

CACR 06-268

In The
ARKANSAS COURT OF APPEALS

MARQUIS BORDERS

Appellant

v.

STATE OF ARKANSAS

Appellee

AN APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
Hon. Berlin C. Jones, *Circuit Judge*
CR 00-923-1; CR 02-02-1

APPELLANT'S ABSTRACT AND OPENING BRIEF AND ADDENDUM

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Informational Statement

I. ANY RELATED OR PRIOR APPEAL (Identify)

None.

II. BASIS OF SUPREME COURT JURISDICTION (see Rule 1-2 (a))

(X) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) ___ Construction of Constitution of Arkansas
- (2) ___ Death penalty, life imprisonment
- (3) ___ Extraordinary writs
- (4) ___ Elections and election procedures
- (5) ___ Discipline of attorneys
- (6) ___ Discipline and disability of judges
- (7) ___ Previous appeal in Supreme Court
- (8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL

- (1) ___ Administrative or regulatory action
- (2) ___ Rule 37
- (3) ___ Rule on Clerk
- (4) ___ Interlocutory appeal
- (5) ___ Usury
- (6) ___ Products liability
- (7) ___ Oil, gas, or mineral rights
- (8) ___ Torts
- (9) ___ Construction of deed or will
- (10) ___ Contract
- (11) X Criminal

(Write a brief statement limited to the space provided describing the case on appeal, and set out the cause of action (i.e., in a civil case, tort, contract, etc., or in a criminal case, the convicted offenses, whether felony or misdemeanor, and the punishment) underlying the judgment from which the appeal is taken.)

This is an appeal from an order that Appellant had violated the terms and conditions of his probation. The court then sentenced Appellant to the underlying charge previously pled, which were Battery in the Second Degree, a D Felony; Theft of Property, a D Felony; Fleeing, a D Felony; and Aggravated Assault, a D Felony. Appellant was sentenced to five years on each of the aforementioned felonies and the court ordered those sentences to run concurrently. Appellant is currently serving a five year sentence in the Arkansas Department of Corrections.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

- appeal presents issue of first impression,
- appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- appeal involves federal constitutional interpretation,
- appeal is of substantial public interest,
- appeal involves significant issue needing clarification or development of the law, or overruling of precedent.
- appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

JURISDICTIONAL STATEMENT

1. This issues of law raised in this appeal are as follows:

THERE ARE NO NON-FRIVOLOUS ISSUES THAT WOULD SUPPORT AN APPEAL IN THIS CASE.

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises no questions of legal significance for jurisdictional purposes.

Patrick J. Benca

POINT RELIED ON FOR APPEAL

I.

THERE ARE NO NON-FRIVOLOUS ISSUES THAT WOULD SUPPORT AN APPEAL IN
THIS CASE.

TABLE OF AUTHORITIES

Cases:

<i>Anders v. California</i> , 386 U.S. 738 (1967)	Arg 1
<i>Hill v. State</i> , 325 Ark. 419, 931 S.W.2d 64 (1996)	Arg 2
<i>Polk v. State</i> , 348 Ark. 446, 73 S.W.3d 609 (2002)	Arg 2
<i>Riddle v. State</i> , 303 Ark. 42, 791 S.W.2d 708 (1990)	Arg 2
<i>White v. State</i> , 47 Ark.App. 127, 886 S.W.2d 867 (1994)	Arg 2

Rule:

Sup. Ct. Rule, 4-3(j)	Arg 1-2
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Abstract

Revocation Hearing

November 15, 2005

(R. 173)

(After all witnesses were sworn, Sharon Reed, a witness for the State was called and she testified as follows:)

Sharon Reed

(R. 173)

My name is Sharon Reed and I work for the Pine Bluff Police Department. I did participate in the search of a residence at 5724 West Seventh back on August the 17th of this year. My involvement in that search was that I had made several controlled purchases from the residence before getting a search warrant signed. We executed a search warrant there.

