

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR11-1043

MILAN ORLANDO MEWBORN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 7, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTH DIVISION
[NO. CR2004-3709]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Milan Mewborn appeals the revocation of his probation by the Pulaski County Circuit Court. Appellant's sole point on appeal seeks reversal on the constitutional ground that he was denied due process when the circuit court failed to consider all the sentencing options available to it upon finding that he had violated his conditions of probation. We affirm.

On February 23, 2005, appellant, while represented by counsel, pled guilty to one count of possession of cocaine with the intent to deliver and was sentenced to five years' probation. The terms of his probation included random drug screening, participation in a drug-treatment program, and remaining within the jurisdiction of the circuit court unless authorized to leave it by the circuit court or his probation officer.

On September 13, 2005, the State filed a petition to revoke appellant's probation, alleging that he violated its terms by failing to (1) report to his probation officer; (2) pay

supervision fees; (3) provide proof of completion of a drug-treatment program; (4) provide his probation officer with his new phone number; and further, (5) that he tested positive for marijuana on April 27, 2005. On February 6, 2006, appellant pled guilty to violating the terms of his probation and was sentenced to another year of probation.

Once again, on April 5, 2006, the State filed a petition to revoke appellant's probation, alleging that he failed to report to his probation officer, failed to pay supervision fees, failed to provide proof of completion of a drug-treatment program, and tested positive for marijuana on February 13, 2006.

A revocation hearing was conducted on June 15, 2011. The State's sole witness was probation officer Timothy Warhurst. He described having received appellant's case in September 2010, and explained that the notes in his file indicated that appellant had not reported since February 13, 2006, and said at that time, appellant tested positive for marijuana.

Appellant testified that he left Pulaski County to live with his mother in Los Angeles, where he remained and helped out in the household. He testified to having earned his GED, taking some college classes, and seeing a psychiatrist regularly. He said that upon discovering that there was a warrant out for his arrest, he turned himself in to law enforcement and was extradited back to Arkansas.

At the close of all the evidence, appellant moved for dismissal, which was denied. The circuit court found appellant guilty of violating probation and sentenced him to ten years' imprisonment in the Arkansas Department of Correction. A notice of appeal was filed on July 21, 2011. This appeal followed.

In revocation proceedings, a circuit court must find by a preponderance of the evidence that a defendant inexcusably violated a condition of probation. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003). The appellate court will not reverse a circuit court's findings on appeal unless they are clearly against the preponderance of the evidence. *Id.* We review the sufficiency of the evidence supporting revocation by viewing the evidence in the light most favorable to the State. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). Notably, the State need only prove one violation of the probation conditions for the trial court to revoke probation. *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987).

Appellant argues that the failure of the trial court to consider alternate punishment options was an abuse of discretion. The Arkansas Constitution, article 2, § 8 includes that no person shall be deprived of life, liberty, or property without due process of law. Arkansas Code Annotated section 5-4-309(d) (Supp. 2009)¹ allows for the revocation of the sentence of probation: "If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation." Under Arkansas Code Annotated section 5-4-309(f)(1) (Supp. 2009),² if probation is revoked, the court may impose any sentence that might have been imposed originally for the offense for which he was found guilty.

¹This statute was repealed in the last legislative session, but the identical provision is now codified at Arkansas Code Annotated section 16-93-308(d) (Supp. 2011).

²This statute was repealed in the last legislative session, but has been replaced by Arkansas Code Annotated section 16-93-309(a)(5) (Supp. 2011), which authorizes the imposition of any sentence that could have been imposed upon the conviction of the original offense.

Following the testimony at the revocation hearing, counsel for appellant asked the circuit court to “consider putting [appellant] back on probation.” The circuit judge responded, “Yes, I’m not going to do that. That’s not the way it goes.” Appellant notes that, as the circuit court had done previously in his case, a suspended sentence or term of probation was available to the circuit court. Appellant had been placed on probation for five years in 2005, resumed probation in February 2006 for five more years, and in June 2011, was revoked on that probation. Appellant testified that he no longer used drugs and had not committed any new criminal offenses since February 2006.

While appellant acknowledges that the circuit court had the authority to impose the sentence that it did, he claims that it was a violation of due process for the circuit court to fail to exercise discretion by refusing to even consider his request to be put back on probation.

The State contends that the issue is not preserved for our review because, at the revocation hearing, appellant failed to raise this argument when the circuit court sentenced him to the Arkansas Department of Correction. This court has consistently held that the failure to raise an argument at trial, even that a constitutional violation has occurred, will not be allowed to be raised for the first time on appeal. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006). Therefore, as appellant failed to object to the sentence as unconstitutional when the circuit court rejected his request for probation, his argument is not preserved for review. *Cline v. State*, 2011 Ark. App. 315.

Affirmed.

PITTMAN and MARTIN, JJ., agree.