

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR11-1240

GARY DON WALLACE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 10, 2012APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT
[CR-2003-346, CR-2009-271,
CR-2009-966, CR-2009-967]HONORABLE STEPHEN TABOR,
JUDGEAFFIRMED IN PART; REVERSED
AND DISMISSED IN PART**DAVID M. GLOVER, Judge**

Gary Don Wallace appeals the revocation of several suspended sentences. He argues that the trial court was without jurisdiction to revoke one of his suspended sentences, which the State concedes, and that the State's proof was insufficient to support revocation of the remaining suspended sentences. We hold that the trial court's revocation of Wallace's remaining suspended sentences was not clearly against the preponderance of the evidence. Therefore, we affirm in part and reverse and dismiss in part.

Wallace has a long history with the Sebastian County Circuit Court. In July 2002, he pleaded guilty to overdraft (CR-2002-681), for which he was given a five-year suspended imposition of sentence and was ordered to pay restitution of \$2696.99, a public-defender fee of \$100, a fine of \$500, and court costs of \$150. In April 2003, Wallace pleaded guilty to driving while intoxicated, fourth offense (CR-2003-346), and was sentenced to two years'

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incarceration with an additional four-year suspended imposition of sentence. In July 2009, he pleaded guilty to second-degree forgery (CR-2009-271) and received a ten-year suspended imposition of sentence and was ordered to pay \$2772 in restitution and \$150 in court costs. In January 2010, Wallace pleaded guilty to two counts of theft by receiving (CR-2009-966 and CR-2009-967), for which he was sentenced to three years' incarceration with an additional seven-year suspended imposition of sentence.

The State filed a petition to revoke Wallace's suspended sentences on May 4, 2011; it was amended on May 24, 2011, to allege that Wallace committed the offense of theft by receiving on May 22, 2011, and that he had failed to pay restitution in CR-2002-681 and CR-2009-271. After a revocation hearing, the trial court specifically revoked Wallace's suspended sentences in CR-2003-346, CR-2009-271, CR-2009-966, and CR-2009-967¹ on the basis that the State had proved by a preponderance of the evidence that he had committed the offense of theft by receiving.

Jurisdiction to Revoke Suspended Imposition of Sentence CR-2003-346

Wallace argues that the trial court was without jurisdiction to revoke his suspended imposition of sentence in CR-2003-346. The State concedes error on this point, and we agree that the trial court was without jurisdiction to revoke the 2003 suspended sentence.

Wallace pleaded guilty to DWI, fourth offense, in April 2003, for which he was sentenced to two years' incarceration with an additional four-year suspended imposition of

¹The trial court did not revoke Wallace's suspended sentence in CR-2002-681. Furthermore, while the State introduced evidence of nonpayment of restitution and while there was testimony as to why Wallace had not paid restitution, the trial court did not revoke Wallace's suspended sentences on that basis.

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sentence.² This sentence would have been completed in 2009, well before the revocation petition was filed in 2011. Wallace was not ordered to pay restitution in this case, so jurisdiction could not be continued under Arkansas Code Annotated section 5-4-303(h)(2) (Repl. 2006) (trial court may extend probation period if defendant has not satisfactorily made all restitution payments at end of probation period). Because the period of the suspended sentence had expired prior to the State filing a petition for revocation, the trial court was without authority to revoke the suspended imposition of sentence in CR-2003-346. Therefore, we reverse and dismiss the revocation in that case.

Revocation of 2009 Suspended Imposition of Sentences

Wallace also argues that the trial court erred in revoking the suspended imposition of sentences in CR-2009-271, -966, and -967. We affirm these revocations.

A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Id.* Because of the lower burden of proof, evidence that is insufficient to support a criminal conviction may be sufficient for the revocation of a suspended sentence. *Knotts v.*

²Wallace was also given jail-time credit of seventy-seven days.

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State, 2012 Ark. App. 121. The appellate courts defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Stultz, supra*.