When we got inside the residence, two people were running down the hallway, which were you and Marquis Borders and Antonio Borders. In the living room area was a Charles Arnold. He was in the living room area. And we located some suspected crack cocaine, because I haven't go the field results back yet. It field tested it. It did test positive. But as far as coming back from the State Crime Lab, we haven't received it back yet. We arrested – when they was found inside the bathroom area, the commode was flushing during the time. Sergeant Zuber had to force entry into the bathroom. We arrested all three of the subjects, took them down, arrested them, done an interview with them. They all refused to make a statement.

The three individuals that were found in the home were Margquis Borders; Antonio Borders and Charles Arnold. I have not received information as to whether Antonio Borders and Marquis Borders are related.

I believe that 5724 West Seventh is a residence home and not an apartment. (R. 174). I was not able to identify the owner of 5724 West Seventh Street. I did not locate anything inside

the residence to identify the possible owner of this residence.

When we made entry inside the residence, I was the third person inside. Marquis and Antonio was running down the hallway, and Charles Arnold was located in the living room area. The first area that I entered was the living room. That is where Mr. Arnold was found. We did a criminal history on Mr. Arnold and his age is 19 years old. Mr. Antonio Borders, after doing a criminal history on him, he's 27 years of age. Mr. Arnold was located in the living room area.

The evidence that I believed was crack cocaine was located in the living room area on one of the end tables. This evidence was not in a package. It was laying out on the table, like a picture, it was laying on top of. I did weigh this particular type of evidence and it weighed 1.2 gross grams. That was the only alleged controlled substance that was found inside of the home.

Mr. Marquis and Mr. Antonio Borders were located in the bathroom. I wasn't the first one inside the bathroom area. (R. 176). Sergeant Zuber was. But when I made it around, he was trying to get both of them in handcuffs, and he was asking for somebody else to come with some handcuffs. The commode was flushing when I did make it around up in there, and Sergeant Zuber was just, you know, trying to get them in custody. Sergeant Zuber did not indicate whether or not he observed anything that was being flushed down the commode. He didn't get to see anything being flushed. There was no remnants left in the toilet after it was flushed.

I did seek the search warrant for this particular type of evidence. I was not able to identify possibly who the controlled purchases were from. During the investigation for the search warrant, as far as when I was making some of controlled buys, they just would say the last name, Borders, but they didn't say first names, last names – I mean – first names to either.

There was nothing else in the home located identifying possibly who the occupant or owner of the home was. It did not appear that the home was being lived in. Had a couch in the

living room area, a few kitchen items. I don't even think it had a bed in the back. There was no bed in the rooms.

Based upon the information that we gathered from that search warrant, Mr. Borders was charged with possession of a controlled substance and also distribution near a certain facility, because there was church located. The proximity of the church building was 295 feet. The name of the particular church St. Andrews A.M.E. Church.

Cross Examination

I was unable to ascertain who the owner of the property was. (R. 178). I indicated that Charles Arnold was in the living room, nearest to the contraband. Charging Mr. Borders was not based upon the fact that I feel like he was in close proximity to the drugs. He was not in close – like I say, all of them was in the living room when we got there. But you saw both of the Borders boys running down the hallway when entry was made inside the residence. So basically, to me, all of them was inside the living room area.

There was no evidence recovered in the bathroom. No paraphernalia or anything like that. We still haven't received the actual test back yet. I did a field test, and I said it weighed 1.2 gross grams.

(The witness was excused and Kristy Allen was called as a witness for the state and she testified as follows:)

Kristy Allen
(R. 180)

My name is Kristy Allen and I'm a parole and probation officer. Marquis Borders is assigned to me. I was not the original officer for Mr. Borders. I came to have the cases for Mr. Borders on July of 2003.

In my review of the file, Mr. Borders was read the rules of probation. There is a signed

copy of the rules by Mr. Borders inside the file. I did file a violation report with the Court in regards to Mr. Borders.

