

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-408

FREDERICK DWAYNE MASON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered December 2, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR-07-1780]

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

LARRY D. VAUGHT, Chief Judge

A jury convicted appellant Fredrick Mason of two counts of aggravated robbery, two counts of theft of property, and second-degree battery. He was sentenced to a term of 660 months in the Arkansas Department of Correction. Pursuant to *Anders v. California*, 386 U.S. 738, 744–45 (1967), and Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals, Mason’s counsel has filed a motion to withdraw on grounds that the appeal is without merit. Counsel’s motion was accompanied by an abstract and brief discussing seven points in the record that might arguably support an appeal. The clerk of this court furnished Mason with a copy of his counsel’s brief and notified him of his right to file pro se points for reversal within thirty days. Although appellant filed seven pro se points for reversal, six of the issues raised were either wholly outside the record, raised for the first time on appeal, fully covered in his counsel’s brief, or otherwise not preserved for appellate review.

The remaining issue involves Mason’s claim that the trial court “made a fundamental error” by failing to ask Mason if he wanted to testify at trial. The record indicated that at the close of the State’s case-in-chief, the court asked Mason’s attorney if he planned to put on testimony. Counsel replied, “I’m not letting my guy testify.” The court and counsel then proceeded to discuss jury instructions. And, as Mason points out, the court did not ask him if he wanted to testify. The law is clear that an accused has the right to choose to testify on his own behalf, and counsel may only advise him in making the decision. *See, e.g., Benson v. State*, 357 Ark. 43, 48, 160 S.W.3d 341, 344 (2004). This right is based on the First, Sixth, and Fourteenth Amendments to the United States Constitution, and only the defendant is empowered to make a knowing and voluntary waiver of the right. *Henson v. State*, 94 Ark. App. 163, 169–70, 227 S.W.3d 450, 454–55 (2006). However, when a defendant remains silent after counsel has rested, there is a knowing and voluntary waiver of the right to testify. *Id.* at 170, 227 S.W.3d at 455; *see also United States v. Kamerud*, 326 F.3d 1008, 1017 (8th Cir. 2003) (holding that if a defendant desires to exercise his constitutional right to testify, he must act affirmatively and express to the trial court his desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred).

Here, when counsel stated that he was “not letting my guy testify,” Mason did not act affirmatively and express to the court his desire to testify. By failing to do so, he not only waived his right to testify at trial, but also waived his appeal of this issue to our court. As such, from our review of the record and the briefs presented to us, we hold that counsel complied with Rule 4-3(k) and that the appeal is without merit. Accordingly, counsel’s motion to be relieved is granted

Cite as 2009 Ark. App. 794

and the judgment of conviction is affirmed.

Affirmed; the motion to be relieved as counsel is granted.

HART and ROBBINS, JJ., agree.

Danny R. Williams, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.