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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-12-584

BRANDON CLARK FRITTS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** June 19, 2013 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DIVISION [NO. CR-07-14G] HONORABLE JAMES O. COX, JUDGE MOTION TO WITHDRAW GRANTED; AFFIRMED

DAVID M. GLOVER, Judge

On August 13, 2007, Brandon Fritts pleaded guilty to battery in the first degree and being a felon in possession of a firearm, both Class B felonies. Fritts was sentenced to ten years' incarceration, to be followed by an additional ten years' suspended imposition of sentence for each offense (to be served concurrently with each other and with several other convictions, conditioned upon good behavior). On January 5, 2012, the State filed a petition to revoke Fritts's suspended sentence, alleging that he had violated the terms of his suspended sentence by associating with known felons or persons of bad character. On February 9, 2012, the State filed an amended petition for revocation alleging that, in addition to the ground listed in the original petition for revocation, on December 20,

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2011, Fritts had committed three counts of residential burglary; on January 3, 2012, he had committed first-degree murder and the offense of being a felon in possession of a firearm; and on January 25, 2012, he had been arrested in Oklahoma for endeavoring to manufacture methamphetamine. Both of these petitions for revocation referenced only the guilty plea to the first-degree battery offense.

A hearing on both petitions to revoke was held on May 30, 2012, at which time the State presented testimony from Fort Smith police officers regarding the murder of Jamie Czeck. This testimony revealed that Fritts had admitted to the officers that he had shot Czeck seven or eight times; that no one else was involved; and that Fritts had shot Czeck twice in the head because the last time he had shot someone in the head, it "did not work out the way he intended." When asked why he had shot Czeck, Fritts said that Czeck would not shut up and had "pi**ed" him off.

There was also testimony from three persons whose residences had been burglarized on December 20, 2011, in Sebastian County. Money, guns, and electronics were stolen in those burglaries. Kevin Nickson, an employee with the Sebastian County Sheriff's Office, testified that Fritts admitted to him that he had committed those burglaries because someone had upset him, and he was looking for a gun to kill that person. The gun used to murder Czeck was ultimately determined to have been one of the guns stolen in the December 20 residential burglaries.

At the close of the revocation hearing, the trial court found that Fritts had violated the terms of his suspended sentence, revoked the sentence, and sentenced Fritts to ten years

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in the Arkansas Department of Correction. However, later that afternoon, the State informed the trial court that Fritts had pleaded guilty to not just first-degree battery (as had been alleged in the two petitions for revocation), but also to being a felon in possession of a firearm, and therefore, his exposure was not just ten years for first-degree battery, as alleged at the revocation hearing, but twenty years—ten years for each offense. Fritts's counsel objected, arguing that only the battery charge was before the court, not the felon-in-possession charge. Fritts's counsel also argued that jeopardy had attached because the trial court had sentenced Fritts to ten years in prison. The State argued that both charges arose under the same case number and since both petitions were filed in the matter, the trial court could consider both counts. The trial court took the matter under advisement to decide whether it would amend the sentence.

On June 1, 2012, the State filed a second amended petition to revoke, alleging the same reasons for revocation, but adding that Fritts had pleaded guilty not only to battery in the first degree on August 10, 2007, but also to being a felon in possession of a firearm and was sentenced to ten years' imprisonment and an additional ten years' suspended imposition of sentence on each charge (with the sentences to run concurrently). On June 5, 2012, the trial court reconvened the proceedings, and it ruled that since a judgment had not yet been entered, it retained jurisdiction, and it could amend any findings prior to a sentence being executed. The trial court then accepted the State's second amended petition and upon revocation sentenced Fritts to a total of twenty years in prison—ten years on each count, to

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be served consecutively—stating that had it known that Fritts was exposed to twenty years, it would have originally sentenced him to twenty years.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Arkansas Rules of the Supreme Court and Court of Appeals, Fritts's counsel has filed a motion to withdraw on the grounds that the appeal is wholly without merit. Counsel's motion was accompanied by a brief, referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to appellant made by the trial 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. The clerk of this court furnished Fritts with a copy of his counsel's brief and notified him of his right to file *pro se* points; Fritts has filed no points.

