ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 07-1302

	Opinion Delivered AUGUST 27, 2008
RONNIE DAYBERRY APPELLANT	APPEAL FROM THE STONE COUNTY CIRCUIT COURT, [NO. CR2005-83, CR2005-92, CR2006-3]
V.	HONORABLE JOHN DAN KEMP, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Ronnie Dayberry entered negotiated guilty pleas to two counts of Class A arson, and one count each of Class D felony arson, Class C felony theft of property, Class B felony theft by receiving, and second-degree domestic battery and false imprisonment, both of which are Class C felonies. Pursuant to a judgment entered on August 14, 2006, Mr. Dayberry was fined $3000 and placed on ten years' probation, with the first five years to be supervised. The conditions of appellant's probation included not committing any offense punishable by imprisonment, not drinking alcohol, and not using any controlled substance.

On September 13, 2006, the State filed a petition to revoke appellant's probation on the grounds that he committed two counts of harassing communications on September 2, 2006. On January 22, 2007, the State filed an amended petition to revoke alleging that

Mr. Dayberry committed additional violations by consuming alcohol, and by testing positive for marijuana on January 1, 2007, and January 15, 2007.

After a revocation hearing, the trial court revoked Mr. Dayberry's probation based on its finding that he violated his conditions as alleged by the State. On May 24, 2007, the trial court entered a judgment sentencing appellant to concurrent prison terms of thirty, thirty, and three years for the arson convictions. The trial court also sentenced appellant to three years for theft of property, five years for theft by receiving, three years for domestic battery, and three years for false imprisonment, with each of these sentences to run concurrently. The trial court ordered the arson sentences to be served consecutive to the remaining sentences, for a total of thirty-five years in prison. Mr. Dayberry now appeals, arguing that his sentence imposed after revocation was grossly excessive and represented a clear and manifest abuse of the trial court's sentencing discretion. We affirm.

Appellant's probation officer, Kenny Kendrick, testified for the State. Mr. Kendrick stated that on the day of January 1, 2007, he received a report from the police that there had been an altercation between Mr. Dayberry and a woman. Later that evening, there was a report of an altercation between Mr. Dayberry and a man. Mr. Kendrick testified that he made contact with appellant that night and that Mr. Dayberry submitted to a drug test at the probation office. That test was positive for marijuana. According to Mr. Kendrick, appellant made a scheduled office visit on January 3, 2007, where he admitted to drinking a beer and a half two days earlier. Mr. Kendrick performed another drug test on January 15, 2007, and Mr. Dayberry again tested positive for marijuana.

Officer Jackie McCool testified that he responded to the disturbance involving Mr. Dayberry on January 1, 2007, and that when he arrived a woman advised him that appellant had threatened her. Officer McCool entered a residence and found Mr. Dayberry hiding in a closet. According to Officer McCool, there was a lot of alcohol being consumed in the residence and upon being questioned Mr. Dayberry admitted he had drank alcohol earlier that day.

Lindsey Wilson at one time had a relationship with Mr. Dayberry, and she was the victim of one of the arsons for which he pleaded guilty. She testified that at about 1:00 a.m. on September 2, 2006, her telephone rang and because Mr. Dayberry's name was on the caller-ID, she did not answer. Ms. Wilson stated that Mr. Dayberry left a message on her answering machine, and that, "I was scared tremendously about this phone call based on the fact that he had already been convicted of burning down my house."

Chuck Melton testified about the other harassing communication that occurred on September 2, 2006. He stated that his ex-wife and Mr. Dayberry had a relationship at some point, and that Mr. Dayberry called him that night making threats. According to Mr. Melton, Mr. Dayberry was intoxicated and was taunting him about having sexual relations with Mr. Melton's ex-wife while she was pregnant with Mr. Melton's son. Mr. Dayberry said he was going to "whip his ass," and also told Mr. Melton to sleep with a bucket of water beside his bed, which Mr. Melton interpreted as a threat to burn his house.

Brandy Patrick was a recent girlfriend of appellant's, and she testified on his behalf. Ms. Patrick stated that prior to trial, Mr. Melton told her he would tell the truth on the

witness stand in exchange for $1000, and that the truth was that he was drunk on the night of the phone call and was not sure whether or not it was Mr. Dayberry he was speaking with.