In the month of August of 2005, it was alleged that Mr. Borders did not report. At the time, Mr. Borders was reporting monthly. It as an in-office appointment. There was a certain date that Mr. Borders was to report on. He was supposed to report on August 18th of 2005. Mr. Borders was arrest on August 17, 2005.

After the month of August I did have further contact with Mr. Borders. He reported in September and also reported last month, in October.

In my review of the file, this is not the first violation report to be filed against Mr. Borders. Those past violation reports, included problems with failing to report.

One of the additional violations alleged is that Mr. Borders is also delinquent in his probation service fees and amount owed to the Jefferson County sheriff's office. The \$525 to the sheriff's office and \$630.00 to the probation office is not a present delinquent amount. There has been a payment since the violation was filed. (R. 182). The present delinquent amount is – to Arkansas Department of Community Correction, which is probation and parole, is \$655. His last payment was for \$50, which was on October the 1st. And I'm not sure what his delinquent balance is to the sheriff. But that is what it was as of September 2005, which was \$525.

Mr. Borders was ordered to pay \$35 per month to the Jefferson County sheriff as well as the \$25 per month probation service fee. Before October, the last payments, there were other payments. There was a \$75 payment in July and a \$25 payment in May. He paid \$50 in April of 2005, \$25 in March of 2005. Before that, it goes back into 2003.

To my knowledge during this period of time before Mr. Borders was arrested and his violation report was filed, he was working with Lewis Construction, doing, like, pickup work,

part-time work, but nothing full-time.

I don't have how many hours of community service Mr. Borders completed. I'm not sure how many hours he has completed. At the time I filed the report, I stated he had failed to complete the 120 hours. My information would be accurate based upon the date of the violation report. He hasn't completed the 120 hours. I'm not sure as to how many he has completed. I don't believe that he has worked any since the violation report has been filed. At that time of filing the violation report, I indicated that he had failed to complete the 120 hours. Mr. Borders never indicated to me any reason why he was unable to complete the community service. I did counsel Mr. Borders about the community service.

After Mr. Borders was released from jail earlier this year, he did come in, and he began working community service around April. And after that, he just kind of fell off a little bit. He worked in April, and the last time he worked his community service was on June the 14th, 2005. (R. 184). So he worked in April, some in May, and half of June. June 14th was the last day that he worked.

[Q] To your knowledge did Mr. Borders give you any reason as to why he stopped completing the community service?

[A] That was during the time when he was working with Lewis Construction. He was going to work then.

The reason Mr. Borders indicated to me he was unable to do community service was because he was employed at Lewis Construction. I did not verify any of that information. I didn't call and verify.

Mr. Borders attended GED classes sporadically from time to time. But he didn't attend long enough to complete. I did attempt to counsel Mr. Borders with regards to the GED. After I

would speak with him, he would attend a few classes. To my knowledge there was no reason that would prevent Mr. Borders from completing the GED requirement after that.

During this period of time, Mr. Borders did not ever indicate that he had issues or problems with drugs. He was drug tested during this time. Mr. Borders was drug tested in May and again in July, and he tested negative for marijuana, cocaine, and methamphetamine. He was tested. Those three were not found. They were negative.

Since the violation report has been filed, Mr. Borders has reported. He was well aware of the violation. He has not made any attempts with regards to the GED and community service.

Cross Examination

He has made attempts to complete his GED and he just hasn't completed it. (R. 186). Since the violation has been filed, he has not made an attempt to complete his GED.

I did not confirm that he was, in fact, working and that possibly would have been a conflict with the community service hours that he worked or owed. The last time that he has done some community service work was June 14th. I don't know what his remaining balance is. He would have 120 hours. I don't not keep a record of how many hours he's performed and what he owes. He's worked a few times, so I'm willing just to guess that he's worked at least half of it.

He's tested negative on all of his drug screens.

While under my supervision, Mr. Borders pretty much reports as instructed. He's been under my supervision since July of 2003. During that period of time, he has attended regularly.

