment Order" and that he had discussed the conditions that appellant "would have signed in court." The probation officer explained that appellant was to refrain from testing positive for illegal drugs, pay weekly child support, pay supervision fees, maintain gainful employment, and pay restitution, court costs, and fines. The

probation officer then stated the ways in which appellant had violated the terms heretofore enumerated.

At the conclusion of the State's presentation, appellant's counsel moved for a directed verdict, including an argument that the State "failed to provide the Court sufficient evidence showing that Mr. Jackson was given written terms of conditions of his probation, specifically enumerating those terms and conditions that he is here being violated on. ... [D]efendant has to be given written terms of his conditions of probation." The State responded that the trial judge could take judicial notice of the court file that included his probation conditions, as well as the probation officer's testimony. Defense counsel objected to the trial court taking judicial notice of anything. The judge announced his ruling, finding that appellant had not complied with the conditions of his probation. The judge ruled on neither the defense objection to a lack of written conditions, nor the State's request for taking of judicial notice. A judgment followed, as did a notice of appeal.

Whether there is proof that a probationer received written conditions of probation is a procedural matter, and not one of the sufficiency of the evidence, because the purpose of providing the conditions in writing is to prevent confusion on the probationer's part. *See Nelson v. State,* 84 Ark. App. 373, 141 S.W.3d 900 (2004). This procedural issue was raised to the trial court. *See Whitener v. State*, __ Ark. App. __, __ S.W.3d __ (Oct. 25, 2006).

The judge correctly revoked appellant's probation, although we affirm for a different reason. Our appellate courts, even in criminal proceedings, are permitted to go to the record to affirm. *See Johnson v. State*, 366 Ark. 286, __ S.W.3d __ (2006). This is particularly so

where there exists a document in the record to support doing so. *See Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999); *Heagerty v. State*, 335 Ark. 520, 983 S.W.2d 908 (1998); *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993). The record in fact reflects that written conditions were given to appellant, which contain initials and a signature purportedly of appellant executed on August 20, 2004. This combined with the probation officer's testimony, provided evidence that such written conditions existed and the specific conditions therein. There was no procedural or due process error in this instance.

For the foregoing reasons, we affirm the revocation of appellant's probation.

GLOVER and BAKER, JJ., agree.