

DIVISION II

CACR07-1097

May 14, 2008

DARLENE A. RELEFORD

APPELLANT

APPEAL FROM SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT [NO. CR-06-1046]

V.

HON. J. MICHAEL FITZHUGH,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant pleaded guilty in March 2007 to felony non-support of a minor child, a violation of Ark. Code Ann. § 5-26-401 (Supp. 2007). Imposition of sentence was suspended for a period of six years. In June 2007, the trial court found that appellant had subsequently violated the conditions of her suspended sentence by failing to pay child support as ordered, revoked her suspended sentence, and sentenced her to one year imprisonment with five years' suspended imposition of sentence. She argues on appeal that the trial court erred in finding that she inexcusably failed to pay child support. We affirm.

In revocation proceedings, the State must prove by a preponderance of the evidence that the defendant has violated a condition of suspension. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004). While one cannot be punished by imprisonment solely because of a failure to pay money in the absence of a determination that the failure was willful, a defendant's failure to make bona fide efforts to seek employment or to borrow money may

justify imprisonment. *Id.* In reviewing the sufficiency of the evidence to support a finding that a condition of suspension has been violated, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence and reverse the trial court's decision only if its findings are clearly against the preponderance of the evidence. *Id.*

Here, the record shows that appellant failed to pay child support in any amount for two years despite being ordered to do so by the circuit court. When initially charged with criminal non-support, she entered a negotiated plea of guilty and, as a condition of her suspended imposition of sentence, was ordered to pay child support of \$41 per week. It is undisputed that appellant again failed to pay child support in any amount. The only issue on appeal is whether the evidence supports the trial court's finding that her failure to pay was inexcusable. We hold that it does. The record shows that, although she claimed to be disabled and thus unable to pay child support in the amount of \$41 per week, appellant could and did obtain \$250 bail to secure her own release from jail following her arrest. Furthermore, although appellant admitted that she had been employed before and relied solely on her own asserted disability as an excuse for nonpayment, it was shown that her application for disability benefits had been twice denied by the Social Security Administration. The sole evidence of appellant's disability, which she claimed to include high blood pressure, an enlarged heart, back pain, and carpal tunnel syndrome, was appellant's own self-serving testimony. Under these circumstances, we cannot say that the trial court erred as a matter of law by declining to believe appellant's testimony. *See Gossett v. State, supra.*

Affirmed.

ROBBINS, J., agrees.

MARSHALL, J., concurs.

MARSHALL, J., concurring. I concur in the court's judgment because, taking the circuit court's bench ruling as a whole, it implicitly found Ms. Releford's testimony not credible. This was a judgment call for that court to make.

On the facts, one point. The circuit court did not characterize Ms. Releford's testimony as "self serving", and for our court to do so is unfair or at least redundant. In my experience, most testimony from a party serves that party's interest.

On the law, the precedent our court relies upon, *Gossett*, is a bit off point. Mr. Gossett was "an able-bodied and skilled welder" who fled to Washington State and claimed that he could not find a job rather than paying more than \$20,000.00 of back child support. 87 Ark. App. 317, 319, 191 S.W.3d 548, 549–50 (2004). Ms. Releford, on the other hand, testified that she had to quit work and could not work because she was disabled. It was the circuit court's job to believe or disbelieve her testimony. But we would do well to acknowledge the difficult issues raised by imprisoning non-paying judgment debtors, issues that our supreme court explored in its unanimous opinion reversing an imprisonment decision in *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). *Gossett* relied on *Jordan*. And *Jordan*, which is the governing precedent, makes plain that these are not and should not be easy cases.