NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION I

CACR06-821

September 12, 2007

LUWALHATI LALOTA a/k/a LYN JOHNSON
APPELLANT

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. CR-2005-1100-1]

V.

HON. WILLIAM A. STOREY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant pled nolo contendere in February 2006 to a misdemeanor offense of permitting dangerous animals to run at large. She was fined and given a one-year suspended sentence conditioned on her removing all animals from her property by February 15, vacating her premises by April 9, and remaining on good behavior. She did not meet either of these deadlines; after numerous dogs were found on her property after the period for removal expired, a petition to revoke was filed. At the revocation hearing held in April 2006, the trial court found that appellant had willfully kept animals on her premises in violation of her suspension and sentenced her to thirty days in jail with 335 days suspended. On appeal, she argues that her nolo contendere plea was extorted and invalid, that her violation of the conditions should have been excused because they were not willful, and that her sentence was illegal. We find no error, and we affirm.

Generally, there is no right to appeal a plea of guilty or nolo contendere, except for a conditional plea of guilty premised on an appeal of the denial of a suppression motion pursuant to Ark. R. Cr. P. 24.3. Ark. R. App. P. – Crim. 1. There are two other exceptions to this general rule. First, an appeal may be taken when there is a challenge to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself. *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). Second, an appeal is allowed from the denial of a post-trial motion brought within thirty days of the entry of judgment challenging the validity and legality of the sentence itself. *Seibs v. State*, *supra*. None of these exceptions apply in this case. It is not an appeal from a conditional guilty plea under Rule 24.3 of the Arkansas Rules of Criminal Procedure, sentence was imposed by the trial judge rather than by a jury in a separate proceeding, and there was no denial of a motion challenging the validity and legality of the sentence imposed following the guilty plea. Consequently, appellant's challenge to the voluntariness of her plea is not properly before us, and we do not address it.

Appellant next argues that the trial court erred in the revocation proceeding because the evidence does not support a finding that she willfully violated the conditions of her suspension. To revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of probation or the suspended sentence by a preponderance of the evidence. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). On appellate review, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Id.* Determination of the preponderance of the evidence turns on questions of

credibility and weight to be given to the testimony, and we therefore defer to the trial judge's superior position. *Id*.

Here, the record shows that appellant had been keeping many dogs on her property, breeding them for sale. After her dogs had killed several of her neighbors' sheep and after a score of police visits to her property in response to complaints about her animals, appellant, a self-described "reclusive attorney," was charged with and pled nolo contendere to permitting dangerous animals to run at large. Imposition of sentence was suspended for one year on the condition that she would, among other things, remove all of the animals from her property by February 15, 2006. However, numerous dogs, including one that had apparently died of privation, remained on her property well into March 2006. Although appellant argues that she tried her utmost to dispose of the dogs, she admitted at the hearing that she did not dispose of the dogs as ordered because she wanted to sell them instead of merely giving them away. We hold that the trial court's finding that appellant willfully violated the conditions of her suspension is not clearly contrary to the preponderance of the evidence.

Next, appellant argues that her sentence was illegal in that, counting the suspended portion and jail time together, it amounted to exactly one year. She argues that the one-year jail sentence was illegal because seventy days had passed since the original suspension, so that the maximum allowable sentence upon revocation was thirty days in jail with 265 days suspended, rather than the 335 days suspended that the trial court ordered. This argument hinges on her assertion that she was originally given a suspended execution of sentence rather than suspended imposition following her plea of nolo contendere. We do not so interpret the

trial court's judgment. Both from the bench and in his written order, the trial judge expressly stated that imposition of sentence was suspended subject to certain conditions. We therefore conclude that it was the intention of the trial court to suspend imposition of a sentence to imprisonment, not to impose an actual sentence. *See Shavers v. State*, 66 Ark. App. 173, 991 S.W.2d 622 (1999); *see also Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999). Where imposition of sentence is suspended and the defendant has inexcusably failed to comply with a condition of the suspension, the trial court is authorized to impose any sentence that could originally have been imposed for the offense. Ark. Code Ann. § 5-4-309 (d) and (f) (Repl. 2006).

We note that appellant also argues that the trial court lacked authority to impose as a condition the requirement that she leave her premises following her plea of nolo contendere, and that she should be allowed to withdraw her plea because her punishment was excessive. Because the condition that appellant leave her premises was not the basis for the revocation of her suspension, that question relates to her prior plea and is not properly before us. Finally, appellant's argument that her punishment was excessive in relation to her offense is a plea for clemency that we lack authority to grant and which must be addressed to the executive branch. *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990).

Affirmed.

MILLER, J., agrees.

HART, J., concurs.

Josephine Linker Hart, J., concurring. As the majority opinion states, appellant's original suspended imposition of sentence was conditioned on her vacating her premises. I further note that, upon revocation, the circuit court wrote on the amended judgment and disposition order that "[a]ll terms and conditions of Defendant's plea agreement entered on February 9, 2006, and filed for record on February 13, 2006, (the original conditions) shall remain in full force and effect." By joining the majority, I do not intend to suggest that imposing a condition of banishment or exile is proper. *See Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999).