NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-263

	Opinion Delivered September 17, 2008
WILLIAM M. CHAPPLE APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-99-472]
V.	HONORABLE JAMES O. COX JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant, William M. Chapple, argues that the circuit court erred in revoking his suspended sentence absent evidence of the terms and conditions of the suspended sentence, absent evidence that he received a written copy of those terms and conditions, and absent evidence that the violations were committed after the commencement of the period of the suspended sentence. We affirm.

In 2000, appellant pleaded guilty to residential burglary and conspiracy to commit aggravated robbery, for which he was sentenced to nine years' imprisonment to be followed by a suspended imposition of sentence of eleven years. In 2007, the State filed a petition to revoke, alleging that on September 20, 2005, he was convicted in federal court of two counts of mailing threatening communications. At the hearing, the State introduced a judgment from federal court showing that the two counts of mailing threatening communications were committed on October 1, 2004, and October 4, 2004. The circuit court revoked his

suspended sentence and sentenced him to eight years' imprisonment.

On appeal from that revocation, appellant asserts that the evidence is insufficient to support the revocation because the State failed to introduce into evidence the terms and conditions of his suspended sentence. This, however, is a procedural objection, not a challenge to the sufficiency of the evidence, and because appellant did not raise this objection before the circuit court, it was waived. *Whitener v. State*, 96 Ark. App. 354, 241 S.W.3d 779 (2006) (holding that defendant's challenge to the sufficiency of the evidence based on the State's failure to introduce into evidence the terms and conditions of her probation was instead a procedural matter waived by her failure to object at revocation hearing). Moreover, prior to revoking appellant's suspended sentence, the court—without objection from appellant—referred to appellant's terms and conditions that were in the court's files and noted that appellant was prohibited from violating any federal law. Thus, the court had before it evidence of the terms and conditions of appellant's suspended sentence.[1]

Appellant further asserts that the evidence is insufficient because the State failed to present evidence that the terms and conditions of his suspended sentence were given to him in writing. This objection, however, also is procedural, and because it was not made before the circuit court, it was waived. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004) (holding that defendant's challenge to the sufficiency of the evidence based on the State's

[1] Appellant acknowledges that *Whitener* is controlling but suggests that we overrule the case. He does not, however, present any arguments that were not addressed in either *Whitener* or in *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004), so we decline his request.

failure to introduce into evidence proof that the written list of probationary conditions was given to him was a procedural matter waived by his failure to object at the revocation hearing).

For his next point, appellant notes that he was initially sentenced to a term of imprisonment to be followed by a suspended sentence. Citing our revocation statutes, he observes that "[i]f a court sentences a defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment." Ark. Code Ann. § 5-4-307(c) (Repl. 2006). But he further notes that there was no evidence presented by the State regarding when he was released from prison, and he urges that the court erred in revoking absent evidence that he had been released from prison and therefore subject to the terms and conditions of his suspended sentence.

Appellant's challenge is to the jurisdiction of the circuit court to revoke, and the circuit court may not revoke a suspended sentence prior to the commencement of the period of suspension. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003). The State, however, "is not required to prove jurisdiction...unless evidence is admitted that affirmatively shows that the court lacks jurisdiction." Ark. Code Ann. § 5-1-111(b) (Repl. 2006); *see Duncan v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 3, 2008). Here the record does not contain affirmative evidence addressing when appellant was set at liberty. It is appellant's burden to produce a record that demonstrates error. *See Rameriz v. State*, 91 Ark. App. 271, 209 S.W.3d 457 (2005). Because appellant failed to produce a record showing that he had not been

lawfully set at liberty at the time he violated a condition of his suspended sentence, appellant failed in his burden of demonstrating error. *See id*. (holding that defendant failed to demonstrate error as he did not produce a record showing when he was released from prison in support of his claim that his suspended sentence had expired by the time the revocation hearing was held). Accordingly, we affirm.

Affirmed.

HUNT, J., agrees.

GRIFFEN, J., concurs.

GRIFFEN, J., concurring. For the reasons stated in my dissenting opinion in *Whitener v. State*, 96 Ark. App. 354, 241 S.W.3d 779 (2006), I concur in the result announced by the majority opinion. In doing so, I reaffirm my conviction that *Whitener*, relied on to affirm the trial court in the present appeal, was wrongly decided and should be overruled.