Cite as 2023 Ark. App. 87

ARKANSAS COURT OF APPEALS

DIVISIONS III & IV

No. CR-22-24

	Opinion Delivered February 15, 2023
XAVIER JUWON LACEY APPELLANT	APPEAL FROM THE MILLER COUNTY CIRCUIT COURT [NO. 46CR-20-669]
V.	HONORABLE BRENT HALTOM, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; MOTION TO WITHDRAW GRANTED

WAYMOND M. BROWN, Judge

This no-merit appeal stems from the Miller County Circuit Court's revocation of appellant Xavier Lacey's probation. Pursuant to *Anders v. California*[1] and Arkansas Supreme Court Rule 4-3(b)(1),[2] appellant's counsel has filed a motion to withdraw and a no-merit brief stating there are no meritorious grounds to support an appeal. The clerk of this court mailed a certified copy of counsel's motion and brief to appellant, informing him of his right to file pro se points for reversal; he elected to do so. From our review of the record and the brief presented, we find that counsel's brief is in compliance with the directives of *Anders* and the requirements of Rule 4-3 and that there are no issues of arguable merit to support

[1]386 U.S. 738 (1967).

[2](2021).

an appeal. Accordingly, we affirm the revocation of appellant's probation and grant counsel's motion to withdraw.

On December 8, 2020, in case No. 46CR-20-669, appellant pleaded guilty to theft of property (firearm), a Class D felony.[3] He was sentenced to five years' probation subject to certain terms and conditions that were set out in writing and signed by appellant and assessed certain costs, fees, and fines. On March 22, 2021, the State filed a petition to revoke alleging appellant had violated the conditions of his probation by committing a new criminal offense (aggravated assault on a family or household member and fleeing); failing to abstain from the use of a controlled substance (tested positive for marijuana); failing to report to the supervising officer as directed (did not report as directed on January 28, 2021); failing to pay court-ordered financial obligations (appellant was ordered to pay a booking fee of $40, court costs of $150, a $1,000 fine, and a $100 bailiff fee; however, no payment has been made); and failing to pay the suspended-sentence or probation-supervision fee as ordered by the court (no payment has been made).

A revocation hearing was held on September 16, 2021. The circuit court found that appellant had violated his probation by committing a new offense (fleeing); testing positive for marijuana and admitting his possession and use thereof; failing to report; and failing to make court-ordered payments. As a result, the circuit court revoked appellant's probation

[3]On September 21, 2020, in case No. 46CR-20-287, appellant also pleaded guilty to one count of breaking or entering and four counts of theft of property (credit or debit card) and was sentenced to an aggregate term of six years' probation. Although appellant's probation was revoked on both cases in a single revocation hearing, the revocation in case No. 46CR-20-287 is addressed in a separate appeal. *See Lacey v. State*, 2023 Ark. App. 85.

and sentenced him to six years' imprisonment in the Arkansas Department of Correction.[4] This no-merit appeal followed.

In considering a no-merit brief, we must determine whether, after a full examination of the proceedings, there is any nonfrivolous basis for an appeal.[5] The test is not whether there is any reversible error but whether an appeal would be wholly frivolous.[6] Counsel's brief must contain a list of all rulings adverse to the defendant made by the circuit 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.[7] Here, counsel's brief addresses the adverse rulings and the circuit court's decision to revoke appellant's probation. Counsel asserts that these are the only rulings adverse to appellant, none of which provide meritorious grounds for appeal. We agree.

Probation may be revoked upon a finding by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the probation.[8] The State bears the burden of proof but need only prove that the defendant committed one violation of the conditions.[9] We will not reverse a circuit court's revocation decision unless

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[4]This term of incarceration was ordered to run consecutively to the term of incarceration simultaneously imposed in case No. 46CR-20-287.

[5]*Bohanon v. State*, 2020 Ark. App. 22, 594 S.W.3d 92.

[6]*Id.*

[7]*Id.*

[8]*Leach v. State*, 2015 Ark. App. 17, 453 S.W.3d 690.

[9]*Id.*

it is clearly against the preponderance of the evidence.[10] Here, the circuit court found that appellant had violated the conditions of his probation by committing a new criminal offense. A certified copy of appellant's guilty plea to the misdemeanor offense of fleeing was admitted without objection. Appellant also admitted that he had been arrested for fleeing from officers and further testified that he fled on February 22, 2021, because he was on probation. A preponderance of the evidence supports the circuit court's finding that appellant violated the condition of his probation by committing a new criminal offense and failing to live a law-abiding life. Additionally, there was evidence that appellant failed to pay his court-ordered financial obligations, failed to report to his supervising officer, and tested positive for marijuana, any of which, standing alone, is a sufficient basis to sustain the revocation of appellant's probation.

The circuit court made additional adverse rulings during the revocation hearing in addition to the revocation itself. First, the circuit court overruled appellant's objection to Officer Josh Sturtevant's testimony regarding what occurred when he arrived at the address to which he was dispatched on February 22, 2021, which subsequently resulted in appellant's arrest on a misdemeanor fleeing charge. Appellant objected to the testimony, stating, "I believe this Detective is going to go into the aggravated assault charge. I believe that [appellant] has a right to confront his accuser [Brandi King] on that one . . . ." The State countered that the purpose was to elicit testimony regarding the fleeing charge and not the aggravated assault. The circuit court overruled the objection and allowed the testimony.