(The State rested, and the Defendant was called where he testified as follows:)

Marquis Borders
(R. 188)

I do realize that I was charged with possession of a controlled substance with intent to

deliver. I have heard the explanation of the officer about searching the premises, and in the premises was a Charles Arnold, me, and Antonio Borders. Antonio is my brother. I did hear the officer testify.

I do not know anything personally about any drugs, crack cocaine, or any type of substance like that being in the home while I was there. I had probably been there about an hour on this particular search warrant being executed. I didn't see anything like that while I was there. I did not use drugs while I was there. I did not participate in trying to bag it up or put it into a situation where I could sell it.

When entry was forced, I was coming out the bathroom. I was already coming back up the hallway when they came in. I deny that I was running down the hallway when they came in the front door. My brother was in the bathroom when the front door or the entry was forced into the home. (R. 190). I don't know whether or not he had flushed anything other than if he was using the bathroom in the normal circumstances flushed any kind of contraband down the toilet.

I do not use drugs. My testimony is that I knew nothing about drug and did not see any drugs. That was Mr. Arnold's brother's house. Both of them are my cousins. The owner of the house is my cousin. The owner of the house is Antonio Dixon. I understand that Mr. Dixon was not present when this took place. Charles Arnold is Antonio Dixon's brother. Both of them are my cousins. I came to the home by myself. When I got there, my brother was there. Mr. Arnold was there. Mr. Dixon was not there.

My probation officer testified that I have been appearing regularly for assigned meetings with probation officers. She tested me a number of times, and I have always tested negative. (R. 192).

I was really working is why I have not completed my community service and my GED

courses. I was working. I was working for Mr. Lenix Lewis. I am working there now. I have worked for him for about two years. I do construction work.

I work with Lenix Construction off and on. Sometime – most of the time he just stop by the house and come get me or he let me know the night before, you know, he need me in the morning. I really can't say how much work I'm getting. Last week I worked three days. It weather related to some degree. We work on the inside of houses, outside of houses, and stuff like that. Probably rehab work. I've worked for him for about three years. He just pays me cash money.

I worked regularly this summer. (R. 194). I was working more in the summer than I am now. I did notify my probation office that it might be a reason why I couldn't complete my GED or my community service. I talked to Ms. Albright about it.

Cross Examination

Mr. Dixon has been living at this home about seven or eight months. I don't know for sure though. I visited him every now and then. Probably maybe once or twice a week. I was not aware that drugs were being sold out of his home.

When the police came me and my brother were not in the bathroom. I was coming up the hallway. I was coming out the back room. He was coming out of the bathroom. I didn't say I was coming out of the bathroom. I said, out the back room. I was coming out of the back room, and my brother was in the bathroom. The officers were mistaken when they said by me and my brother were in the bathroom. I can't remember why I was in the backroom. (R. 196).

There was a couch in the living room. Beside this couch was an end table. I was in the living room. I was seated on the couch in the living room. During that time I was there, I never saw any controlled substances in the house.

I was probably making \$40 to \$50 to \$75 a day working at Lewis Construction. I would make an average of \$60.00 a day at Lewis Construction.

I'm presently living with my mother. I just help her pay her bills. I've worked with Lewis for approximately two years. During the other parts of the week, two days or so, I am able to then complete my community service and GED sometime. (R. 198) It's just Monday through Wednesday, I think, or Monday through Thursday.

I'm just about through with my GED and my community service hours. I know I have about 28 hours of community service left. I know that because Ms. Albright told me.

(The Defense rested and the following arguments were made:)

MS. MANNING: Your Honor, Mr. Marquis Borders wants to manage to slide by on his probation. This is not the first time that a revocation matter has been filed against Mr. Borders. He's had the opportunity to bring himself into compliance and to show that he wants to do right by this court and uphold his obligations. And Mr. Borders has not indicated any of that by his actions. He wants to sporadically report when he wants to; sporadically do his community service and complete his GED at his own pace and time. There has been nothing preventing Mr. Borders, from his own testimony, from completing all of this. He has been on probation since approximately 2001, and it has taken Mr. Borders this amount of time to even accomplish—and manage to accomplish even part of that. The behavior of Mr. Borders, in addition, with regards to the technical violations and with regard to the new charge.