At the revocation hearing, Juan Beltran testified that Wallace called him on May 22, 2011, regarding a 1991 BMW that Beltran had for sale.³ Beltran testified that the vehicle had mechanical problems—the transmission would only shift into first and second gears. Wallace arrived by cab to meet Beltran, discussed Beltran's asking price of \$1000 cash, and then took the BMW for a test drive. He came back and told Beltran that he was going to take the vehicle for another test drive, and Beltran agreed. When Wallace had not returned or called in thirty minutes, Beltran attempted to call him and got no answer; Beltran then called the police. Beltran began looking for the vehicle and found it at Wilcox Transmission, but Wallace was not with the vehicle. Beltran stated that he and Wallace had never discussed Wallace having the transmission checked.

Fort Smith police officer Brad Philpott testified that he was dispatched on May 22 to a vehicle-theft report but that the vehicle was located before he arrived; however, Philpott proceeded to the vehicle location and made contact with Beltran, who told him that Wallace had told him that he would be "right back" with the vehicle but never returned. Philpott contacted the cab company and learned that Wallace had been picked up at a local motel; the motel manager told Philpott the room in which Wallace was staying. Philpott testified that he found Wallace in the room talking on the telephone, and when he advised Wallace that he was there about the vehicle, Wallace handed him the key to the BMW and told him that he was

³Beltran testified that the vehicle was registered in the name of Juan Hernandez, the person from whom he purchased the vehicle, and that he had a bill of sale from Hernandez.

taking it to have the transmission repaired. Philpott arrested Wallace on an outstanding felony warrant.

Wallace testified on his own behalf. He said that he had driven the BMW and had returned with a friend who was living at the motel to look at the transmission, but they could not determine what was wrong with it. Wallace said that as he was taking his friend back to the motel, the transmission “quit completely,” and they pushed the vehicle to Wilcox Transmission. Wallace testified that by the time he arrived at the other man’s room at the motel, the police were there. He denied stealing the vehicle or telling the officer that he was going to have the vehicle repaired. Wallace stated that he was going to leave the BMW at the transmission garage until Monday morning and learn how much it would cost to repair the transmission. Wallace also asserted that he had the money to pay for the vehicle and planned on paying for it, but he failed to inform the officer of that fact when questioned about the vehicle. He also said that he did not have his phone with him when the transmission went out.

The State recalled Juan Beltran as a rebuttal witness. Beltran testified that when he found the vehicle, he was able to drive it back to his house.

The trial court found Beltran’s testimony that he waited thirty minutes before calling the police to be credible and that Wallace’s testimony made no sense. While the trial court stated that it believed Wallace’s actions would have been better characterized as theft, it nevertheless concluded that the State had proved by a preponderance of the evidence that Wallace had committed theft by receiving.

A person commits theft by receiving if he “receives, retains, or disposes of stolen property of another person knowing that the property was stolen or having good reason to

believe the property was stolen.” Ark. Code Ann. § 5-36-106(a) (Supp. 2011). Proof of actual possession is not necessary to establish theft by receiving; constructive possession is sufficient, and a person constructively possess property when he has the power and intent to control it. *Turner v. State*, 2012 Ark. App. 150, ___ S.W.3d ___.

Wallace argues that there was no evidence that the BMW was stolen and that there was no evidence that he was retaining, possessing, or disposing of the vehicle. He argues that it was entirely likely that the transmission slipped out and had to be pushed to the transmission shop, and it was illogical for the trial court to find that he committed the offense of theft by receiving by parking the vehicle in plain sight blocks away from the owner.

We hold that the State proved by a preponderance of the evidence that Wallace committed theft by receiving. The trial court found Beltran’s testimony to be credible and that Wallace’s testimony made no sense. Furthermore, Wallace was the person who took the vehicle; after he failed to return the vehicle, he was found in possession of the vehicle keys; when he was found at the motel he was talking on his phone, yet he had not called Beltran to advise him that the transmission “quit completely” and that the vehicle was at the transmission shop; Beltran was able to drive the vehicle even though Wallace asserted that the transmission would not work; and although Wallace claimed to have had the money to purchase the vehicle, he failed to apprise the police officer of that fact when questioned about the vehicle.

Affirmed in part; reversed and dismissed in part.

VAUGHT, C.J., and MARTIN, J., agree.

James, Carter & Coulter, PLC, by: *Misty Wilson Borkowski*, for appellant.

Dustin McDaniel, Att’y Gen., by: *Christian Harris*, Ass’t Att’y Gen., for appellee.