This is the second time this case has been before this court. The first time, this court denied counsel's motion to withdraw and ordered rebriefing to address the sufficiency of the evidence to support the revocation. *Fritts v. State*, 2013 Ark. App. 30. Counsel has cured this omission on remand.

A circuit court may revoke a suspension or probation if it finds that the State proved by a preponderance of the evidence that the appellant inexcusably failed to comply with a condition of the suspension or probation; a trial court's findings are given deference on appeal because determinations of the preponderance of the evidence turn heavily on questions of credibility and the weight of the evidence. *Edwards v. State*, 2012 Ark. App.

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551, at 2. In order to revoke a suspended sentence, the State is only required to prove that a defendant violated one condition of his suspended sentence; because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended imposition of sentence. *Id.*

Fritts admitted that he had murdered Czeck and had committed three residential burglaries. The State proved by a preponderance of the evidence that Fritts inexcusably failed to comply with a term of his suspension; these admissions constitute a violation of the good-behavior requirement of Fritts's suspended sentences.

In addition to the sufficiency of the evidence, Fritts's counsel discusses two rulings she considers to be adverse. The first issue is whether the trial court had the authority to sentence Fritts to a greater sentence at the probation-revocation hearing than he was originally sentenced. Fritts was originally sentenced to concurrent ten-year terms of imprisonment to be followed by ten-year suspended impositions of sentence for each offense. When the trial court revoked Fritts's suspended impositions of sentence, it sentenced Fritts to ten years' incarceration on each charge to be run consecutively, for a total of twenty years. This was entirely appropriate. Upon revocation of a suspended imposition of sentence, a trial court may impose any sentence that might have been originally imposed for the offenses of which he was found guilty. Ark. Code Ann. § 16-93-308(g)(1)(A) (Supp. 2011). However, any sentence of imprisonment, when combined with any previous imprisonment imposed for the same offense, shall not exceed the limits

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of Arkansas Code Annotated section 5-4-401. Ark. Code Ann. § 16-93-308(g)(1)(B). Fritts's underlying offenses were both Class B felonies. The sentencing range for a Class B felony is five to twenty years. Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006). Fritts had already been sentenced to ten years on the underlying offenses, but the trial court only sentenced Fritts to ten years on each offense, which is within the sentencing range.

The remaining adverse ruling was the trial court's amendment of Fritts's sentence. The trial court had originally sentenced Fritts to ten years' imprisonment. This amendment occurred after the trial court learned that Fritts had originally pleaded guilty to not only the first-degree battery offense, as the State had originally alleged, but also to being a felon in possession of a firearm. When made aware of this fact, the trial court took the issue under advisement and increased Fritts's sentence to twenty years—ten years' incarceration on each offense, to be served consecutively. Fritts's counsel objected on the grounds that only the battery charge was before the court and that jeopardy had attached because the trial court had sentenced Fritts to ten years in prison. The State contended that both charges arose under the same case number and since the petition was filed in the matter, the trial court could consider both counts.

The trial court took the issue under advisement and ultimately ruled that since a judgment had not yet been entered, it retained jurisdiction and could amend any findings made prior to a sentence being placed into execution. This was correct. Judgment and commitment orders are effective only upon entry of record. *See Bradford v. State*, 351 Ark.

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394, 94 S.W.3d 904 (2003). No judgment and commitment order had been entered of record at the time the trial court learned that Fritts's suspended sentence involved two offenses instead of one; therefore, there was no error in the trial court's reconsideration of Fritts's sentence.

Counsel's motion to withdraw is granted, and the revocation of Fritts's suspended sentences is affirmed.

GLADWIN, C.J., and VAUGHT, J., agree.

Wallace, Martin, Duke & Russell, PLLC, by: *Sheri L. Latimer*, for appellant.

No response.