The officer testified that upon entering this residence they observed both Mr. Borders run into the bathroom, that he was not coming out of the back room, and that when they managed to gain entrance into the bathroom, they were not allowed into the bathroom. When they managed to gain entrance, they were flushing something down the toilet. This incriminating behavior just

doesn't signify that Mr. Borders just happened to be merely present at this house. It incriminates him and shows that he was aware that there was contraband and controlled substance in this house, and therefore, we would ask the Court to revoke him to the Arkansas Department of Correction.

THE COURT: Mr. Bynum.

MR. BYNUM: May it please the Court, your Honor. My understanding from the testimony of the probation officer that other than Mr. Borders not completing his community service—and she wasn't entirely certain how much. My Client testified that he only has 28 hours left. And the fact that he has not completed his GED course which in fact he has started and attended— Other than that he as reported regularly for the past two years. The probation officer testified that she has been his probation officer since 2003, and he has never flunked a drug test. While there are some things that he could have done better on, that's certainly a lot better than a lot of people we deal with here that aren't revoked because of those of violations of this probation.

As to the new charges, you Honor, all I can testify is that my client denies that he had the cocaine, possessed it, controlled it, or in any way tried to conceal it. I think that those issues are such that the Court is just going to have to determine whether or not that is sufficient with what I consider to be his over-all generally favorable behavior on his probation. Whether or not that is sufficient to send him to the Department of Correction. I would ask the Court not to do that. I would ask the Court to continue him on probation and allow the defendant to, in fact, defend himself in an actual trial on the merits of the new charge. Thank you, your Honor.

THE COURT: State.

MS. MANNING: No rebuttal, your Honor.

THE COURT: You may go to the rostrum, Mr. Borders. It would appear, now, Case 03-920-I'm sorry-2000-923, you were placed on probation on or about June 28, '01, with 120 hours community services to be done and to complete you GED. Here we are in '05, and you're telling me you've got 28 hours to do, and you've been working two or three days a week. (R. 202). Don't know what you're been trying to do to get your GED completed nor to get your community services hours done. As I was going through the file, I read several violation petitions that have been filed against you, and you have been continued and given a chance, and all of them included GED and community service hours work. You seem to be paying your bill pretty well and seen to be reporting quite well, to be down right truthful about it, to that. They say you were read your probation rights, and inclusive therein should be you should not habitually hang around places where the controlled substance law is broken and/or where the alcohol laws are broken. And you say you visited that home two or three times a week, and they are making controlled substance buys, and you are not aware of what is going on. The further, they come into the premises and they find crack cocaine laying in plain view on top of a table. There is no type of a wrapper, and you were there in the house, and had been there for approximately an hour, and you haven't seen it. Makes the court believe that you are extremely naive or else you think the Court is extremely naive, to that, or you are just down right being deceptive and untruthful with the court. Can't read minds; don't know which one, but if you are sitting there - - they described it as being limited furniture in the premises and not beds to even indicate that even anybody lived there, as such - - makes it rather unique that no one lived there they would have utilities on, and that they had water on to flush it. Truly troubles the Court and that you were there and even that a name of which you were the same last name, but not your first name was identified by the person who was making a controlled buy as a person named Borders. And you say you were there two or three

days a week, and the controlled buy is being made by someone named Borders although on the date of the search you and your brother were there, both having the last name Borders and such. We believe some of the time you were spending there could have been used doing your community service, could have been used getting your GED, and could have been used finding gainful employment since you're only getting anywhere from \$35 to \$75 a day, two or three days a week. It would appear that there is a great likelihood that you very well were involved in distributing illegal drugs. The Court is not making a finding to that effect. The Court is fining, however, that you didn't have any business in that house whereby drugs were regularly being sold, and you were on probation. That you were regularly there. You were there, and based upon the fact that you were sitting in the living room and could not see the crack cocaine lying on the table, you don't have the wherewithal to whereby you should be there.

