

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-266

DONALD LEWIS BURTON, SR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered JANUARY 11, 2012

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. CR2008-1435-1]

HONORABLE ROBIN F. GREEN,
JUDGE

REBRIEFING ORDERED; MOTION
TO WITHDRAW DENIED

CLIFF HOOFFMAN, Judge

Appellant Donald Burton's attorney has filed a no-merit brief and a motion to withdraw alleging that there are no nonfrivolous issues upon which an appeal could be based from Burton's probation revocation. Because Burton may have received an illegal sentence, an appeal would not be wholly frivolous; thus, we order rebriefing.

On August 17, 2009, Burton pled guilty to the charge of theft of property, a Class C felony, and was sentenced to forty-five days in the county jail and five years' probation. A judgment and commitment order was entered August 24, 2009. On December 8, 2010, the State filed a petition to revoke Burton's probation, alleging that he had committed the offense of possession of a controlled substance, had tested positive for THC on three occasions, and had confessed to using marijuana on two separate occasions. A revocation hearing was held on December 9, 2010, and Burton admitted to all of the allegations



contained in the State's petition. The court revoked Burton's probation and sentenced him to four years' imprisonment, six years' suspended imposition of sentence, and long-term drug treatment while in the Department of Correction. The judgment and commitment order was entered on December 21, 2010, and a notice of appeal was filed on January 6, 2011. An amended judgment and commitment order was entered on January 13, 2011, to reflect that Burton was to receive fifty-one days of jail-time credit. An amended notice of appeal was filed on January 19, 2011.

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, Burton's counsel has filed a motion to withdraw on the ground that an appeal in this matter would be wholly without merit. Burton was provided a copy of his counsel's brief and was notified of his right to file a list of points on appeal within thirty days. Burton has not raised any pro se points for reversal.

Burton's counsel's motion was accompanied by a brief purportedly containing a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party, as well as an explanation as to why each adverse ruling is not a meritorious ground for reversal. This court is bound to perform a full examination of the proceedings to decide if an appeal would be wholly frivolous. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). If counsel fails to address all possible grounds for reversal, this court can deny the motion to withdraw and order rebriefing. *Id.* 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's counsel's motion to withdraw and order rebriefing in adversary form.



Stribling v. State, 2011 Ark. App. 386.

Burton's sentence may be illegal because of the special condition on his judgment and commitment order that he receive drug treatment while in prison. *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909. Because counsel failed to address this ground for reversal that would not be wholly frivolous, we must order rebriefing in adversary form. *Stribling v. State*, 2011 Ark. App. 386.

Counsel's brief is also deficient because his addendum does not include the original judgment and commitment order entered August 24, 2009, reflecting Burton's sentence of probation that was later revoked. We have held that this is an important item for reaching the merits of such a case. *Vick v. State*, 2009 Ark. App. 524, 334 S.W.3d 85.

Lastly, we note that counsel's abstract is deficient. Arkansas Supreme Court Rule 4-2(a)(5)(B) states that the question-and-answer format shall not be used in the abstract. On page one of the abstract, counsel has used this format although it is not necessary.

Because counsel fails to demonstrate that an appeal would be wholly frivolous, we remand for adversarial rebriefing. We encourage appellate counsel, prior to filing the substituted brief, to review Arkansas Supreme Court Rule 4-2 to ensure that the substituted brief complies with the rule and that no additional deficiencies are present.

Rebriefing ordered; motion to withdraw denied.

GRUBER and GLOVER, JJ., agree.

Matthew J. McWilliams, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.