Cite as 2012 Ark. App. 30

# ARKANSAS COURT OF APPEALS

DIVISION IV
**No.** CACR11-235

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| | **Opinion Delivered** January 11, 2012 |
| DEWANA DIONE RUNION<br>APPELLANT | APPEAL FROM THE DREW COUNTY CIRCUIT COURT<br>[No. CR 2009-005-3] |
| V. | HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | REBRIEFING ORDERED; MOTION TO WITHDRAW DENIED |

**LARRY D. VAUGHT, Chief Judge**

This is a no-merit appeal from the revocation of appellant Dewana Runion's probation. We order rebriefing.

On June 18, 2009, Runion pled guilty to fraudulent use of a credit or debit card and was sentenced to thirty-six months' probation under the Community Punishment Act. Some of the conditions that Runion's probation included were that she not consume controlled substances, that she submit to random drug testing, that she report to her probation officer, and that she pay probation-supervision fees. On October 25, 2010, the State filed a petition for revocation of probation alleging that Runion violated the terms and conditions of her probation by failing to comply with the above-stated conditions.

At the revocation hearing on January 24, 2011, David Crutchfield, a probation/parole officer with the Arkansas Department of Community Correction, testified that Runion violated

the terms and conditions of her probation by testing positive for heroin/opiates on August 14, 2009, testing positive for heroin/opiates and benzodiazepines on January 29, 2010, failing to report for random drug testing in April, May, June, August, September, and October 2010, failing to report to her probation officer in April, May, June, August, September, and October 2010, and failing to pay her probation-supervision fees.

Runion testified at the hearing. She admitted that she tested positive for controlled substances but stated that she was under a doctor's care and had prescriptions for the controlled substances. She also admitted that she failed to report as ordered because she did not have a driver's license. She added that sometimes she did report, but her probation officer was not there. Finally, Runion admitted that she was behind on paying her fees because she did not have a job.

At the conclusion of the hearing, the trial court revoked Runion's probation, finding that she violated the terms and conditions of her probation by her own admissions. The trial court sentenced her to a one-year term in the Department of Community Correction (DCC) and stated that the judgment and commitment order should reflect that if Runion successfully completed the nine-month drug program provided by the DCC, the department was authorized to release her early. A judgment and commitment order was entered January 24, 2011, which provided:

> DEFENDANT SHALL ENTER AND SUCCESSFULLY COMPLETE THE DRUG PROGRAM AT [DCC]. UPON THE DEFENDANT'S SUCCESSFUL COMPLETION OF THE DRUG PROGRAM AT [DCC], SHE MAY BE RELEASED.

Beneath this paragraph, written in script, is: "This court okays now [defendant's] release if she successfully completes the 9 month drug program." It is this order from which Runion's counsel brings this no-merit appeal.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) (2011) of the Rules of the Arkansas Supreme Court and Court of Appeals, Runion's counsel has filed this no-merit brief and a motion to withdraw. An *Anders* brief may be submitted in lieu of an appeal on the merits only if such an appeal would be "wholly frivolous." *Eads v. State*, 74 Ark. App. 363, 365, 47 S.W.3d 918, 919 (2001). In arguing that an appeal of this case is without merit, Runion's counsel's brief purportedly refers to everything in the record that might arguably support an appeal—noting that the only adverse ruling was the revocation decision—and includes an explanation as to why the adverse ruling is not a meritorious ground for reversal. Counsel argues that credibility determinations are for the fact-finder and that the evidence before the trial court is substantial and supports the revocation. Runion was provided a copy of her counsel's brief and was notified of her right to file a list of points on appeal. She raises two pro se points for reversal. The State has filed a responsive brief.

*Anders* "requires that after an appellant's counsel submits a no-merit brief, this court conduct a full examination of the proceedings to decide if the case is 'wholly frivolous.' . . . We undertake this thorough review of the full record regardless of whether or not the appellant identifies the trial court's errors." *Eads*, 74 Ark. App. at 365, 47 S.W.3d at 919. Based on our review of the case at bar, we remand because we have discovered a ground for possible reversal that was not abstracted or discussed by Runion's counsel that would not be wholly frivolous.

After the trial court revoked Runion's probation, the court ordered Runion to serve a one-year sentence in the DCC, where she was ordered to enter and successfully complete a drug program. The trial court also stated in its judgment and commitment order that Runion may be

released early upon her successful completion of the drug program. This may have resulted in an illegal sentence. *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909 (holding that a sentence of incarceration with the special condition that the defendant complete drug and alcohol treatment was an illegal sentence); *Parmley v. State*, 2011 Ark. App. 685 (same). And while this argument was not raised below, it is well settled that an appellant may challenge an illegal sentence for the first time on appeal, even if he did not raise the argument below. *Richie*, 2009 Ark. 602, at 4 (citations omitted). We view an issue of a void or illegal sentence as being an issue of subject-matter jurisdiction, which we may review whether or not an objection was made in the trial court. *Id.* (citations omitted). A sentence is void or illegal when the trial court lacks authority to impose it. *Id.* (citation omitted).

We have ordered rebriefing in adversary form when it has been determined that an appeal would not be wholly frivolous. *Eads*, 74 Ark. App. at 365–66, 47 S.W.3d at 919. 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. *Tucker v. State*, 47 Ark. App. 96, 98, 885 S.W.2d 904, 905 (1994). Because Runion's counsel fails to demonstrate that an appeal would be wholly frivolous, we remand for adversarial rebriefing.

Rebriefing ordered; motion to withdraw as counsel denied.

GLADWIN and BROWN, JJ., agree.

*Julia K. Hudson*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.