

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR12-574

DENNIS RICHARDS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 16, 2013

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[No. CR-2009-372]HONORABLE H.G. PARTLOW, JR.,
JUDGE

AFFIRMED; MOTION GRANTED

LARRY D. VAUGHT, Judge

This is a no-merit appeal from the revocation of Dennis Richards's probation. On September 4, 2009, Richards pled guilty to possession of drug paraphernalia and was sentenced to probation for sixty months. On January 12, 2012, the State filed a petition to revoke Richards's probation, alleging that he failed to pay fines, restitution, and costs; failed to report to his probation officer; failed to notify the sheriff of his current address and employment; failed to pay probation fees; violated criminal laws (theft of property and criminal trespass on farmland); associated with felons; and associated with others violating the law. After a hearing on May 4, 2012, the trial court revoked Richards's probation and ordered him to serve three years' incarceration along with a seven-year suspended imposition of sentence.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals, Richards's counsel has filed a motion

to withdraw on the grounds that the appeal is wholly without merit. Counsel's motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings made by the trial court on all objections, motions, and requests made by either party that were adverse to Richards, with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of our court furnished Richards with a copy of his counsel's brief and notified him of his right to file pro se points, but Richards has not filed any points.

At the hearing, Deborah Wiseman testified that she is employed with the Crittenden County Sheriff's Office and collects fines on behalf of the courthouse. She said that while Richards had made some payments on the restitution, costs, and fees that he was ordered to pay, there was still a balance owed and that he had not made a payment in the last year.

Markita Thompson, Richards's probation officer, testified that when she assumed Richards's case, he had been reporting fairly regularly but was a month or two behind in paying his probation fees. She also testified that he was arrested for criminal trespass and theft of property in January 2012. She added that while he had reported regularly to her prior to his January 2012 arrest, he had not reported to her since he was released on bond in March 2012.

Briggs Keaton of the Crittenden County Sheriff's Office testified that he was called to the farm of Bryan Kramer on January 7, 2012, after receiving a report that two trucks were stuck in the mud in the middle of the field. Richards was the driver of one of the trucks. Officer Keaton learned that John Lucas was the driver of the other truck and that Amanda

Buckley was his passenger. The officer testified that there was approximately \$1600–\$1800 of metal irrigation-system piping that had been removed and was lying underneath the trucks. Kramer testified that he did not give permission to Richards to drive on his property or to remove or use the metal pipes. Kramer said that he considered the piping stolen.

The final witness was Richards. He testified that after he was sentenced to probation in 2009, he tried to report and pay his financial commitments regularly. He said that he did not report to his probation officer after he was released from jail in March 2012 because a fellow inmate told him he did not have to. He conceded that he did not make his payments while he was in jail. While he said that he had no problem paying the rest of his financial obligations, he also said that his money is limited because he has a disability, along with a wife and four children to care for. He denied the trespass charges, claiming that he and his friends were merely trying to go fishing and that he did not know that the field was private property. He added that they were not stealing the piping; rather, they were using it to try to pry their vehicles out of the mud. He said that he did not know that Lucas was a felon.

At the conclusion of the hearing, the trial court revoked Richards's probation, finding that he failed to pay the fines and costs he was ordered to pay; he failed to report to his probation officer; he failed to pay probation fees; he associated with a felon; and he violated the law by trespassing on another's field and appropriating another man's property for his own benefit.

Counsel for Richards contends that there is no merit to the appeal of the revocation decision made by the trial court in this case. In revocation proceedings, the State has the

burden of proving that the appellant violated the terms of his probation, as alleged in the revocation petition, by a preponderance of the evidence; we will not reverse a trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Williams v. State*, 2012 Ark. App. 447, at 2. The State need only show that the appellant committed one violation in order to sustain a revocation. *Id.* We defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Id.* at 2–3.