Mr. Dayberry testified on his own behalf, and he denied placing a call to Mr. Melton. He stated that Mr. Melton asked him for a $1000 bribe to tell the truth prior to trial, but that he could not afford to pay Mr. Melton. Mr. Dayberry denied using marijuana since being placed on probation, and contested the two positive test results. Mr. Dayberry did admit that on January 1, 2007, he drank "maybe half a beer." Mr. Dayberry stated that he has completed a substance abuse program and continues to attend AA meetings. Although he previously pleaded guilty to seven felony offenses, Mr. Dayberry denied that he committed any of those offenses at the revocation hearing.

On appeal, Mr. Dayberry challenges his thirty-five-year sentence as being grossly excessive and an abuse of the trial court's sentencing discretion. He contends that his probation violations were very minor, and that his sentence was "unbelievably disproportionate" to the seriousness of the violations. He submits that his "technical violations" were not of the kind and character to justify a thirty-five-year sentence. Mr. Dayberry suggests that the State's case against him on the seven felonies for which he pleaded guilty must not have been very strong or the State would not have agreed to nothing more than probation and a fine. He further directs us to testimony in this case that his alcohol consumption was merely a half can of beer; that he consistently visited his probation officer and paid probation fees, and on multiple occasions tested negative for drugs; that his

telephone message to his ex-girlfriend contained no explicit threat; and that Mr. Melton asked for money to change his testimony about their alleged telephone communication.

Mr. Dayberry primarily takes issue with the thirty-year sentence for Class A felony arson, which is the maximum penalty permitted for that offense. He notes that under the sentencing guidelines his presumptive sentence for that offense was fifty-four months. Mr. Dayberry also cites numerous Arkansas cases where persons convicted of arson received significantly lighter sentences than thirty years. He asserts that had the trial court properly exercised its discretion, his sentence would have been far less than what was actually imposed. Mr. Dayberry requests that this case be remanded for resentencing with directions to the trial court to sentence him in conformity with the presumptive sentencing guidelines.

We hold that the argument appellant raises in this appeal is not preserved for review. When the trial court announced appellant's thirty-five-year sentence at the conclusion of the revocation hearing, Mr. Dayberry made no objection, nor did he file a post-trial motion challenging the sentence. We will not consider an argument contesting the sentence if the appellant, even though present during the sentencing phase, failed to voice to the trial court his objection to the sentence. *Barnett v. State*, 328 Ark. 246, 943 S.W.2d 571 (1997); *see Williams v. State*, 320 Ark. 498, 898 S.W.2d 38 (1995). We have steadfastly refused to review issues that were not preserved at trial. *Williams*, *supra.*

Mr. Dayberry argues in his reply brief that he preserved his challenge to the length of his sentence because, before his sentence was imposed, he asked the trial court for leniency including confinement in either a treatment facility or county jail. Appellant further asked

that if he is incarcerated, that "he can come out and try to help his mother with her physical problems" within a reasonable period of time. However, when his sentence was imposed Mr. Dayberry did not make any objection or claim that the sentence was grossly excessive or an abuse of discretion as he now asserts on appeal. Nor did he ask the trial court to sentence him in conformity with the presumptive sentencing guidelines. Because appellant failed to contest the thirty-five-year sentence after it was imposed and raises arguments for the first time on appeal, we need not reach the merits.

Furthermore, we would affirm even if the merits of appellant's argument were preserved. Pursuant to Ark. Code Ann. § 5-4-309(f)(1)(A) (Repl. 2006), if a trial court revokes probation it may impose any sentence that might have been imposed originally. The maximum aggregate prison time for Mr. Dayberry's seven felony convictions is 116 years. Mr. Dayberry seems to suggest that he was sentenced to thirty-five years for drinking a beer and failing drug tests when, in fact, he was sentenced for his original felonies. While the trial court did deviate from the presumptive sentence for appellant's Class A arson convictions, this deviation was authorized pursuant to Ark. Code Ann. § 16-90-804 (Repl. 2006), and the trial court made written findings to justify the departure, including the fact that many of the offenses exposed a risk of injury to others, and that multiple sentences (including the two thirty-year arson sentences) were ordered to run concurrently. If the sentence fixed by the trial court is within the limits set by the legislature, absent exceptions not present in this case,

we are not at liberty to reduce it even if we thought it unduly harsh. *See Williams*, *supra*.[1] There are no legal grounds to reverse the thirty-five-year sentence imposed by the trial court.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

[1]In his reply brief, appellant argues that the precedent in *Williams*, *supra*, violates public policy. However, this court lacks the authority to overrule decisions of the supreme court. *See Flores v. State*, 87 Ark. App. 327, 194 S.W.3d 207 (2004).