

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR 08-385

JAMES J. SCOTT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** NOVEMBER 5, 2008

APPEAL FROM THE SCOTT  
COUNTY CIRCUIT COURT,  
[NO. CR2006-38A]

HONORABLE DEWELL FRANKLIN  
AREY III, JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellant James J. Scott pleaded guilty to possession of methamphetamine with intent to deliver, and on December 27, 2006, he was placed on three years' probation. On February 28, 2007, the State filed a petition to revoke appellant's probated sentence on the following grounds: (1) failure to pay fines and court costs; (2) failure to report to his probation officer in February 2007; (3) pending criminal charges. After a revocation hearing held on November 6, 2007, the trial court found that Mr. Scott violated the conditions of his probation. On that day appellant's probation was revoked and a judgment was entered sentencing him to ten years in prison, with four years suspended.

Mr. Scott posted an appeal bond on November 30, 2007. On December 4, 2007, Mr. Scott filed a motion for new trial, wherein he claimed that he received ineffective assistance of counsel at the revocation hearing. A hearing on appellant's motion for new trial

was held on January 3, 2008, and on that day the trial court entered an order denying the motion. The trial court's order recites, "After hearing the evidence and argument of counsel, the court hereby denies the motion, on the grounds that the New Trial Statute applies only to jury trials, and that Rule 37 relief requires that the defendant be in custody."

Mr. Scott now appeals from his probation revocation entered November 6, 2007, and the denial of his motion for new trial entered January 3, 2008. He contends that the trial court erred in finding that there is a custody requirement on motions for new trial, and also erred in concluding that his motion was restricted to jury trials. Mr. Scott asks this court to reverse and remand for a substantive hearing on his motion for new trial. We affirm.

Appellant's probation officer, Doug Hartman, testified at the revocation hearing. Mr. Hartman stated that Mr. Scott failed to report as directed for his February 2007 office visit. Mr. Hart acknowledged that Mr. Scott may have been in jail at that time, and that since being released Mr. Scott made all of his monthly visits. Mr. Hartman also testified that Mr. Scott has made no payments toward his fines and costs.

Officer John Miller testified about a traffic stop he made in Sebastian County on the night of February 9, 2007. Officer Miller stated that he stopped a vehicle being driven by Mr. Scott for going 62 m.p.h. in a 35 m.p.h. zone. There were two other passengers in the car. Mr. Scott could produce no identification, and according to Officer Miller he was uncooperative and his speech was slurred and incoherent. Because of Mr. Scott's erratic and suspicious behavior, Officer Miller thought that his safety was in imminent danger and he

forcibly arrested Mr. Scott. Officer Miller arrested appellant for reckless driving, disorderly conduct, resisting arrest, DWI, and assault.

At the conclusion of the testimony in the revocation hearing, Mr. Scott's counsel argued:

Our defense has been based primarily, Judge, on the principle that this man has not been convicted of anything. He's not been convicted of anything. He's entitled to a trial. And it may be at that trial that he'll be found not guilty. If he is and this court sends him down to the penitentiary, he's sitting there in penitentiary when he hasn't in fact been found guilty of anything. He has not been tried, Judge. They're premature on this. They should have waited until he was tried and convicted.

The trial court announced from the bench that it thought that there was sufficient evidence that Mr. Scott committed an offense punishable by imprisonment in violation of his probation, and the trial court further found that Mr. Scott committed a violation based on the uncontroverted proof that he failed to pay fines and costs.

In his motion for new trial, Mr. Scott asserted that his motion was timely because it was filed within thirty days pursuant to Arkansas Rule of Criminal Procedure 33.3(b). Mr. Scott further indicated that he was filing his motion for new trial under the authority of Ark. Code Ann. § 16-89-130 (Repl. 2005), which provides:

(a) A new trial is the reexamination of an issue of fact in the same court by another jury after a verdict has been given.

(b) The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment.

(c) The court in which a trial is had upon an issue of fact may grant a new trial when a verdict is rendered against the defendant by which his or her substantial rights have been prejudiced, upon his or her motion, in the following cases:

(1) Where the trial in the case of a felony was commenced and completed in his or her absence;

(2) Where the jury has received any evidence out of court other than that resulting from a view as provided in this code;

(3) Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors;

(4) Where the court has misinstructed or refused to properly instruct the jury;

(5) Where the verdict is against law or evidence;

(6) Where the defendant has discovered important evidence in his or her favor since the verdict; and

(7) Where, from the misconduct of the jury or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial.

