Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-524

	Opinion Delivered December 17, 2008
BRIAN HOLLEMAN APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, [NO. CR-2004-0358-1]
V.	HONORABLE BERLIN C. JONES, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Brian Holleman appeals the revocation of his probation, for which he was sentenced to a term of imprisonment of six years in the Arkansas Department of Correction. On appeal, he argues that the State failed to present any proof that he was provided with the written terms and conditions of his probation and that the judgment prepared by the State did not properly reflect the circuit court's order from the bench as it relates to the payment of restitution. We affirm.

On March 14, 2007, appellant was sentenced to sixty months' probation for the offense of non-support, a Class D felony, pursuant to Arkansas Code Annotated section 5-26-401. On October 24, 2007, the State filed a petition to revoke his probation, alleging that appellant had violated the terms and conditions of his suspended sentence by using illegal drugs; failing to report; failing to pay fees; failing to pay restitution; and failing to comply with special

conditions, specifically, failing to make an effort to obtain a GED and failing to complete any community service work.

A hearing was held on the petition on February 12, 2008, after which the circuit court determined that appellant had willfully violated the conditions of his probation. The judgment and commitment order was filed on February 20, 2008, and an amended judgment and commitment order was filed on March 6, 2008. Appellant filed a timely notice of appeal on March 11, 2008.

Standard of Review

In a hearing to revoke a probation or suspended imposition of sentence, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Repl. 2006); *Haley*, *supra*. The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Id.* When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Id.*

Discussion

We initially note that appellant abstracted only two paragraphs from the hearing on the State's petition to revoke. While appellant failed to provide a sufficient abstract of the hearing testimony under the requirements of Ark. Sup. Ct. R. 4-2, there is a complete record of the hearing that has been filed with the court. Despite the deficiencies of appellant's brief, we can reach the merits of the case because we may go to the record to affirm. *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001).

I. Lack of Proof that Terms and Conditions Were Provided

Appellant cites Arkansas Code Annotated section 5-4-303(g) (Repl. 1997), which states that "if the court suspends the imposition of sentence on a defendant or places him or her on probation, the defendant ***shall*** be given a written statement explicitly setting forth the conditions under which he or she is being released." (Emphasis added.) The reason for the statutory requirement is to avoid any misunderstanding by the probationer. *See Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981). Appellant asserts that the requirement comports with due process; otherwise, the circuit courts have no power to imply and then later revoke on conditions that were not expressly communicated in writing to the defendant. *See Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983). In *Neely*, the defendant was orally informed that suspended portions of his sentence were being suspended conditioned upon his good behavior. There was no evidence presented that the good behavior condition of his suspended sentence had ever been communicated in writing, and the subsequent revocation was reversed. *See also Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980) (analyzing why all

conditions must be presented in writing).

Although he acknowledges that the issue was not raised at the circuit court level, appellant maintains that proof that he was provided a written copy of the terms and conditions of his probation is a substantial right and/or evidentiary issue and should be reviewed under the third prong of *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). The third prong requires a circuit court to intervene, without an objection, and correct a serious error. Because the State provided no evidence that the terms and conditions of appellant's probation were ever provided to him in writing, coupled with the circuit court's failure to correct the error, appellant contends that the revocation proceeding should be reversed and dismissed.

The State asserts that appellant failed to raise this issue before the circuit court or object to the revocation hearing on the basis that the State failed to provide him with a written copy of the terms and conditions of his probation. Therefore, the State maintains that appellant has waived the argument for appeal. *See Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Regarding appellant's request for this court to address the issue under the exception provided in *Wicks*, *supra*, the State claims that he fails to show how this is an appropriate case for the application of the "serious error" exception. We agree. Appellant has provided no convincing argument or authority to persuade this court to reconsider its position that this is a procedural issue. *See Nelson*, *supra*. As this is an argument raised for the first time on appeal, the court need not consider appellant's procedural argument. *See Whitener v. State*, 96 Ark. App. 354, 241 S.W.3d 779 (2006).

To the extent that appellant argues that the circuit court lacked knowledge of the terms and conditions of his probation, it is clear that the circuit court can enforce its own filemarked judgment and disposition order, which included certain probation conditions, even though it was not introduced into evidence at the hearing on the petition to revoke. A court may rely on pleadings and orders in its own case file in reaching a decision. *See Mitchell v. State*, 345 Ark. 359, 45 S.W.3d 846 (2001). The March 14 , 2007 judgment and disposition order itself directed appellant to comply with all the rules and regulations of the probation department, to pay a fine, court costs, fees, and restitution at the rate of $380 per month, and to perform 120 hours of community service. Accordingly, the restitution ordered was a condition of his probation. *See* Ark. Code Ann. § 5-4-205(f)(1) (Repl. 2006).

