ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CACR07-1296

May 21, 2008

STEPHEN M. WISE

APPELLANT

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[NO. CR-05-704]

V.

HONORABLE J. MICHAEL FITZHUGH, JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The circuit court's order entered July 22, 2005, shows that appellant, Stephen M. Wise, pleaded guilty to the crime of possession of methamphetamine and that the court imposed a two-year sentence with an additional eight-year suspended imposition of sentence. On August 7, 2007, the State filed a petition to revoke the suspended sentence, asserting in part that on August 1, 2007, appellant committed the offenses of possession of methamphetamine with the intent to deliver and possession of drug paraphernalia. Following the revocation hearing, the court revoked the suspended sentence, and on appeal, appellant argues that the court erred in doing so. The decision is affirmed, as the court's findings are not clearly against the preponderance of the evidence.

At the revocation hearing, Detective Dewey Young testified that on August 1, 2007,

he arrived at a Fort Smith residence to search for a missing person, James Dodd. Young was greeted at the door by the homeowner, who told him that Dodd was upstairs. Young asked if he could enter the residence to speak with Dodd, and the homeowner agreed.

Young went into a small upstairs bedroom where he found Dodd and appellant. When Young entered the room he "smelled an overwhelming aroma"of marijuana smoke and observed smoke in the air. He saw a "water bong" on a dresser, but the bowl was missing from the bong. Young asked where the bowl and marijuana were, but no one would tell him. According to Young, both Dodd and appellant were nervous, so he patted them down for weapons.

While patting down appellant, Young felt a hard cylinder—like a wrench socket—in appellant's pants pocket. Young believed it to be either a smoking device or a device for transporting narcotics. Young seized the cylinder, and inside it he found several plastic ziplock baggies. Four of the baggies contained a crystal-like white substance that Young concluded was methamphetamine. Young arrested appellant for possession of methamphetamine with the intent to deliver and for possession of drug paraphernalia. The substance was later tested by the Arkansas State Crime Laboratory and was found to consist of 3.5761 grams of methamphetamine and dimethyl sulfone.

Sergeant George Lawson testified that the methamphetamine possessed by appellant had a street value of $250 to $275, and was in an amount that could be described as an "eight-ball." He further testified that a "user" would not normally buy an eight ball, though he admitted on cross-examination that while normally a user would buy less, "there have been

times to where the user has bought that amount."

Counsel for appellant conceded that appellant "would be guilty of the lesser-included, what I call a plain old possession," but that "[w]e don't feel like that it was possession with the intent to deliver." The circuit court found that appellant "violated the terms of his release." On appeal, appellant asserts that "[t]here is nothing presented to show he actually had [the] intent to deliver, just that he possessed the contraband." In support, he notes Lawson's admission that there were times when a user would purchase an eight ball.

On appellate review of the circuit court's decision to revoke suspended imposition of sentence, the circuit court's decision will be affirmed unless its findings are clearly against the preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.2d 254 (2004). The separate packaging and the amount of methamphetamine—well in excess of the statutory amount creating a rebuttable presumption that the person possesses the controlled substance with intent to deliver—establish that the court's ruling should be affirmed. *See Thomason v. State*, 91 Ark. App. 128, 208 S.W.3d 830 (2005); *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004). Moreover, revocations may be based on lesser-included offenses. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978). Evidence of possession alone would establish that the circuit court's decision to revoke was not clearly against the preponderance of the evidence.[1]

[1]Appellant also observes that "[t]here is an argument that the actions of the officer in conducting the pat down search were illegal but that was not raised by the defense attorney." Such arguments must be raised below to be addressed on appeal. *See Roston v. State*, 362 Ark. 408, 208 S.W.2d 759 (2005).

Affirmed.

GLADWIN and MARSHALL, JJ., agree.