(d) The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to in evidence or in argument.

In particular, Mr. Scott based his motion on subsection (c)(7) of the above statute, claiming that he received ineffective assistance of counsel at the revocation hearing. Appellant submitted that his trial counsel was under the gross misunderstanding of the law that a revocation could not occur unless there was a conviction, and that as a result his counsel failed to prepare and present a defense to the State's allegations. Mr. Scott contended in his motion that his trial counsel should have called as witnesses his passengers in the vehicle, who would have testified that he was not intoxicated and did not resist arrest or commit any other offense punishable by imprisonment. Appellant asserted that had these witnesses been called there was a reasonable probability that the result would have been different.

Mr. Scott was permitted to proffer the testimony of several witnesses at the hearing on his new-trial motion. Mr. Scott himself testified that his trial counsel advised him not to testify at the revocation hearing and told him that his probation could not be revoked because he had not yet been convicted of the alleged criminal charges. Mr. Scott further stated that on the night of the traffic stop he was not intoxicated and did not assault the

police officer. Mr. Scott also stated that his fines had been paid by his step-grandfather. Appellant's step-grandfather testified that he had paid appellant's fines, and he also was privy to a conversation wherein Mr. Scott's counsel advised that appellant's defense would be that there had not yet been a criminal conviction. Mr. Scott's father testified that he was also present during this consultation with the attorney.

Brenda Keeney was a passenger in appellant's car on the night he was stopped. She stated that she was available to be called as a witness at the revocation hearing and would have testified. Ms. Keeney stated that Mr. Scott was not drinking or using drugs that night, and that he did not assault or otherwise provoke the officer.

Mr. Scott's trial counsel also gave proffered testimony at the hearing on the motion for new trial. He did recall a meeting with Mr. Scott and his father and step-grandfather, but denied advising that the defense would be a lack of a criminal conviction. However, appellant's trial counsel did acknowledge making this argument to the trial court at the revocation hearing because he thought the State was premature in trying to revoke appellant's probation.

Mr. Scott's argument on appeal is that the trial court erroneously refused to consider the merits of his claim that he was entitled to a new trial on the basis of ineffective assistance of counsel. Mr. Scott contends that, contrary to the trial court's ruling, there is no custody requirement, and his motion for new trial was applicable to his revocation hearing because the relevant statute is not limited to only jury trials.

We need not reach the merits of appellant's arguments because even if the trial court erred in refusing to consider his claim of ineffective assistance of counsel, he suffered no prejudice. At the conclusion of the revocation hearing, the trial court discussed the alleged criminal violations, and then announced:

But the conditions also required the Defendant to pay his fines, costs, and fees. And the testimony has been that that's not happened at all. And as you know, [defense counsel], the State bears the burden of only proving one violation. So even if there hasn't been a conviction on the criminal charges, clearly the fees, fines and costs have not been paid. And I think that proof was uncontroverted. Based on that I'm going to find that the State met its burden of proving that the Defendant has inexcusably failed to comply with the condition of his probation.

In Mr. Scott's motion for new trial, he claimed, "The ineffectiveness of counsel is this: Trial counsel erroneously believed that a revocation could not occur unless there was a conviction on the Sebastian County offenses." In his appellate brief, appellant makes exactly the same claim. Mr. Scott did proffer testimony at the hearing on his motion for new trial that his fines and costs had been paid. However, in neither his motion for new trial nor his argument on appeal does Mr. Scott make any argument relating to the effectiveness of his counsel as it relates to the unpaid fines and costs.

The State need only prove one violation of the conditions of probation in order to revoke. *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987). Moreover, it has consistently been held that we will not reverse in the absence of prejudice. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003). In the present case, even had the trial court reached the substance of Mr. Scott's argument and agreed that his trial counsel was ineffective for failing to call witnesses to rebut the criminal allegations, Mr. Scott would nonetheless

not have been entitled to a new trial. This is because the revocation was also specifically grounded on appellant's failure to pay fines and costs, and appellant has made no argument below or an appeal that his counsel was ineffective for failing to present proof of his having made the required payments. Mr. Scott's probation would have been revoked even had he successfully refuted the proof of his committing new crimes, and because he suffered no prejudice we affirm his revocation as well as the trial court's denial of his motion for new trial.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.