In this case, a preponderance of the evidence supports the trial court's revocation decision. There was testimony from Wiseman that Richards failed to pay his court-ordered restitution, fines, and costs. Richards's probation officer testified that Richards failed to report, failed to pay probation fees, had been arrested for criminal trespass and theft of property, and had been associating with a felon. Officer Keaton confirmed that he found Richards's vehicle stuck in the mud in Kramer's field, that there was metal piping lying under the truck, and that Richards was arrested for trespass and theft of property. The owner of the field and piping testified that he did not give Richards permission to be on the property or to use or take the property. Furthermore, Richards admitted that he did not report after his March 2012 release from jail and failed to make all of his payments. While he claimed he thought that he did not have to report and make payments after his release, the trial court found this excuse incredible. The trial court also did not believe Richards's story that he was on Kramer's property to go fishing because there had been a problem in that area with thieves stealing from farmers. As set forth above, we defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Williams*, 2012

Ark. App. 447, at 2–3. Thus, we hold that there is no meritorious ground for reversal on the sufficiency of the evidence supporting the revocation.

In addition, the record reveals that there were four evidentiary rulings adverse to Richards. Each adverse evidentiary ruling was abstracted and discussed in the no-merit brief. Our court will not reverse a trial court’s evidentiary ruling unless it abused its discretion in making the ruling. *Williams v. State*, 2012 Ark. App. 310, at 9, ___ S.W.3d___, ___.

Three adverse evidentiary rulings occurred during the testimony of Thompson, Richards’s probation officer. The first occurred when Thompson was asked about Richards’s drug-test results. Defense counsel objected, arguing that another probation officer had administered the test and that he was not available at the hearing to be cross-examined. The trial court overruled the objection, finding that the drug-test results were included in the probation report.

It is true that the right to confront witnesses applies to revocation cases. *James v. State*, 2012 Ark. App. 429, at 3–4 (citing *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998); *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989)). Arkansas Code Annotated section 16-93-307(c)(1), (2) (Supp. 2011) provides that at a revocation hearing the defendant has the right to counsel and to confront and cross-examine an adverse witness unless the court specifically finds good cause for not allowing confrontation. In the case at bar, the trial court found good cause for not allowing confrontation of the probation officer who had administered the drug test because the drug-test results were included in the probation report, from which Thompson was permitted to testify. Ark. R. Evid. 803(6) (2012).

Moreover, we note that the denial of the right to confront witnesses may be harmless error. *Caswell*, 63 Ark. App. at 64, 973 S.W.2d at 835. Assuming arguendo that the trial court erred on this point, the error was harmless because the probation officer's testimony did not actually reveal the results of the drug test, and more significantly, the trial court did not rely on the drug-test results as a basis for revoking Richards's probation. Thus, the trial court did not abuse its discretion in connection with this adverse ruling.

Likewise, the trial court did not abuse its discretion when it overruled Richards's counsel's objection to the probation officer being asked whether she recommended in her violation report that Richards's probation be revoked. Rule 702 of the Arkansas Rules of Evidence provides that lay-witness testimony is appropriate where it is rationally based on the perception of the witness and is helpful to a clear understanding of the determination of a fact in issue. Ark. R. Evid. 702(1), (2) (2012). Richards's probation officer's testimony on this issue was proper in that it explained how the revocation proceeding came about.

The third adverse ruling occurred when the State objected to defense counsel's question to Thompson about whether she had heard that probationers assume that they do not have to report to their probation officers once they have had a probation warrant filed against them. The trial court sustained this objection, stating, "You can ask her if that's what the law is or what the rule and regulations are." The trial court did not abuse its discretion in sustaining the State's objection because the answer sought from Thompson required her to engage in speculation and conjecture—it was not rationally based on her perception. Ark. R. Evid. 702(1).

The fourth and final adverse ruling occurred during the testimony of Officer Keaton. When he was testifying about what the farm owner told him over the telephone, defense counsel lodged a hearsay objection. The State responded that the testimony was not offered for the truth of the matter asserted; rather, it was to show that the officer made contact with the property owner. The trial court overruled the hearsay objection and permitted the testimony. The rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings. *Jones v. State*, 31 Ark. App. 23, 25, 786 S.W.2d 851, 852 (1990). Nevertheless, the testimony was admissible. It did not fall within the definition of hearsay because it was not offered for the truth of the matter asserted. Ark. R. Evid. 801(c) (2012).

From a review of the record and the brief presented to this court, Richards's counsel has complied with the requirements of Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals. Therefore, counsel's motion to be relieved is granted, and Richards's revocation is affirmed.

Affirmed; motion granted.

GLADWIN, C.J., and GLOVER, J., agree.

C. Brian Richards, for appellant.

No response.