ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-539

	Opinion Delivered DECEMBER 17, 2008
ROGER D. CLAPHAN APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT
V.	[NO. CR-2006-88-G]
	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Roger Claphan appeals the revocation of his suspended imposition of sentence. Appellant contends that the trial court's finding, that he inexcusably failed to pay child support as agreed, is clearly against the preponderance of the evidence. We disagree and affirm.

In revocation proceedings, the State must prove by a preponderance of the evidence that the defendant violated a condition of probation or suspension. *See Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002); *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004); *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998). In reviewing the sufficiency of the evidence to support a finding that a condition of probation or suspension has been violated, we defer to the superior position of the trial court to determine questions of credibility and

the weight to be given to the evidence. *See Gossett v. State*, *supra*. We reverse only if the trial court's findings are clearly against the preponderance of the evidence. *See id*.

Arkansas has adopted statutory guidelines as to what matters shall be considered by a court when deciding whether to revoke for failure to pay. Arkansas Code Annotated section 5-4-205(f)(3) (Repl. 2006) provides that in making that determination, the court must consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. *See Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). Appellant acknowledges that he was delinquent and had not paid according to the terms of his suspension, but he argues that his failure to pay was justifiable given his circumstances. Appellant has failed to demonstrate clear error in this instance.

The course of events are not in dispute. Appellant was charged with felony non-support in June 2006 for failure to pay child support for his two minor children. Appellant was divorced in June 1999 and was ordered to pay approximately $355 per month in child support, but he had failed to do so, resulting in a sizable arrearage for which he was arrested in 2006. On January 26, 2007, appellant and the prosecutor came to an agreement in which he was to forfeit the $1000 bond he posted toward child support and in which he agreed to pay his child support as ordered in his divorce case. There were other fines and costs he agreed to pay, but those are not relevant to the appeal before us. The suspended imposition of sentence was to last for ten years. Failure to abide by the agreement exposed appellant to up to ten years in prison.

In October 2007, the prosecutor filed a petition to revoke contending that appellant failed to pay child support for the previous four months. Appellant was arrested pursuant to this petition in November, but again posted a $1000 cash bond to be released.

At the revocation hearing conducted in January 2008, Laura Goines, appellant's ex-wife and the mother of his two children at issue, testified. Goines stated that appellant was over $15,000 behind pursuant to their divorce decree and that she received a $1000 bond forfeiture that appellant posted to be released from jail for non-support. She testified that appellant had otherwise made only $190 total in child support payments in the year that the suspension agreement was in place.

In 2007, appellant earned an annual income of $19,917.86. Appellant's testimony reflected that he was earning between $1,200 and $1,400 per month and had monthly expenses totaling $905 per month. Those expenses included a cell phone for $80 per month, and a $120 per month smoking habit. Appellant acknowledged that he owed a sizable amount for past-due child support and had not made child support payments as he had agreed. Appellant testified to his understanding that he was supposed to pay over $400 per month in current and back-due support. Appellant stated that he was also burdened by trying to make $700 in monthly payments on his mother's house, which he and his sister owned after their mother's death. Appellant said that the house was in the process of foreclosure, and he had not made a monthly payment since October 2007. Appellant had been living in the house, although he said he did not have hot water because he could not afford the propane. He said

he had not listed the house for sale, nor had his sister made any payments to keep it from foreclosure.

Appellant said he ate meals and showered at his sister's house and that he paid his sister $30 to $40 per week to defray those costs. Appellant's brother-in-law verified that appellant gave him and appellant's sister about $30 to $40 per week for nightly meals and a hot shower. Appellant testified that he had been jailed again pending this revocation hearing and had borrowed $1000 from a friend to be released on bond. Appellant offered to forfeit that bond money to pay toward child support. Appellant stated that he was not good at managing money, but that he was doing the best he could.

The trial court found that appellant had violated the terms of his suspension, noting that appellant had enough money to pay for his own cell phone and cigarettes, but not to help raise his children. The judge believed appellant was guilty of "blatant abuse of the system." Appellant was sentenced to three years in prison to be followed by a seven-year suspended sentence. Appellant appealed that judgment to our court.

After performing the proper standard of review on this case, we hold that the trial court's findings are not clearly against the preponderance of the evidence. It is clear that the trial judge considered the appellant's earning capacity, expenses, and particular circumstances in coming to the decision to revoke. While appellant was clearly in some financial distress, we hold that there was evidence from which the trial court could determine that appellant's best efforts to raise funds were directed to objectives other than satisfaction of his child-support obligations. In making our review, we defer to the superior position of the trial court

to determine questions of credibility and the weight to be given to the evidence. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996).

Affirmed.

HART and BAKER, JJ., agree.