

ARKANSAS COURT OF APPEALSDIVISION I
No. CACR11-1277

JAMES WAYNE MILLER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED SEPTEMBER 26, 2012APPEAL FROM THE DREW
COUNTY CIRCUIT COURT,
[NO. CR-2005-205]

HONORABLE SAM POPE, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

On February 6, 2006, appellant James Wayne Miller entered a no-contest plea to charges of residential burglary, robbery, and terroristic threatening, for which he was sentenced to the Arkansas Department of Correction (ADC) for a period of seventy-two months, plus an additional seventy-two months' suspended imposition of sentence (SIS) following his release from the ADC. On March 29, 2011, the State filed a petition to revoke appellant's SIS, alleging that he violated the conditions of his SIS by (1) possessing a stolen gun that he planned to sell to an individual whom he knew to be a felon, and (2) failing to pay any of the costs, fees, or restitution in the amounts as required by the order and conditions of his SIS.

At the revocation hearing conducted on September 6, 2011, the trial court heard testimony that appellant contacted Bruce James about selling him some firearms. James was

a convicted felon at the time appellant contacted him. Officer Jeremy Simmons testified that he told James that several guns were missing after a break-in occurred at the Swap Shop, a local store, and asked him to give the police department a call if he “had any knowledge or heard anything” about the theft. When appellant approached James about the guns, James contacted Investigator Hollingsworth. James informed Investigator Hollingsworth that appellant offered to sell him a .22-caliber Derringer pistol and a .45-caliber Ruger Black Powder pistol. One of these firearms met the description of a stolen gun from the Swap Shop.

At this point, Investigator Hollingsworth set up a sting operation and called the Arkansas State Police to search James’s car. They found no firearms in the car at that time. Investigator Hollingsworth sent James to bring appellant into Warren city limits so that they could attempt to buy the firearms from him, but the attempt failed.

Subsequent to that attempt, Investigator Hollingsworth searched James’s vehicle a second time and sent James a second time to pick up appellant. Investigator Hollingsworth advised Trooper Byron Curry of the situation and asked him to make a traffic stop of James’s car. Trooper Curry stopped James’s vehicle, and, after receiving consent from James, Investigator Hollingsworth searched the vehicle where he found a revolver, wrapped in a towel, between appellant’s seat and the center console. Trooper Curry testified that he first noticed the towel on appellant’s side of the vehicle when he removed appellant from the vehicle and was in the process of handcuffing him. That revolver was the same gun reported

stolen from the Swap Shop. Based on this evidence, the trial court found that the State proved that appellant violated condition one of his SIS and revoked his SIS.

Appellant argued at the hearing that he had never been in possession of the gun and denied having any knowledge of the gun being in the car. Appellant asserted that James set him up and that the only reason for being in the car with James was because James had asked him to do yard work for James's mother. He stated that the two of them were on the way to James's mother's house when they were pulled over by Trooper Curry.

The trial court, noting that this case turned on the credibility of appellant and James, determined that appellant violated the conditions of his SIS by committing a criminal offense. Appellant was sentenced to twelve years in the ADC pursuant to an order filed on September 12, 2011, and he filed a timely notice of appeal on September 21, 2011.

To revoke a probation or suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Foster v. State*, 104 Ark. App. 108, 289 S.W.3d 476 (2008). The trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Costes v. State*, 103 Ark. App. 171, 287 S.W.3d 639 (2008). Because 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 court's superior position. *Johnson v. State*, 2011 Ark. App. 718.

Evidence that may be insufficient for a criminal conviction may be sufficient for revocation. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). Proof of just one

violation of the terms and conditions is sufficient to support revocation. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

Appellant claims that while the officers' testimony regarding the discovery of the stolen gun in the same vehicle occupied by appellant corroborates James's story, it does not disprove his contention or make it less likely that James put the gun in the vehicle. Appellant notes that James conceded at the hearing that he had a criminal history, including convictions for theft of property, theft by receiving, and breaking or entering. At the time of this hearing, James was being held in the Dallas County Jail waiting to be transferred to the ADC for theft of property. Appellant argues that James, because of his long criminal history, would benefit by cooperating with law enforcement in the arrest and conviction of another felon.

While appellant acknowledges Investigator Hollingsworth's search of James's truck prior to his meeting with appellant, he submits that James had a substantial amount of time to retrieve the gun and place it in the vehicle without being observed by the police. He notes that Investigator Hollingsworth testified that, after the first search of James's vehicle, approximately thirty minutes passed from the time James drove out of sight until he returned. The trial court noted that there was no testimony contradicting that James was allowed to travel unescorted from the time he left Investigator Hollingsworth up to the time he had appellant in the vehicle.

Other than the testimony of James, there was no other evidence that connected appellant to the gun that was retrieved from James's vehicle. There were no other witnesses who testified that appellant ever had possession of the gun or who could verify that appellant

was attempting to sell any gun. Appellant submits that there was neither evidence connecting him to the burglary of the Swap Shop nor forensic or physical evidence connecting him to the gun. Investigator Hollingsworth specifically testified that he attempted to lift fingerprints from the gun, but no fingerprints were located. Appellant notes that he made no statement or confession indicating that he had any involvement in this illegal transfer or possession.

In its ruling, the trial court stated that the issue was one of credibility—whether to believe appellant or James. The trial court commented that appellant and James were “two peas in a pod.” In deciding to afford more weight to James’s testimony, the trial court noted that his testimony was corroborated because there were “disinterested police officers who confirm what (James) had to say about this.”

According to the conditions of his SIS, appellant was not to commit “any felony, misdemeanor or other criminal offense punishable by confinement in jail or prison.” By possessing a stolen firearm, he could be convicted of multiple crimes, including theft of property, theft by receiving, and possession of a firearm by a convicted felon.

We hold that a preponderance of the evidence shows that appellant possessed the stolen firearm from the Swap Shop and attempted to sell it to a third party. While appellant argues that James’s testimony is not credible because (1) he is a convicted felon, (2) there was a substantial gap in time between the search of his car and the later discovery of the stolen firearm, and (3) James had an incentive to make it appear that appellant possessed the gun,

questions of credibility and the weight to be given to testimony are for the circuit court to determine. *Giffin v. State*, 2009 Ark. App. 355.

The trial court heard testimony from Officer Simmons that he has “had several dealings with Mr. James in the past” and “has determined [James] to be a reliable source of information.” Additionally, the trial court heard testimony that officers completed a thorough search of James’s car before he picked up appellant. Finally, Trooper Curry testified that the gun was found next to where appellant was seated in the car. As a result, the trial court had the opportunity to evaluate the testimony and determined that James and the officers were credible.

The sole issue raised by appellant on appeal turns solely on the credibility of the testimony, and there is no basis for this court to reverse the trial court’s findings.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

Joseph P. Mazzanti, III, for appellant.

Dustin McDaniel, Att’y Gen., by: *Brad Newman*, Ass’t Att’y Gen., and *John A. Mallory, Jr.*, Law Student No.1707 Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the supervision of *Kathryn Henry*, Ass’t Att’y Gen., for appellee.