The Court finds that you have violated the terms and conditions of your probation on four D's. The Court would revoke your probation and sentence you to the Department of Corrections for a period of five years on each count; said terms are to run concurrent with each other. (R. 204)

Statement of the Case

On September 27, 2000, Appellant was charged, in case No. CR 00-923-1, with Battery in the Second Degree, a D Felony and Theft of Property, a C Felony. (R. 3, Add. 1). Appellant entered into a negotiated plea where the battery was reduced to Battery in the Third Degree, a misdemeanor, and Theft of Property, a C Felony. (R. 25, Add. 5). In exchange for that plea, Appellant was placed on one year probation. Appellant signed “[c]onditions of [s]uspended [s]entence or [p]robation, which provided (*inter alia*) that he was to pay supervision fees of \$25.00 per month and to complete 120 hours of community service. (R. 28, Add. 28)

Approximately five (5) months later, a petition to revoke probation was filed on behalf of the State. (R. 31, Add. 11). In the attached violation report, it was alleged that Appellant was charged with the offense of Fleeing and Aggravated Assault in case No. CR 2002-2-1. (R. 129, Add. 3) An additional violations were that Appellant failed to cooperate regarding his 120 hours of community service and failure to pay probation and other fees. (R. 32, Add. 12). Appellant entered a plea of guilty to the charges in CR 2002-2-1 and admitted to the petition for revocation filed in the original criminal charge. In exchange for that plea, the court ordered Appellant to be placed on four (4) years probation. (R. 41, Add. 16).

On September 19, 2003, the State filed a petition to revoke in both cases. (R. 44, Add. 19). This revocation was amended on December 11, 2003 alleging additional charges; not paying supervision and Sheriff’s fees; and not complying with community service requirements; and not completing GED classes or his ADC Tour. (R. 53, Add. 22). On April 9, 2004, Appellant entered into a negotiated plea and put back on probation for four (4) years. He was ordered, as a condition of probation, to complete 120 hours of community service; obtain a GED; and pay Sheriff and probation fees. (R. 67, Add. 30).

On October 10, 2005, the most recent revocation petition was filed. (R. 103, Add. 31) ¹.

The facts of the violation provided:

On or about 8/17/05, Mr. Borders was arrested in Jefferson County and charged with Possession of a Controlled Substance CR 05-0805-1. Mr. Borders filed to report for the month of August 2005. Mr. Borders is currently \$525.00 delinquent in Sheriff's Fees and \$630.00 delinquent in Probation Service Fees totaling \$1155.00. Mr. Borders failed to complete 120 hours of community service work. Mr. Borders failed to obtain a GED. (R. 105, Add. 33).

A hearing was held on November 15, 2005, and the court found that Appellant was in violation of his conditions. (R. 202, Ab 13). Based upon that finding, Appellant was sentenced to five (5) years in the Arkansas Department of Corrections. *Id.*

A notice of appeal was timely filed on December 19, 2005. (R. 127, Add. 43). After a review of the record, Counsel can find no error. As there appears to be no error from the court's ruling, this appeal is based upon the principles of *Anders v. California*, 386 U.S. 738 (1967); *Matthews v. State*, 332 Ark. 661, 966 S.W.2d 888 (1998)(per curiam).

¹ Other Petitions to Revoke were filed, but it appears based upon the record that they were either dismissed and/or duplicative.

Argument

I.

THERE ARE NO NON-FRIVOLOUS ISSUES THAT WOULD SUPPORT AN APPEAL IN THIS CASE

In compliance with the directive in *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j)(1) of the Rules of the Supreme Court and Court of Appeals, counsel for the Appellant has thoroughly examined the record of this proceeding but found no error that would support an appeal. As required by Rule 4-3(j), the reasons the adverse rulings provide no meritorious grounds for appeal will be discussed in this brief.

