NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-310

	Opinion Delivered October 8, 2008
TERRANCE A. EATMON APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NOS. CR99-297; CR99-298; CR99-803; CR01-907]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Chief Judge

Appellant received suspended imposition of sentence for multiple felony convictions conditioned, *inter alia*, on his making scheduled restitution payments to three of the victims. The State subsequently filed a petition to revoke appellant's suspension on the grounds that he had failed to make payments as ordered and was substantially in arrears. After a hearing, the trial judge found that appellant inexcusably failed to comply with the terms of his suspension and revoked his suspensions. On appeal, appellant argues that the evidence was insufficient to support the trial court's finding that he willfully failed to pay restitution as ordered, and that the trial court erred in denying his post-trial petition for reconsideration. We affirm.

In revocation proceedings, the State must prove by a preponderance of the evidence that the defendant has violated a condition of his suspension. *Jones v. State*, 52 Ark. App. 179,

916 S.W.2d 766 (1996). Where the sufficiency of the evidence is challenged on appeal from an order of revocation, 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 there was evidence that appellant owed a balance of $2,734 on case number 99-298, and that he made no payments in that case from March 2007 until August 2007. In two other cases appellant owed restitution of $8,260 and $6,983. Appellant made no payments whatsoever in the latter cases. Appellant testified that he did have the money to make the ordered payments but that it was difficult for him to make the payments in person and he did not know the mailing address where payments could be sent. He also testified that he was a currently unemployed tattoo artist, but that work in that field was always available. Finally, appellant refused to forfeit the $1,000 bond he had posted in exchange for a continuance because he had borrowed the money from family members and planned to give it back to them.

Although a probationer cannot be imprisoned solely on the basis of failure to pay restitution, his failure to seek employment or make bone fide efforts to borrow money to pay restitution may support a finding that his failure to pay was a willful act warranting imprisonment. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004). Here, appellant stated that he was unemployed although he was always able to make money as a tattoo artist; furthermore, the record shows that, after being sentenced to imprisonment for failure to pay restitution in compliance with the terms of his suspension, appellant was able to immediately

raise the entire $2,734 owing in case number 99-298 and attach a certified check for $2,675 to his petition for reconsideration. From this, it properly may be inferred that appellant had resources but was not inclined to tap them until imprisonment was imminent. Under these circumstances, it cannot be said that the trial court's finding of willful refusal to pay was clearly contrary to the preponderance of the evidence. *See id.*

Next, appellant argues that the trial court erred in denying his petition for reconsideration because, he asserts, he did not understand at the time of the hearing that he could forfeit his $1,000 bond as partial payment of his restitution debts. We cannot address this issue because appellant filed his notice of appeal from the revocation order before obtaining a ruling on the petition for reconsideration but never amended his notice of appeal to seek review of the denial of the post-trial motion as required by Ark. R. App. P. – Crim. (2)(b)(2). Thus, the issue is not properly before us. Even if it were, however, appellant's asserted lack of understanding is not a compelling basis for reconsideration of the revocation order. Even assuming that appellant did not understand that his bond could be forfeited as partial payment of restitution, his attorney certainly did. It was the attorney's duty to explain this matter to his client in sufficient detail to permit him to make an informed decision regarding the forfeiture. If appellant's attorney failed in this duty, appellant must assert that point in a Rule 37 petition; he cannot raise ineffective assistance of counsel for the first time on appeal. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004).

Affirmed.

BAKER and HUNT, JJ., agree.