

ARKANSAS COURT OF APPEALSDIVISION II
No. CR-12-1066MORRELL D. STEWART
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered June 19, 2013

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. CR-2008-79]HONORABLE JOHN N.
FOGLEMEN, JUDGEAFFIRMED; MOTION TO BE
RELIEVED GRANTED**DAVID M. GLOVER, Judge**

Morrell Stewart pleaded guilty to the offense of burglary, a Class C felony, on February 22, 2008, and was placed on probation for five years. Three years later, in December 2010, the State filed a petition for revocation of probation, alleging that Stewart had failed to pay fines, costs, and fees as directed; had failed to report as directed; had failed to pay his probation fees; had failed to notify the sheriff and probation office of his current address and employment; and had committed the offenses of aggravated residential burglary and terroristic threatening in the first degree. Following a hearing on the revocation petition, the trial court revoked Stewart's probation and sentenced him to three years in the Arkansas Department of Correction.

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Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Arkansas Rules of the Supreme Court and Court of Appeals, Stewart'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 adverse to Stewart made by the trial court on all objections, motions, and requests made by either party, with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished Stewart with a copy of his counsel's brief and notified him of his right to file *pro se* points; Stewart has not filed any points.

At the revocation hearing, Virginia House (who oversees the collection and disbursement of court-imposed fines and costs for the Crittenden County Sheriff's Office) testified that as a condition of his probation, Stewart was assessed a fine of \$1500 and costs of \$770, which was to be paid at the rate of \$50 per month beginning April 22, 2008. She testified that Stewart had paid twenty-five dollars on April 9, 2012.

Constance Brown, Stewart's probation officer, testified that Stewart had failed to report on one occasion; that he had indicated to her that he was working but did not tell her for whom and did not provide evidence (such as a pay stub) of his work; and that he did not do community service because he told her that he was working and would make payments. She testified that Stewart told her in June 2012 that he was still working and would mail her a money order for \$140, but that the money order "did not post" by his July visit. On cross-examination, she said that as of September 1, 2012, Stewart was behind

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in probation fees by \$132.58; she also said that Stewart had paid \$140, but that it “had not posted yet.” The State objected to that statement, arguing that Brown’s prior testimony was that Stewart said that he was sending \$140 but that it never arrived. Brown then testified that Stewart told her that he had mailed the \$140, but he had never presented proof that he had mailed it, and it had not posted as of the revocation hearing.

Stewart testified in his own defense. He agreed that he had missed one probation appointment; he said that he missed his August appointment because he did not have the money to make his payment. He said that he knew he owed money and that he would pay it, but he had been laid off from his job with a fence company about a month before. He acknowledged that he had been working for the fence company from around March 2008 until he was laid off. He explained that he did not do community service because he had a job, but he now would be willing to do community service to work off his fees. Stewart said that the fence company had called him and that he was supposed to go back to work for them next week. He testified that he had only paid twenty-five dollars on his fine and costs because he did not have any money and was trying to keep up his probation fees. He said that he had been working but that he did not make good money. He also said that he lived with his stepmother and his aunt and that they worked and supported him; however, he then stated that he had his apartment and “stuff” to pay for. Stewart also said that he was incarcerated for ten months in December 2010 on new charges.

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The trial court stated that it did not remember the last time it had revoked someone's probation simply for not paying but that it had never seen anyone do so little when they testified that they had been working. Continuing, the trial court found that from February 2008 until December 2010, Stewart was employed and made zero effort to make payments toward his fines and costs. The trial court revoked Stewart's probation on the basis that he had made no effort to pay his fine and costs and sentenced him to three years in the Arkansas Department of Correction.

The first adverse ruling is the revocation of Stewart's probation on the basis that he inexcusably failed to make payments on his fine and costs. In *Bohlman v. State*, 2013 Ark. App. 162, at 2–3 (citations omitted), this court held:

A circuit court may revoke a defendant's suspension at any time during its pendency if it finds by a preponderance of the evidence that the defendant inexcusably failed to comply with a condition of suspension. The State has the burden of proof by the preponderance of the evidence but need prove only one violation; we will not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. . . . Where the alleged violation of conditions is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. The burden of proof does not shift from the State. However, once the State has introduced evidence of nonpayment, the burden of going forward does shift to the defendant to offer some reasonable excuse for the failure to pay. If an assertion of inability to pay is made, the State can then carry its burden in various ways, e.g., it can undermine the probationer's credibility, or it can show a lack of effort, such as a failure to make bona fide efforts to seek employment or to borrow money to make payments. In determining whether to revoke a suspended sentence for nonpayment, the court is required to consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that

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may have a bearing on the defendant's ability to pay. . . . A defendant cannot be imprisoned solely because of a failure to pay restitution if the failure to pay was not willful. However, the failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment.

Here, there was testimony that Stewart had been employed for a significant time during his probation but had only made one twenty-five-dollar payment on his fine and costs during that time. The trial court was clear in its ruling that it believed that Stewart could have paid more toward his fine and costs during the time he was employed but simply chose not to do so. This evidence supports the trial court's finding that the State proved by a preponderance of the evidence that Stewart inexcusably failed to make payments on his fine and costs.

The only other adverse ruling was the State's objection after Constance Brown's testimony on cross-examination that Stewart had paid \$140 on his fine and costs but that it had not posted yet when she had testified on direct examination that Stewart told her that he was sending \$140 but that it had not posted. The prosecutor objected, arguing that that was not Brown's testimony on direct. Brown then clarified her testimony by stating that Stewart told her that he had mailed the money but that he never brought in a receipt, and as of the date of the revocation hearing, it still had not posted. This was simply a clarification of Brown's testimony, and it does not provide a basis for reversing the revocation.

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

Affirmed; motion to be relieved granted.

WOOD and BROWN, JJ., agree.

C. Brian Williams, for appellant.

No response.