Counsel has made a thorough review of the records addressing the petition for revocation. No objections were raised by Appellant during the hearing, and the only apparent issue raised is whether there was sufficient evidence to revoke. Counsel believes there was sufficient evidence to support the trial courts finding.

The most recent petition for revocation alleged:

On or about 8/17/05, Mr. Borders was arrested in Jefferson County and charged with Possession of a Controlled Substance CR 05-0805-1. Mr. Borders failed to report for the month of August 2005. Mr. Borders is currently \$525.00 delinquent in Sheriff's Fees and \$630.00 delinquent in Probation Service Fees totaling \$1155.00. Mr. Borders failed to complete 120 hours of community service work. Mr. Borders failed to obtain a GED. (R. 105, Add. 33).

In support of the allegations, the State elicited testimony from Sharon Reed who works for the Pine Bluff Police Department. (R. 173, Ab 1). She described a search warrant executed at a home that was occupied by Appellant and others. (R. 174, Ab 1). Reed testified that after she gained entry she witnessed Appellant running down the hallway. According to Reed, Appellant was located in a bathroom where the toilet had recently been flushed. (R. 176, Ab 2). No contraband was located in the bathroom. (R. 177, Ab 2). A search of the living room area of the resi-

dence revealed suspected crack cocaine that field tested positive for cocaine. (R. 174, Ab 1). No lab report confirming the substance as crack cocaine was introduced. (R. 173, Ab 1).

In further support of petition, the State called Kristy Allen, an officer with probation and parole. (R. 180, Ab 4). She testified that Appellant read and signed the rules of probation, and filed a probation violation report. (R. 181, Ab 4). At the time the violation report was filed, Appellant was in arrears of \$525.00 to the Sheriff's Office and \$630.00 in probation fees. (R. 182, Ab 4). She acknowledged that after the violation was reported that Appellant made up the delinquent amount. (R. 182, Ab 4). She also testified that Appellant had not completed community service (R. 184, Ab 6). Lastly, that Appellant failed to work toward his GED, as ordered by the court. (R. 186, Ab 6).

Appellant's testimony denied the factual allegations made by Reed regarding the execution of the search warrant. (R. 190, Ab 7-8).² He acknowledged that his community service was short by 28 hours (R. 199, Ab 9), and that he failed to obtain his GED. (R. 199, Ab 9). No proof was offered regarding the fees at the time the petition for revocation was filed.

Appellant has no arguable claim to raise before the court. First, there was testimony that crack cocaine was located in an area jointly occupied by Appellant and others. The State established constructive possession. Constructive possession may be established by circumstantial evidence. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). The circumstantial evidence provided by Reed was that Appellant was found to be running down the hall. *See Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996); *Riddle v. State*, 303 Ark. 42, 791 S.W.2d 708 (1990)(flight is

² A fact-finder may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on the appellate courts absent an abuse of discretion. *White v. State*, 47 Ark.App. 127, 886 S.W.2d 867 (1994).

circumstantial evidence of guilt). That allegation in addition to a flushing toilet is also circumstantial evidence of guilt.

Second, even if the Court were to find that Appellant did not constructively possess the cocaine found at the residence, there is no dispute about his delinquent fees at the time of petition for revocation being filed. Moreover, there is no dispute about his failure to complete the community service or his GED.

The trial court did not err in its ruling finding that there was sufficient evidence to support the finding that Appellant violated the conditions of his probation.

CONCLUSION

Having carefully reviewed the record for prejudicial error, or errors that could support the appeal, and having found none, it is submitted that the Appellant's conviction should be affirmed.

Respectfully,

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CERTIFICATE OF SERVICE

I certify that a copy was placed in the Attorney General's box at the Supreme Court Clerk's Office, and was served by first class mail on Circuit Judge Berlin Jones on May 26, 2006.

Patrick J. Benca.

ADDENDUM

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