

DIVISION I

CACR07-272

NOVEMBER 14, 2007

VICTORIA FARRELLY
APPELLANT

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. CR-2002-1671]

V.

HON. CHARLES E. CLAWSON,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

On December 4, 2006, the Faulkner County Circuit Court filed a judgment and commitment order, which found appellant Victoria Farrelly guilty of failing to comply with the terms and conditions of her probation. On appeal from that order, appellant contends that the evidence of violation is not sufficient to revoke her probation. We affirm the trial court's decision to revoke appellant's probation.

Appellant pled guilty on January 27, 2004, in Faulkner County Circuit Court, to forgery in the second degree, and the trial court sentenced her to sixty months' supervised probation. The supervision of her probation was transferred to Pulaski County, where appellant was already serving a separate probationary sentence. On August 13, 2005, while under supervision in Pulaski County, appellant was charged with robbery. She was tried before a Pulaski County jury and found not guilty. However, before her robbery trial, a

motion to revoke probation was filed on September 9, 2005, in Faulkner County, alleging that appellant had violated the laws of Arkansas, had failed to pay fines and fees, and had failed to report. After the revocation hearing, the trial court found that appellant failed to report and sentenced her to thirty-six months in the Arkansas Department of Correction. This appeal follows.

Our law regarding revocation of probation or suspended sentence is well settled. To revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of the probation or suspended sentence by a preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Supp. 2003). *See also Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002); *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). On appellate review, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Williams*, 351 Ark. at 234, 91 S.W.3d at 70. Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended sentence. *Id.* Thus, the burden on the State is not as great in a revocation hearing. *Id.* Furthermore, because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Id.*

1. Sufficiency argument

Appellant admits that at the close of the State's case and at the close of her own case she did not move for directed verdict. However, she maintains, and we so hold, that appellant has preserved her sufficiency-of-the-evidence argument as a matter for appeal

under *Whitener v. State*, 96 Ark. App. 354, ___ S.W.3d ___ (2006). In *Whitener*, this court held that the sufficiency of the evidence of the State's proof regarding violation of a condition of probation may be challenged on appeal of a revocation in the absence of a directed-verdict motion, citing *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001). Appellant argues that the evidence of violation is not sufficient by the standard of proof in revocation hearings.

2. *Failure to comply with probation conditions*

Appellant claims that the trial court based its decision to revoke on one specific finding of failure to report, and not on allegations that appellant had violated the laws of Arkansas and had failed to pay fines and fees. No evidence was submitted regarding appellant's charge of robbery in Pulaski County. Further, appellant claims that Earl Cranor, a probation officer from Faulkner County, testified that appellant owed fines and supervision fees that had lapsed, but specifically tied that lapse to a time in which he testified that she had failed to report. Therefore, she argues that this court should limit its review to the single allegation that appellant failed to report. We hold that within this limited review, the trial court's findings are not clearly against the preponderance of the evidence.

Appellant argues that Earl Cranor testified that appellant's case was transferred to Pulaski County for probation supervision in March 2004. From that date until he was notified of her robbery charge at the end of August 2005, Cranor stated that he was never notified of any infractions of appellant's conditions of probation. Appellant testified that her troubles regarding probation began only after receiving the robbery charge and in

determining whether to report to probation during the pendency of the new charge. She claimed that her public defender told her that if the judge did not order her to do it, she did not have to report. She also claimed that her probation officer in Pulaski County, Orrville Thomas, also told her she did not have to report.

Appellant asserts that the Pulaski County docket pages that were introduced into evidence reflect that she had been in court six times during the pendency of the robbery charge. She was never arrested during that time. She contends that Cranor explained why probation officers from Pulaski County would not detain appellant, given the warrant, stating “That’s Little Rock,” meaning that Little Rock has a tendency to get things “messed up.” She maintains that another explanation for Little Rock’s lack of action in response to the warrant is that it also supposed appellant was not to report during the pendency of the robbery case. Further, she claims that Thomas told her that she did not have to report during the pendency of the robbery case. She contends that Thomas never discussed with her that she was to report to Faulkner County. Appellant’s sister also testified that it was clear to her that Thomas told appellant that she did not have to report to Faulkner County, based upon Thomas’s statement, “I’m your only probation officer.”

Appellant argues that the State must show that her failure to report was inexcusable or not justified. Ark. Code Ann. § 5-4-309(d). She argues that under *Thompson v. State*, 248 Ark. 625, 453 S.W.2d 41 (1970), she has demonstrated that any failure to report is excusable. In *Thompson, supra*, the Arkansas Supreme Court held that there was no abuse of judicial discretion in finding that Thompson had offered no justifiable excuse for his failure to report

when the probation officer had received no communication, and Thompson had moved from his previous address; did not go to probation; and claimed not to know his probation officer's telephone number. Appellant herein argues that she did meet with her probation officer, talked with him on the telephone, and met with him in court. The docket sheet and chronological log show that she attended court. She argues, therefore, that the trial court erred in finding that the State met its burden by a preponderance of the evidence.

However, the evidence presented by the State was that Cranor testified that he had multiple conversations with appellant in which he instructed her to report after she incurred the robbery charge. Joint exhibit number one, which is a detailed chronological log of appellant's probation, indicates that appellant was instructed to report by Cranor on April 11, 2006, and on August 29, 2006. Appellant failed to do so, maintaining that this failure was excusable because her Pulaski County probation officer indicated to her that she did not have to report in the Faulkner County case. However, the circuit judge, sitting as the trier of fact, was not required to believe appellant's version of events because she was the person most interested in the outcome of the proceeding. *E.g., Scott v. State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989).

The State notes that appellant also failed to report to Thomas while he supervised her Faulkner County probation. A July 13, 2005 entry by Thomas indicates that appellant reported for her scheduled office visit that day. That entry also indicates that her next office visit was scheduled for August 9, 2005, at 3:30 p.m. Appellant failed to report to her August 9, 2005 visit, but she reported on August 23, 2005, instead. Thus, regardless of whether

appellant reported to Cranor, she failed to report as instructed by Thomas, and, by doing so, violated the terms of her Faulkner County probation. Accordingly, we hold that the trial court was not clearly erroneous in finding that appellant failed to report, and thus violated a condition of her probation.

Affirmed.

BIRD and HEFFLEY, JJ., agree.