

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-13-451

CAMERON SCHUBERT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 20, 2013

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[CR-2012-328]

HONORABLE MICHAEL MEDLOCK,
JUDGE

REVERSED AND DISMISSED

RHONDA K. WOOD, Judge

This is an appeal from the circuit court’s revocation of Cameron Schubert’s suspended sentence. The court found that Schubert had inexcusably violated the terms and conditions of his sentence by refusing to complete his community service. Schubert contends that he was ready and willing to complete his community service, but that he could not stop taking his prescription medication in order to pass a drug test as required by the community-service rules. We agree with Schubert and hold that the court’s revocation was clearly against the preponderance of the evidence.

Cameron Schubert pleaded guilty to assault in November 2012. The circuit court suspended imposition of his sentence for one year, and in the meantime Schubert had to complete 30 days of community service. Schubert went to the probation office a month later, and his probation officer said that the community-service program required its

participants to pass a drug test. Schubert said that he couldn't pass a drug test because he was taking prescription medications, including methadone, morphine, and diazepam.¹ Schubert took these drugs for pain management because he has congenital hip dysplasia and has had a total left-hip replacement and two left-knee operations. He also gets regular spinal injections and receives social-security-disability benefits and Medicare.

The probation officer told him that the community-service rules were nonnegotiable and that Schubert would have to stop taking his medicine before the officer would allow him to perform community service. Schubert refused, and in December, one month after Schubert pleaded guilty, the State filed a petition to revoke alleging that Schubert had "failed to abide by the rules and regulations of his community service." At the hearing, the circuit court found that Schubert had inexcusably violated the terms and conditions of the suspended sentence by failing to complete his community-service hours and sentenced him to 30 days in the county jail.

In order to revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). The State bears the burden of proof but need only prove that the defendant committed one violation of the conditions. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). We do not reverse a circuit court's findings on appeal unless they are clearly against the preponderance of the evidence. *Harris v. State*, 98 Ark. App. 264, 254 S.W.3d 789 (2007).

¹Schubert presented his prescriptions as an exhibit.

As an initial matter, the terms of Schubert's suspended sentence did not require him to stop taking his prescribed medications. So Schubert did not and cannot violate a condition that didn't exist. Next, regarding his failure to complete community service, Schubert actually tried to complete his community-service hours, but the probation officer prevented him from doing so. Once the officer required him to pass a drug test before performing community service, Schubert could only stop taking his prescribed drugs or go to jail. This was a troubling choice for Schubert, especially when the probation officer didn't know how stopping the medicine would affect Schubert's health. In fact, the State did not present any medical evidence that Schubert was dissembling or that his medications were unnecessary. On the contrary, the evidence showed that Schubert was disabled and would probably need some special considerations in order to complete his community-service hours.² For example Schubert testified that he couldn't drive and couldn't use power tools.

To sum up, the State presented no proof that Schubert had violated a condition of his suspended sentence. Rather, Schubert showed up to the probation office one month after pleading guilty and was ready and willing to complete his service hours. The probation officer's additional condition—unknown to Schubert—that effectively prevented Schubert from completing his community service does not provide a basis to revoke. We hold that the court's finding that Schubert had violated a condition of his sentence was clearly against the preponderance of the evidence.

²Schubert testified that he thought he would be required to pick up trash because that's what he had done the last time he did community service ten years ago.

Even if the court was correct to find a violation, the violation in this case was not “inexcusable.” *Peterson, supra*. “Forgivable, pardonable, and excusable behavior” does not justify a probation revocation. *See Barbee v. State*, 346 Ark. 185, 189, 56 S.W.3d 370, 372 (2001). Given the uncontroverted evidence about Schubert’s medical history and his medications, it was also clearly against the preponderance of the evidence for the court to find that any failure was inexcusable. We therefore reverse the revocation and dismiss the petition to revoke.

Reversed and dismissed.

HIXSON and GLOVER, JJ., agree.

Ray Hodnett, for appellant.

Dustin McDaniel, Att’y Gen., by: *Kathryn Henry*, Ass’t Att’y Gen., for appellee.