Appellant has offered no evidence that he was uninformed of the conditions of probation. The reason behind the written-condition requirement, to avoid a misunderstanding, was satisfied here. Appellant must show prejudice resulting from an error by the circuit court. *See Phillips v. State*, 40 Ark. App. 19, 840 S.W.2d 808 (1992). Appellant's probation officer, Krystie Johnson, testified that as part of the intake process she advised appellant of the probation rules and conditions and that he acknowledged them by signing the rules and by stating that he understood them. She explained that the conditions were discussed at length and that there was a specific requirement that appellant refrain from using illegal drugs — one that he was not in compliance with on multiple occasions. Johnson also testified he violated the condition that he report monthly on seven different occasions. She detailed a condition dealing with periodic payments, which appellant was delinquent on

in the amount of $1,155 in restitution at the time of the hearing. She testified that appellant specifically acknowledged his required community service hours and financial obligation, but had failed to comply with them as well as the requirement to enroll in a GED program. She did acknowledge that appellant's attitude with respect to his probation obligations and responsibilities seemed better than at the beginning—likely due in part to the level of drugs in his system. She indicated that he had apologized and might benefit from anger-management and drug-treatment programs.

Appellant testified on his own behalf, giving various excuses for not taking the drug tests as required, failing to complete community service, failing to report as directed, and failing to make the required restitution payments—including the fact that he only works in the summertime, as he has for the past sixteen years, building swimming pools.

The circuit court specifically found that appellant read the probation conditions or that the rules and conditions were read to him and that he understood them. Accordingly, he has failed to show that any error by the circuit court caused him prejudice. We affirm on this point.

II. Judgment Does Not Reflect Order of Circuit Court from the Bench

Appellant requested that this court correct the judgment and commitment order entered on March 6, 2008, to conform to the oral ruling made by the circuit court from the bench at the conclusion of the hearing. At that time, the circuit judge stated:

> We find that your acts and conduct would constitute a violation of your probation and that the probation should be revoked. It is hearby revoked and you are remanded to the sheriff of Jefferson County to be by him transported to the Arkansas Department of Correction where you will serve a term of six

> years of the D felony. ***All fees, fines and costs that are presently obligated remain to be paid when you are released***. That is the judgment and sentence of the Court. (Emphasis added.)

Despite that specific ruling by the circuit court, the amended judgment that was entered on March 6, 2008, states on page two, under "special conditions," that appellant would be responsible for "any outstanding balance of fine, cost or ***restitution*** previously ordered is due immediately upon release." (Emphasis added.) Appellant urges that this case is similar to *McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999), in which our supreme court held that a judgment nunc pro tunc to include a fine was appropriate where it was pronounced as part of the sentence in open court but not reduced to writing in the judgment. He states that a clerical error occurs when a judicial act is not properly reduced to writing and urges the court to modify the order to show what was actually ordered by the circuit court judge. Additionally, he argues that the language used to impose the fines, costs, and restitution is vague and does not specify the amount he must pay.

The State notes that appellant does not challenge the legality of his sentence, *see Bush v. State*, 90 Ark. App. 373, 206 S.W.3d 268 (2005), but simply requests this court to enter a nunc pro tunc order because the restitution provision in the judgment was a mistake. Appellant, however, never brought this alleged "mistake" to the attention of the circuit court. He failed to file a post-trial motion challenging his sentence or the restitution provision in the judgment and commitment order. This court will not consider an argument contesting a sentence if an appellant fails to object to it. *See Williams v. State*, 320 Ark. 498, 898 S.W.2d 38 (1995).

Alternatively, we hold that the circuit court did not err, as it had the authority to modify its oral pronouncement of appellant's sentence before the entry of the judgment and commitment order. *See Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). A sentence is not placed into execution until a judgment and commitment order is issued or entered. *See Pierce v. State*, 79 Ark. App. 263, 86 S.W.3d 1 (2002). A judgment is entered when it is marked "filed." *See* Admin. Order 2(b)(2) (2008) (dictating that a ruling is not final until a written order is filed with the clerk of the court). The filing of the judgment and commitment order establishes a conviction and execution of a sentence. *Shirley v. State*, 84 Ark. App. 395, 141 S.W.3d 921 (2004).

Appellant filed a notice of appeal from that final written judgment, not the oral pronouncement. While the circuit court judge orally pronounced a sentence on February 12, 2008, a judgment and commitment order was filed on February 20, 2008, and the amended judgment and commitment order was effective when filed on March 6, 2008.

The circuit court was not precluded from entering a judgment and commitment order clarifying the financial obligations on appellant's conviction for non-support. In construing judgments, an appellate court looks for the intention of the circuit court, which is derived from the judgment and the record. *See Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003). The record indicates that, in ordering "[a]ll fees, fines and costs that are presently obligated remains to be paid," the circuit court intended to order that *all* financial obligations previously ordered were to be paid. There is no indication in the record before us that the circuit court intended to release appellant from his restitution obligation. Because the

restitution was ordered in the original judgment and disposition order, appellant was not prejudiced by the subsequent reference to the same restitution in the amended judgment and commitment order. Consequently, the judgment and commitment order reflects the circuit court's intent to correct any misstatement that was made at the time of the oral pronouncement of sentencing. *See Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988).

Likewise, we find no merit in appellant's allegation that the language in the amended judgment and commitment order is vague and does not specify the amount he must pay. The fines, costs, and restitution ordered in the original judgment and disposition order are incorporated by reference in the amended judgment and commitment order in the "special conditions" section. The intent of the circuit court appears to be clearly manifested by referring to the previously-ordered financial obligations in the non-support case. *See Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999).

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.