

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CACR06-157

September 20, 2006

BRADLEY G. FLY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[CR-01-43, CR-01-118]

HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

This is a revocation case. On February 1, 2002, appellant, Bradley Fly, pleaded guilty to charges of breaking or entering and theft of property in two separate underlying cases, CR2001-118 and CR2001-43G. He was sentenced to the Arkansas Department of Correction "RPF" (Regional Punishment Facility) for a period of two years, with an additional suspended imposition of sentence of eight years. He was also ordered to make full restitution at the rate of fifty-five dollars per month beginning sixty days after release from the regional punishment facility. Appellant was released on parole on September 23, 2002. On June 16, 2005, the State filed its petition to revoke appellant's suspended imposition of sentence. The State based its petition to revoke on appellant's failure to

make any payments toward restitution, which violated the terms and conditions of his suspended imposition of sentence. Following a hearing on the petition, the trial court revoked appellant's suspended imposition of sentence and sentenced him to a term of two years in the Arkansas Department of Correction, to be followed by a suspended imposition of sentence for 192 months. For his sole point of appeal, appellant contends that the trial court erred in granting the State's petition to revoke for the reason that there was insufficient evidence that appellant willfully violated the terms and conditions of his suspended sentence. We affirm the revocation.

At the hearing on the petition to revoke, the State announced that it had three exhibits to introduce but that it would present no witnesses. The exhibits were two fines-and-costs ledgers and one restitution ledger, all of which showed that appellant had made no payments. All three exhibits were admitted without objection, and the State rested its case.

Appellant testified that he was twenty-four years old; that he was last paroled on August 14, 2002; and that, as far as he knew, the State's ledgers were correct regarding his lack of payment of restitution, fines, and costs. Appellant explained that he was currently working at a job where he was making about \$800 a month; that he had been there approximately two and one-half weeks; and that prior to that job, he had worked as a maintenance man at an apartment complex where he received free rent as pay. Appellant testified that an earlier psychological evaluation showed that he was borderline intellectual functioning and that he had been in special-education classes since first grade.

He explained that he was in foster care from ages four to seven and then again from ages eleven to eighteen. He told of receiving treatment at Harbor View Psychiatric Center, Turning Point Center at Arkansas Children's Hospital, Charter Vista Hospital, and Timber Ridge Ranch.

Appellant testified that he did not pay restitution because for a year and a half his only pay was a rent-free apartment; that he had only been at his current job for a short time; that between August 2002, when he was released on parole, and May 2004, he was homeless and worked through the day-labor center. He stated that he was "paroled out" to his grandmother's house in August 2002; that she asked him to leave after about a week because he had not found a job; that he then went to stay at a friend's parents' house and got a job at a chicken plant for six months; that he didn't have much money left over because he paid for rent, food, gasoline, and a portion of the electricity and gas; and that after working at the chicken plant, he was homeless for most of 2003, living on food stamps, and other forms of assistance.

On cross-examination, appellant acknowledged that the first six months after he was released from prison he had approximately sixty dollars a week in spending money left over after paying expenses. He stated that around February 2003, he stopped working at the chicken plant and had to move out of his friend's parents' house. He said that was when he went to jail on an assault-and-battery charge, and from then until May 2004, he was homeless. He stated that he had some day-labor jobs during that period, but that he could not get a job at fast-food places because they would not hire convicted felons.

Appellant explained that he had recently gotten married and that he could make his restitution payments now because he had a job. He acknowledged on cross-examination that he could have made such payments when he had sixty dollars per week remaining for discretionary spending, but that he chose not to do so. On redirect, he stated that the previously mentioned sixty-dollar amount was the prosecutor's number, not his.

At the conclusion of the hearing, the trial court explained its reason for granting the State's petition to revoke:

I think by his own admission the Court is going to find by a preponderance of the evidence that the Defendant has violated the terms of his release. A judgment of conviction is going to be entered against him on the charge. Mr. Fly in January of 2001 committed the offense of theft of property and breaking or entering and there was a restitution order in that case of \$12,746.00 and you have paid zero on that. You have another case where you owe the public defender fee and another fee assessment of \$200.00 and you have paid nothing. There is another case that you owe \$1,010.00 fines, court costs and other fees and have made no effort whatsoever. You now say you have this money and this job and are going to try and do something. I don't believe you. I don't think you are going to do a thing, except continue to go the way you have. I am going to send you to prison.

To revoke probation, or a suspended sentence, the burden is on the State to prove a violation of a condition by a preponderance of the evidence, and on appellate review the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Baldrige v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990).

As his sole point of appeal, appellant contends that the trial court erred in revoking his suspended sentence for failure to pay restitution because there was

insufficient evidence that his failure to pay was willful. Rather, he contends that he was unable to pay restitution.

Arkansas Code Annotated section 5-4-309(d) (Repl. 2006) provides that if a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation. Arkansas Code Annotated section 5-4-205(f) (Repl. 2006) sets forth several factors to be considered by the trial court, including the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

Once the State introduces evidence showing a violation of the terms and conditions related to payment of fines and costs, the defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Baldrige v. State, supra*. It is clear that the considerations set forth in section 5-4-205(f) were before the trial judge and that he did not believe appellant was making good faith efforts to comply. Appellant himself presented testimony concerning his employment history and current employment status. It was evident that his earning capacity was limited to rather menial jobs. From appellant's testimony, his financial resources were clearly minimal because he was homeless and depended upon the assistance of others. In addition, a 2002 forensic report introduced by appellant noted his limited intellectual function and the time that he spent in foster care and treatment facilities. Appellant understandably does not focus on his

drug use, but the 2002 forensic report recounts a history of methamphetamine abuse. The trial court made its assessment of the situation clear when it stated that it did not believe appellant was “going to do a thing, except continue to go the way you have.”

Appellant limits his argument to his contention that there was a lack of evidence to support the revocation. However, the State met its burden of proving that appellant violated the terms and conditions of his suspended sentence by failing to pay restitution, fines, and costs. Appellant’s effort to go forward with his burden of establishing a reasonable excuse for his failure to pay was not convincing to the trial court. Specifically, we note that appellant’s own grandmother kicked him out of her house when he was first paroled because he did not get a job, and that appellant acknowledged having at least some amount of extra money when he was working at the chicken plant but chose not to direct it toward his restitution obligations. We cannot say that the trial court was clearly erroneous in its conclusion, and we therefore affirm the revocation.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.