

Cite as 2012 Ark. App. 390

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. CACR 11-1155

TERRY LEMMOND, JR.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 13, 2012

APPEAL FROM THE STONE  
COUNTY CIRCUIT COURT,  
[NO. CR-2008-53]

HONORABLE JOHN DAN KEMP,  
JUDGE

AFFIRMED

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**WAYMOND M. BROWN, Judge**

Terry Lemmond, Jr., appeals the revocation of his probation, arguing that the trial court (1) erroneously allowed hearsay in the revocation hearing, thus depriving him of his Sixth Amendment right to confront witnesses, and (2) erred in determining that he had inexcusably failed to pay court-ordered fines.

*Background*

On or about June 10, 2008, appellant was arrested in a city park after a police officer smelled the odor of marijuana coming from his car, saw that he had glassy, bloodshot eyes, and upon performing a pat-down, found on appellant's person hydrocodone pills, a marijuana grinder containing usable amounts of marijuana, and scales like those used to weigh drugs. A subsequent search of appellant's car yielded three baggies of marijuana weighing a total of

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45.7 grams, all of which were recovered from under the driver's seat. Appellant failed field-sobriety tests and was also placed under arrest for driving while intoxicated (DWI).

On January 8, 2009, appellant pleaded guilty to two counts of possession of drug paraphernalia, two counts of possession of a controlled substance (marijuana and hydrocodone), one count of DWI, and one count of no proof of insurance, with an enhancement for proximity to a city or state park. The circuit court placed appellant on thirty-six months' probation in the drug-court program, ordered him to pay \$3620 in fines and fees, and ordered him to comply with the terms and conditions of his probation.

Appellant subsequently received three "strikes" for failing to comply with the terms of the drug court and was sentenced to one year in the regional correctional facility, to be followed by thirty-six months' probation. Appellant completed his jail sentence and went back on probation under the drug-court program. On June 20, 2011, the State filed a petition to revoke appellant's probation after he had been charged with harassment and disorderly conduct relating to an incident involving an ex-girlfriend, failed to report to counseling as directed, and failed to pay court-ordered fines. A revocation hearing was held on July 7, 2011, and the circuit court heard testimony from Ben Lockard, appellant's probation officer; Steve Braunhaver, Chief of the Mountain View Police Department; Amy Holloman, the ex-girlfriend; and Ms. Holloman's father, Robert Holloman. The circuit court found that appellant had committed the offense of harassment<sup>1</sup> and had failed to pay his fines

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<sup>1</sup>Appellant was convicted under Ark. Code Ann. § 5-71-208(a)(5) (Repl. 2006), which provides that a person commits the offense of harassment if, with purpose to harass, annoy,

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as directed: on those grounds, the circuit court revoked appellant's probation and sentenced him to 121 months in the Arkansas Department of Correction.

*Discussion*

I. *Admission of Challenged Statements*

At the revocation hearing, when asked to describe how appellant violated the terms of his probation, probation officer Ben Lockard testified that he had received reports from law-enforcement officers of appellant's contact with Amy Holloman. Chief Braunhaver subsequently testified about a disturbance at the local Wal-Mart involving appellant and Ms. Holloman, which ended in appellant's arrest for harassment and disorderly conduct. However, Braunhaver stated that he was not present for any of the events and did not witness them. Chief Braunhaver also testified about the contents of Amy Holloman's victim statement: "There were statements given that she called her dad, Robert Holloman, to come to Wal-Mart and pick her up. Lemmond was following her around and apparently she made statements that she hid in the bathroom from him and was afraid to come out if I remember right." Appellant argues that this testimony was hearsay and that the circuit court violated his Sixth Amendment right to confront witnesses by allowing the testimony into evidence.

In a revocation hearing, a defendant is not entitled to the full panoply of rights that attend a criminal prosecution.<sup>2</sup> Certain rules of evidence, including the hearsay rule, are not

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or alarm another person, without good cause, he engages in conduct or repeatedly commits an act that alarms or seriously annoys another person and that serves no legitimate purpose.

