NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR 07-1292

	Opinion Delivered JUNE 25, 2008
MICHAEL LEE LAYTON APPELLANT	APPEAL FROM THE COLUMBIA COUNTY CIRCUIT COURT, [NO. CR-05-163-5]
V.	HONORABLE LARRY W. CHANDLER, JUDGE
STATE OF ARKANSAS APPELLEE	REBRIEFING ORDERED

JOHN B. ROBBINS, Judge

This is an appeal from a judgment reflecting appellant's convictions for possession of a controlled substance (cocaine) with intent to deliver, simultaneous possession of drugs and firearms, and felon in possession of a firearm. These criminal charges resulted from law enforcement finding contraband in the vehicle appellant was driving. Appellant's wife was a passenger in the vehicle. At trial, appellant's wife testified against him, stating that she was in the crack-dealing business with appellant and that the gun belonged to her husband. This and other evidence was heard by a jury in Columbia County Circuit Court. A timely notice of appeal followed the judgment.

Appellant's counsel has filed a motion to be relieved and a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j) (2007), asserting that the appeal is wholly without merit. Appellant was notified of his attorney's brief and motion, to

which he filed a hand-written set of pro se points for reversal in this matter. The State has filed a responsive brief to appellant's points, agreeing with defense counsel that any appeal would be wholly without merit. We disagree with appellant's counsel and the State that an appeal would be frivolous. Thus, we remand for re-briefing in adversarial form.

A defense attorney may file a no-merit brief and request to withdraw as counsel if, after a conscientious examination of the record, he or she believes that an appeal would be wholly frivolous, pursuant to *Anders v. California*. In so doing, counsel must file a brief discussing all adverse rulings that might arguably support the appeal and explaining why each adverse ruling does not provide a meritorious ground for reversal. *See Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *See Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). Here, a full examination of the proceedings reveals at least two evidentiary objections decided adversely to appellant, and the denial of a motion to dismiss on speedy-trial grounds, as well as the denial of motions for directed verdict. We believe that an appeal of the sufficiency of the evidence to support the existence of possession of the drugs with intent to deliver, and simultaneous possession of drugs and firearms, would not be wholly without merit and frivolous. 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.

Appellant did not deny that when his vehicle was pulled over on July 29, 2005, over thirteen grams of crack cocaine, cash, and marijuana were found inside his wife's backpack in the back seat of the car. Appellant's defense was that the drugs belonged to his wife, and

further that he had no knowledge of their presence. Appellant's wife testified that she had already pleaded guilty to drug charges arising from this traffic stop, and that part of her plea agreement required her to testify against her husband. She testified that she and appellant had been married for four years, that appellant had taught her the crack-cocaine business; that they had bought the firearm together but that appellant had fired it several times; that they purchased it for safety purposes in their drug trade; that they had driven to El Dorado to purchase crack cocaine from a dealer known as "Thug" that day; and that they were on their way back home to Cullen, Louisiana, near the state-line border in southwestern Arkansas, when the traffic stop ensued. The firearm was in plain view, located in between the driver's seat and the arm rest or console area. The sheriff's deputy heard appellant admit that the gun was his.

Appellant's defense counsel moved for directed verdict in part on the basis that his wife was not credible, which issue would be for the fact-finder and not this court on appeal. The motion also challenged the evidence on the basis that his wife, a co-conspirator, presented testimony that had not been corroborated.

Any appeal of the firearm-related offenses would be wholly frivolous to the extent that lack of corroboration was alleged. The law enforcement officer's testimony established appellant claiming ownership of that firearm, which was in plain view. However, we must give pause to the challenge to the lack of corroboration regarding the possession of cocaine. That contraband was not in plain view, but was found in the wife's personal effects in the back seat concealed in her backpack.

Arkansas law is clear that a conviction "cannot be had in any case of felony upon the testimony of an accomplice . . . unless corroborated by other evidence tending to connect the

defendant . . . with the commission of the offense." Ark. Code Ann. § 16-89-111(e)(1)(A) (Supp. 2003). The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. § 16-89-111(e)(1)(B). The corroboration must be sufficient, standing alone, to establish the commission of the offense and to connect the defendant with it. *Marta v. State*, 336 Ark. 67, 983 S.W.2d 924 (1999). The test for corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001).

Corroboration must be evidence of a substantive nature, since it must be directed toward proving the connection of the accused with the crime, and not directed toward corroborating the accomplice's testimony. *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994). Circumstantial evidence may be used to support accomplice testimony, but it, too, must be substantial. *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002). Corroborating evidence need not, however, be so substantial in and of itself to sustain a conviction. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001). Rather, it need only, independently of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the crime. *King v. State*, 254 Ark. 509, 494 S.W.2d 476 (1973). Evidence that only raises a suspicion of guilt is insufficient. *Meeks*, *supra*; *Prather v. State*, 256 Ark. 581, 509 S.W.2d 309 (1974). The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime are relevant facts in determining the connection of an accomplice with the crime. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

Without corroboration of her testimony, we cannot conclude that an appeal of this specific issue would be "wholly frivolous."

We also note that there appears to be some uncertainty as to whether the jury actually found appellant guilty of the offense of felon in possession of a firearm. By means of a motion in limine, defense counsel ensured that the jury was not made aware during the guilt phase that appellant had prior felonies. However, the record does not reveal that the jury was ever instructed to consider whether appellant was guilty of the separate offense of felon in possession of a firearm. The jury was asked to deliberate and make findings on two charges: possession of cocaine with intent to deliver and simultaneous possession of drugs and firearms. Those two charges resulted in guilty verdicts. No verdict was rendered on felon in possession of a firearm, nor was the jury instructed on that law.

When an appeal is submitted to this court under the *Anders* format and we believe that an issue is not wholly frivolous, we are required to deny appellant counsel's motion to withdraw and order re-briefing in adversary form. *Tucker v. State*, 47 Ark. App. 96, 885 S.W.2d 904 (1994). *See also Skiver v. State*, 330 Ark. 432, 954 S.W.2d 913 (1997). By this opinion, we make no commentary on whether any issue bears merit. We simply hold that an appeal of appellant's convictions would not be wholly frivolous.

Motion to withdraw as counsel denied; remanded for re-briefing.

GRIFFEN and VAUGHT, JJ., agree.