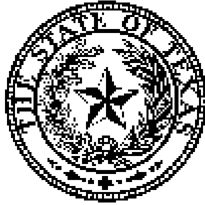
Affirmed and Opinion filed April 20, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00205-CR

DENVER RAY LENNOX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 664,893

O P I N I O N

Appellant, Denver Ray Lennox, appeals the revocation of his probation. He argues that (1) the evidence was insufficient to support the judgment revoking probation, and (2) the sentence assessed constitutes cruel and unusual punishment under the U.S. and Texas Constitutions. We affirm.

Factual Background

Appellant was convicted of aggravated assault and placed on five years probation in 1993. In 1998, the State filed a motion to revoke, alleging, among other things, that he had not complied with the

terms of his probation by failing to (1) secure or maintain employment since October 1996; (2) pay monthly supervision fees dating from January 13, 1994, totaling $765 in arrears; and (3) make payments to reimburse Harris County for compensating his court-appointed attorney, totaling $325 in arrears.

At the hearing, appellant's probation officer, James Rich, testified that appellant had failed to provide proof of employment for the months from October 1996 through August 1998. However, on cross-examination, he admitted that his records showed that appellant had contacted fourteen different employers from August 19th through August 26th of an unspecified year. Rich also testified that as of August 31, 1998, appellant was in arrears of $765 for supervisory fees and $325 for reimbursement of Harris County for paying his lawyer.

The court revoked appellant's probation and assessed five years confinement. In its order, the court stated appellant violated his probation by his failure to secure or maintain employment.

Revocation of Probation

Where the issue is whether the terms of community supervision were violated, the State need only prove its case by a preponderance of the evidence. *See Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App.1993). We review a trial court's decision revoking probation by an abuse of discretion standard. *See Jackson v. State*, 645 S.W.2d 303, 305 (Tex. Crim. App.1983). Proof of any single violation of a condition of probation is sufficient to support a revocation order, thus we need only consider whether the record contains sufficient proof of any one violation. *See Jackson v. State*, 508 S.W.2d 89, 90 (Tex. Crim App. 1974); *Marcum v. State*, 983 S.W.2d 762, 766-67 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd).

For there to be a violation of the requirement to work at suitable employment, the evidence must show that the defendant was able to get a job and failed to do so. *See Steed v. State*, 467 S.W.2d 460, 461 (Tex. Crim. App. 1971); *Dureso v. State,* 988 S.W.2d 448, 450 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). In our case, there was no evidence appellant was able to get work and failed to do so. Rather, the evidence merely proved appellant failed to report on his employment or his efforts to obtain

employment. Therefore, the evidence was insufficient to support the court's finding that appellant violated his probation by failing to secure or maintain employment.

However, even though the court did not have a sufficient basis to revoke on that ground, there was ample evidence that appellant violated the terms of his probation by failing to pay supervisory fees and reimburse the county for his lawyer.[1] Regardless of the reasons given by the trial court for revoking probation, if there is evidence supporting the court's decision, we will not disturb it on appeal. *See Willis v. State,* 2 S.W.3d 397, 399 (Tex. App.–Austin 1999, no pet.); *accord Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App.1988) (if the decision of the trial court on motion to suppress is correct on any theory of law which finds support in the evidence, then the mere fact that the court may have given the wrong reason for its decision will not require a reversal).

Because there was evidence that appellant failed to pay his supervisory fees and reimburse the county as required under his probation, we find the trial court did not abuse its discretion in finding appellant violated the terms of his probation. *See Jackson*, 508 S.W.2d at 90; *Marcum*, 983 S.W.2d at 766-67. We overrule this point of error.

Cruel and Unusual Punishment

Next, appellant argues that the court's sentence of five years imprisonment violated the cruel and unusual punishment clauses of the U.S. and Texas Constitutions. The State counters that appellant did not raise this issue in the trial court, therefore, the issue is waived. We agree. Appellate courts will not consider any error, even those of constitutional nature, that counsel could have called, but did not call, to attention of trial court at the time when such error could have been avoided or corrected by trial court. *See Lee v. State*, 952 S.W.2d 894, 897 (Tex. App.--Dallas 1997, no pet.); *see also* TEX. R. APP. P. 33.1. This point of error is therefore overruled.

---

[1] A defendant's inability to pay is an affirmative defense to a revocation based on the failure to pay supervisory fees and restitution. TEX. CODE CRIM. PROC. ANN., art. 42.12, § 21(c) (Vernon Supp.1999); *See Joseph v. State*, 3 S.W.3d 627 (Tex. App.--Houston [14th Dist.] no pet. h.). Because appellant did not raise inability to pay as a defense, the State was not required to prove his ability to pay.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Chief Justice Murphy, Justices Hudson, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).