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SUPREME COURT OF ARKANSAS

No. CR 12-63

KEVIN KYLE CROUSE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 29, 2012 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT, [NO. CR-2010-79] HONORABLE JOHN N. FOGLEMAN, JUDGE AFFIRMED; COURT OF APPEALS' OPINION VACATED.

PAUL E. DANIELSON, Justice

Appellant Kevin Kyle Crouse appeals from the judgment and commitment order entered against him following the revocation of his probation. The order indicates his conviction for possession with intent to sell/deliver and sentences him to 144 months' imprisonment. Crouse originally appealed the order to the court of appeals, which reversed and remanded the matter, holding that Crouse's original sentence to probation was an illegal sentence because "[p]robation is not an authorized disposition for a Class Y felony." *Crouse v. State*, 2012 Ark. App. 58, at 2. The State petitioned for review, which this court granted. When we grant review of a decision by the court of appeals, we review the case as though the appeal was originally filed in this court. *See Rollins v. State*, 2009 Ark. 484, 347 S.W.3d 20. In this case, Crouse's counsel has filed a no-merit brief in accord with *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k) (2012) and asserts that, due to the low burden of proof on the State in a probation-revocation hearing, Crouse's

conviction and sentence should be affirmed.[1] We agree.

A review of the record reveals that the sole adverse ruling to Crouse made by the circuit court was the granting of the State's petition to revoke probation. To revoke probation or a suspended sentence, the burden is on the State to prove a violation of a condition by a preponderance of the evidence, and on appellate review, the circuit court's findings will be upheld unless they are clearly against the preponderance of the evidence. *See Thompson v. State*, 342 Ark. 365, 28 S.W.3d 290 (2000). We have held that evidence insufficient to support a criminal conviction may be sufficient to support a revocation. *See id.* Furthermore, because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the circuit court's superior position in that regard. *See Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

Here, the circuit court found that Crouse had inexcusably violated the terms and conditions of his probation by using and possessing methamphetamine. We cannot say that this finding was clearly against the preponderance of the evidence, where Daniel Lee Scott, Crouse's probation supervisor, testified that Crouse had tested positive for, and admitted to, using methamphetamine, and Detective Jimmie Evans of the West Memphis Narcotics Unit testified that a small baggie of a white, powdery substance that field-tested positive for methamphetamine was found in a cabinet above Crouse's stove following a search of his

[1]The court of appeals' docket reflects no filing of pro se points by Crouse as permitted by Ark. Sup. Ct. R. 4-3(k)(2).

residence. We conclude that the circuit court's findings were not clearly against the preponderance of the evidence, and an appeal of this ruling would be meritless. We therefore affirm Crouse's conviction and sentence.[2]

While not normally our practice, we believe it helpful in this particular case to explain the error in the court of appeals' reasoning when it reversed and remanded on the basis that probation was not an authorized disposition, and we take this opportunity to do so. Sentencing is entirely a matter for the General Assembly in Arkansas, and the courts of this state are bound by the terms of the sentences enacted by the General Assembly. *See State v. Pinell*, 353 Ark. 129, 114 S.W.3d 175 (2003). With regard to the disposition of probation for drug offenses, this court has held that Act 192 of 1993 "amended Ark. Code Ann. §§ 5-4-104(e)(1) and 5-4-301(a)(1) (Supp. 1991), to permit suspension and probation as alternative sentences" for certain drug offenses. *Elders v. State*, 321 Ark. 60, 64, 900 S.W.2d 170, 172 (1995).

Tracing the statutes back to those preceding Act 192, Ark. Code Ann. § 5-4-104(e)(1) (Supp. 1991) precluded probation for certain drug offenses, providing that

> [t]he court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:
>
> . . . .
>
> (F) Drug related offenses under the Uniform Controlled Substances Act, § 5-64-101 et seq. except to the extent that probation is otherwise permitted under subchapters 1-6 of chapter 64. In other cases, the court may suspend imposition of

[2]We note that our rules do not permit us to take review of a motion decided by the court of appeals, but only an appeal. *See* Ark. Sup. Ct. R. 1-2(e) (2012). We therefore are unable to consider Crouse's counsel's motion to withdraw that was previously denied by the court of appeals.

> sentence or place the defendant on probation, in accordance with §§ 5-4-301 — 5-4-311, except as otherwise specifically prohibited by statute.

Act 192 of 1993, however, amended subsection (e)(1)(F), deleting the entire drug-related offenses section and replacing it with "Engaging in a continuing criminal enterprise." Act 192 of 1993, § 1.

Arkansas Code Annotated § 5-4-301(a)(1)(F) (Supp. 1991) also precluded probation for certain drug offenses, providing that

> [a] court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:
>
> . . . .
>
> (F) Drug related offenses under the Uniform Controlled Substances Act, § 5-64-101 et seq. except to the extent that probation is otherwise permitted under subchapters 1-6 of chapter 64. In other cases, the court may suspend imposition of sentence or place the defendant on probation, except as otherwise specifically prohibited by statute.

However, Act 192 of 1993 amended subsection (a)(1)(F) as well, deleting "[d]rug related offenses" and replacing it too with "Engaging in a continuing criminal enterprise." Act 192 of 1993, § 2.

This court acknowledged the changes to these statutes in *State v. Galyean*, 315 Ark. 699, 701, 870 S.W.2d 706, 707 (1994), wherein we observed that "Act 192 of 1993 amends § 5-4-301(a)(1)(F) and § 5-4-104(e)(1)(F) to remove the language from the two statutes which prohibited trial courts from imposing suspended imposition of sentence or probation on controlled substance offenders." We have further observed that while probation was not previously available for a Class Y drug offense, the passage of Act 192 changed that prohibition, allowing probation for such crimes. *See Vanesch v. State*, 343 Ark. 381, 37

S.W.3d 196 (2001); *see also Pinell*, *supra* (holding that Act 192 made probation available as a sentence alternative for certain Class Y drug offenses).

While §§ 5-4-104 and 5-4-301 prohibit probation for Class Y felonies, probation is a permitted disposition for certain Class Y drug offenses. That is because § 5-64-401 clearly provided, until recently, that offenses under the Uniform Controlled Substances Act are only class-defined felonies "[f]or all purposes other than disposition." Ark. Code Ann. § 5-64-401(a)(1)(i) (Supp. 1991 & Supp. 1993); *see also* Ark. Code Ann. § 5-64-401(a)(1) (Supp. 2009).[3] For these reasons, this court has been resolute that probation was an authorized sentence for certain drug offenses after the General Assembly's enactment of Act 192 of 1993.

Affirmed; Court of Appeals' opinion vacated.

C. Brian Williams, for appellant.

[3]Section 5-64-401 was repealed by Act 570 of 2011, § 33. Crouse's offense date, however, was January 15, 2010; therefore, the 2009 Supplement is the applicable version of the statute.