ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION I

CACR 06-350

December 6, 2006

MICHAEL JEROME BANKS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
[NO. CR02-622]

HONORABLE GRAHAM PARTLOW, JR., CIRCUIT JUDGE

AFFIRMED

On November 4, 2002, appellant pled guilty in the Circuit Court of Crittenden County, to aggravated assault, and he was sentenced to forty-eight months of probation. The State filed an amended petition for revocation on October 28, 2005, alleging that appellant violated his probation by his failure to pay fines, costs and fees, failure to report, failure to pay probation fees, failure to notify the sheriff and his probation officer of his current address and employment, being a felon in possession of a firearm, associating with other felons, committing terroristic threatening, resisting arrest, and by being in possession of and using marijuana. A revocation hearing was held on December 6, 2005, and the trial court found that

all of the grounds for revocation alleged in the amended petition for revocation had been proven by the State. The court sentenced appellant to six years in the Arkansas Department of Correction. Counsel for appellant has filed a no-merit brief and a motion to be permitted to withdraw as counsel. Appellant was notified of his counsel's brief and motion, and he has elected to file pro se points for reversal.

In the brief and motion filed by appellant's counsel, we are urged to hold that an appeal of the revocation would be wholly frivolous. The procedure for the filing of a no-merit brief is governed by *Anders v. California*, 386 U.S.738 (1967), and Rule 4-3(j) of the Rules of the Supreme Court and Court of Appeals. A no-merit brief must contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions, and requests made by either party with an explanation concerning why each adverse ruling is not a meritorious ground for reversal. *Adaway v. State*, 62 Ark. App. 272, 972 S.W.2d 257 (1998). The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be "wholly frivolous." *Anders*, 386 U.S. at 744. Pursuant to *Anders*, the appellate court is also required to make a determination "after a full examination of all the proceedings," whether the case is wholly frivolous.

There were only two rulings adverse to appellant at the hearing. The first was an overruled hearsay objection, and the second was the court's decision to revoke appellant's probation. During the prosecution's direct examination of appellant's probation officer, Michael Walker, Mr. Walker testified that when he attempted to visit appellant's home, he

was advised by appellant's niece that appellant did not reside at that address. Counsel for appellant made a hearsay objection that was overruled by the court. In his brief, counsel for appellant correctly explains that the Arkansas Rules of Evidence do not apply in revocation proceedings. Ark. R. Evid. 1101(b)(3)(2006); *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990); Ark. R. Evid. 1101(b)(3)(2006).

To revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d)(Supp. 2003). The State 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). When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Id.*

In addition to his testimony regarding his attempt to visit appellant's home, appellant's probation officer testified that appellant was not current on his probation fees, that appellant failed to report on three occasions, and that appellant tested positive for cocaine and marijuana on February 24, 2005. Clearly, there was evidence that appellant committed more than one violation of the terms of his probation, so the trial court did not err when it revoked appellant's probation.

Appellant's pro se points are as follows:

1. Mr. Butler Bernard didn't raise any issue to object. The claim of insufficient evidence was barr [sic] by the defendant failure to state specific ground in his direct verdict motion where defense counsel stated only that his motion was based on a lack of evidence. Bowen v. State, 342 Ark. 581, 30 S.W.3d 86 (2000).

2. Failure to pay fine and costs and fees, me and my probation officer we had talk about my fee, and fine and he told me to have them pay by the time I see him again in which I suppose to have seen him Oct 31 of 2005.
When an offender on probation defaults in the payment of supervision fees or any installment thereof, the court may require the offender to show cause why he would not be imprisoned for nonpayment. A.C.A. 16-93-104(2006).

3. My court appointed lawyer didn't raise any issue, or object or speak in my behalf. He didn't never raise and issue that I was never tested positive for the use of marijuana. It doesn't show on record that I tested positive for the drug. My probation officer Mr. Michael Walker signed me up for the 12 step program, and which I was enrolled to a Mrs. Sheila Trotter.

4. The charges of firearm as a felon, Terroristic Threatening, or resisting arrest. I don't have any of those charges, all of them are just hear say charges of the police officer. In which my court appointed lawyer didn't point out, if you read the testimony of officer Futch, officer Wilson, and McCall, in my transcript. Don't nobody state the truth but officer McCall. I feel that I've challenge all nine of the original allegation contained in the petition for revocation of probation.

5. And the fifty point for reversal or modify my sentence. Criminal procedure - sentencing- second sentence cannot be imposed at revocation of probation hearing –Ark. Stat. Ann. § 43-2331 (Repl.1977), adopted by the General Assembly in 1973 and effective at the date of the commission of the crime in issue provided that the court could accept the plea of guilty, suspend imposition of sentence and place the defendant on probation, futher, the court had the authority to revoke probation, and require a probationer to serve the remainder of a sentence imposed, Ark. Stat. Ann 43-2332 (Rep. 1977); however, a second sentence could not be imposed at a revocation hearing.

Appellant's first and third points amount to a claim of ineffective assistance of counsel. Appellant did not raise this issue below. It has long been held that the appellate court will not consider arguments raised for the first time on appeal. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

In his second and fourth points, appellant challenges witness testimony. In point two he asserts that his probation officer advised him to have his fees paid by the end of the month. When questioned about this alleged agreement at the revocation hearing, Mr. Walker stated that he did not remember telling that to appellant. In appellant's fourth point he argues that, except for the testimony of Officer McCall, the police officers' testimony was untruthful. Obviously, the Court chose to believe the testimony of Mr. Walker and the police officers. We defer to the trial judge's determinations of witness credibility and weight to be given the testimony. *Richardson, supra.*

Appellant's final point is that it was error for the court to sentence him to a term of six years rather than to the remainder of his four years of probation. The Arkansas Supreme Court held in *Cox v. State*, 365 Ark. 358, ___ S.W.3d___ (2006), that probation and a fine did not constitute a "sentenced imposed," and therefore it was appropriate for the trial court to impose a sentence that might have been imposed originally when the defendant's probation was revoked. Pursuant to Ark. Code Ann. § 5-13-204(b)(Repl. 2006), aggravated assault is a Class D felony. The sentence for a Class D felony shall not exceed six (6) years.

Ark. Code Ann. § 5-4-401(5)(Repl.2006). Because appellant was originally placed on probation without a period of confinement or suspended imposition of sentence, the trial court did not err by sentencing appellant to six years in the Arkansas Department of Correction upon the revocation of his probation.

After reviewing the record, we agree that there is no merit to an appeal of appellant's revocation of probation and thereby affirm the decision of the trial court and grant counsel's motion to withdraw.

Affirmed.

GLOVER and VAUGHT, JJ., agree.