[10] *Id.*

Officer Sturtevant testified that, upon his arrival, he witnessed appellant run into the woods. He continued that appellant later circled back around and was spotted standing at the end of the driveway behind a car. Officer Sturtevant stated that appellant was taken into custody on the misdemeanor fleeing and a felony. When asked the basis for the felony arrest, Officer Sturtevant testified that it was in response to "the statement given by Ms. King over the telephone because she had already left the scene by the time we had taken him into custody." Appellant renewed his objection to testimony regarding any statement made by King. The State replied that it had not asked for a statement from King but only wanted testimony from Officer Sturtevant regarding the basis for appellant's arrest. Again, the circuit court overruled the objection.

Hearsay is defined by Arkansas Rule of Evidence 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." An out-of-court statement is not hearsay, however, if it is offered to show the basis of an officer's actions.[11] We review evidentiary rulings under an abuse-of-discretion standard and will not reverse a circuit court's ruling on the introduction of evidence absent an abuse of that discretion and a showing of prejudice.[12] On appeal, counsel explained that the officer was acting in response to a police dispatch from a citizen complaint that implicated appellant in an assault. On the basis of that information, officers sought out appellant and subsequently arrested him for fleeing; the charges were later amended to include the felony aggravated assault. Counsel explains that

[11]*Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

[12]*Fannin v. State*, 2021 Ark. App. 304, 624 S.W.3d 727.

the actions of the officers were based on the information received from the police dispatch. Therefore, Officer Sturtevant's testimony was not offered for the truth of the matter asserted but to establish the basis for the officers' actions. Counsel has adequately explained why these rulings provide no meritorious point for appeal.

Second, in closing, appellant's counsel asked the court "to be lenient on [appellant] as he was making an effort if not perfect – – or not up to the ideal probationer." Sentencing in Arkansas is entirely a matter of statute, and no sentence shall be imposed other than as prescribed by statute.[13] When the sentence given is within the maximum prescribed by law, the sentence is not illegal because the court has the authority to impose it.[14] This court has held that the circuit court has discretion to set punishment within the statutory range of punishment provided for a particular crime.[15] The decision to sentence a defendant to concurrent or consecutive sentences for multiple convictions is governed by Arkansas Code Annotated section 5-4-403(a).[16] It is within the discretion of the circuit court to decide whether a defendant's sentences run concurrently or consecutively, and the appellant bears the heavy burden to establish that the circuit court abused or failed to exercise that discretion.[17]

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[13] *Lenard v. State*, 2014 Ark. 478, 522 S.W.3d 118.

[14] *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909.

[15] *Whitmore v. State*, 2018 Ark. App. 44, 539 S.W.3d 596.

[16] (Repl. 2013).

[17] *Throneberry v. State*, 2009 Ark. 507, 342 S.W.3d 269.

This appeal is from the revocation of probation; appellant's underlying conviction was for theft of property (firearm), a Class D felony. The maximum sentence for a Class D felony shall not exceed six years.[18] Upon revocation, the circuit court sentenced appellant to six years' incarceration to run consecutively with the sentences imposed in case No. 46CR-20-287. This sentence did not exceed the statutory maximum, and the circuit court was within its authority and discretion to impose the sentence. Consequently, appellant's request for leniency regarding sentencing provides no meritorious ground for reversal.

Pursuant to Arkansas Supreme Court Rule 4-3(b)(2),[19] appellant filed pro se points for reversal. He contends that if his new felony charge for aggravated assault had been dismissed prior to the revocation hearing instead of after, his probation would not have been revoked. Specifically, he claims, "I would be free if it was no charge [because] it was no violation." Appellant acknowledges that while he did also fail a drug test, it amounted to only a minor violation, and his probation would have been reinstated. Appellant requests to "give all of [his] time back and take the 3 year offer" that he claims was initially offered to him for violating the terms of his probation. Alternatively, he requests that his prison sentence be reduced by half. Appellant's pro se points provide no grounds for reversal because they are either not preserved for appellate review or lack merit.

Having examined the entire record, we hold that counsel has complied with *Anders* and Rule 4–3(b) and that there is no merit to an appeal.

Affirmed; motion to withdraw granted.

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[18]Ark. Code Ann. § 5-4-401(a)(5) (Repl. 2013).

[19](2021).

ABRAMSON, KLAPPENBACH, and HIXSON, JJ., agree.

HARRISON, C.J., and VIRDEN, J., dissent.

BRANDON J. HARRISON, Chief Judge, dissenting. I dissent from the decision to grant counsel's motion to withdraw for the same reasons I dissented today in *Stanley v. State*, 2023 Ark. App. 89, as this record presents the same nonfrivolous illegal-sentence issues.

VIRDEN, J., joins.

Phillip A. McGough, P.A., by: *Phillip A. McGough*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.