<sup>2</sup>*Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989).

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applicable in revocation proceedings as they would be in a trial.<sup>3</sup> However, Arkansas law provides that in revocation proceedings, a defendant has the right to confront and cross-examine an adverse witness unless the court specifically finds good cause for not allowing confrontation.<sup>4</sup> The circuit court must balance the probationer's right to confront witnesses against grounds asserted by the State for not requiring confrontation.<sup>5</sup> The court should assess the explanation offered by the State for why confrontation is undesirable or impractical and consider the reliability of the evidence that the State offers in place of live testimony.<sup>6</sup>

Even when error occurs at revocation proceedings involving the constitutional right to confront adverse witnesses, those errors are subject to harmless-error analysis.<sup>7</sup> This court does not reverse unless prejudice has been shown.<sup>8</sup> In this case, Amy Holloman testified at the revocation hearing and appellant cross-examined her. Consequently, we cannot discern

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<sup>3</sup>*Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000).

<sup>4</sup>Ark. Code Ann. § 5-4-310(c)(1) (Repl. 2006).

<sup>5</sup>*Goforth, supra*.

<sup>6</sup>*Id.*

<sup>7</sup>*Cannon v. State*, 2010 Ark. App. 698, \_\_\_ S.W.3d \_\_\_ (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)). Among the factors for the court to consider in determining whether a Confrontation Clause violation is harmless error are the importance of the witness's testimony in the State's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted; and the overall strength of the State's case.

<sup>8</sup>*Phillips v. State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988).

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any violation of appellant's right to confront witnesses. The circuit court did not specifically go through the steps of a *Goforth* analysis, but there was no need to do so because Amy Holloman was undisputedly available as a witness, did in fact testify, and was cross-examined by appellant.

Moreover, with regard to Lockard's testimony about receiving reports of appellant's interaction with Ms. Holloman, appellant has failed to show that prejudice resulted from the testimony even if an error did occur. The State was required to prove only that appellant violated any one of the conditions of his probation,<sup>9</sup> and Lockard testified without objection that appellant had failed to pay his fines as directed. Appellant admitted that he had failed to pay his fines and did not present any evidence that the failure was excusable. Because there were sufficient grounds to revoke appellant's probation on the failure to pay fines alone, Lockard's testimony referring to reports he had received about appellant harassing Ms. Holloman did not prejudice appellant. Therefore, we affirm the circuit court's admission of the challenged statements.

## II. *Determination that Appellant Inexcusably Failed to Pay Fines*

Appellant also argues that the circuit court erred in determining that he inexcusably failed to pay his fines, in light of evidence that he lacked the financial resources to do so.

A circuit court's findings in revocation proceedings will not be reversed on appeal

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<sup>9</sup>*Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

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unless they are clearly against the preponderance of the evidence.<sup>10</sup> When the alleged probation violation is the failure to make required payments, once the State introduces evidence of nonpayment, the burden then shifts to the defendant to provide a reasonable excuse for failing to make the payments.<sup>11</sup> Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the superior position of the trial court to decide those matters.<sup>12</sup>

Officer Lockard testified that appellant failed to pay \$3115 of his court-ordered fines. Lockard further testified that appellant, although unemployed, was recycling scrap metal for money and that although it was something “to fall back on” as opposed to real employment, he (Lockard) knew that some people made pretty good money doing it. Appellant offered no evidence that he was unable to pay the fines, and absent such evidence, we will not find that the circuit court clearly erred in concluding that the failure was inexcusable.<sup>13</sup> Thus, we affirm.

Affirmed.

WYNNE and GLOVER, JJ., agree.

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<sup>10</sup>*Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001).

<sup>11</sup>*Pitchford v. State*, 2011 Ark. App. 188, \_\_\_ S.W.3d \_\_\_.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*