Cite as 2012 Ark. App. 429

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 11-862

	Opinion Delivered June 27, 2012
ANDRE TIMOTHY JAMES APPELLANT	APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. CR 10-804]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE JOHN N. FOGLEMAN, JUDGE
	AFFIRMED; MOTION TO WITHDRAW GRANTED

WAYMOND M. BROWN, Judge

This is a no-merit appeal from the revocation of appellant Andre Timothy James's probation, wherein he was sentenced to sixty months in the Arkansas Department of Correction. Appellant's counsel has filed a motion to withdraw and a no-merit brief pursuant to *Anders v. California*[1] and Arkansas Supreme Court Rule 4-3(k)(1) (2011). Appellant was provided with a copy of his attorney's brief and was notified of his right to file a list of pro se points on appeal within thirty days; however, he has not raised any pro se points for reversal. We find no meritorious grounds for an appeal; therefore, we affirm and grant counsel's motion to be relieved.

[1]386 U.S. 738 (1967).

Background

On July 30, 2010, appellant pleaded guilty to the sale or delivery of a controlled substance, a Class C felony, and received a sentence of twenty-four months' supervised probation. On November 22, 2010, the State filed a petition to revoke appellant's probation. After a hearing on March 14, 2011, the circuit court found that appellant had violated the terms and conditions of his probation by failing to report to his probation officer, and sentenced him to sixty months in the Arkansas Department of Correction. Appellant filed a timely notice of appeal on April 6, 2011.

Discussion

The only rulings adverse to appellant were the circuit court's overruling of a Confrontation Clause objection by appellant and the revocation of his probation. Neither of those rulings give rise to a meritorious argument for reversal.

I. *Confrontation Clause Objection*

Officer Brandon Gavrock with the Arkansas Game and Fish Commission testified that he observed appellant on the telephone in the booking area of the Crittenden County Detention Center on January 4, 2011. When Gavrock testified that one of the jailers told appellant twice to get off the phone, appellant's attorney objected on the grounds of the Confrontation Clause of the Sixth Amendment, which ensures a defendant's right to confront

adverse witnesses. The court asked Gavrock if he heard what the jailer said, and Gavrock replied, "Yes, sir, I did." The circuit court overruled appellant's objection.

Dana Cage, the jailer Gavrock referred to in his testimony, was called as the next witness. Cage testified about her interaction with and observation of appellant, including her instruction to him to get off the phone, and appellant's attorney cross-examined her without further objection.

Appellant's attorney contends that the circuit court erred in allowing the challenged statement by Gavrock, but that the error was harmless. However, we find no error because in a revocation hearing, the rules of evidence do not strictly apply, particularly the hearsay rule.[2] It is true that the right to confront witnesses does apply[3]; however, this right was not violated when the declarant of the alleged hearsay testified as the very next witness and was cross-examined by appellant. Moreover, even if we were to consider the circuit court's admission of the challenged statement erroneous, such error would be rendered harmless by Cage's testimony.[4] Even when error occurs at revocation proceedings involving the

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[2]*Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000).

[3]*Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998); *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989).

[4]*See, e.g.*, *Hopes v. State*, 306 Ark. 492, 816 S.W.2d 167 (1991) (admission of hearsay testimony held harmless error, where the person whose statements were relayed testified as a witness and corroborated the hearsay testimony, and defendant did not object); *Orr v. State*, 288 Ark. 118, 703 S.W.2d 438 (1986) (where same evidence was introduced by another witness without objection, it was properly before the jury for consideration, and subsequent hearsay testimony by the police constituted harmless error).

constitutional right to confront adverse witnesses, those errors are subject to a harmless-error analysis,[5] and this court will not reverse unless prejudice has been shown.[6]

II. *Order Revoking Probation*

If the circuit court finds by a preponderance of the evidence that a defendant has inexcusably failed to comply with a condition of his probation, the court may revoke the probation at any time prior to its expiration.[7] The burden on the State is not as great in a revocation proceeding as it is in a trial because the burdens of proof are different; evidence that is insufficient to support a criminal conviction may therefore be sufficient to sustain a probation revocation.[8] On appeal, the trial court's decision will not be reversed unless it is clearly against the preponderance of the evidence.[9] In making its review, the appellate court will defer to the superior position of the circuit court to determine questions of credibility and the weight to be given to the evidence.[10]

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[5]*Cannon v. State*, 2010 Ark. App. 698, 379 S.W.3d 561 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)). Among the factors for the court to consider in determining whether a Confrontation Clause violation is harmless error are: the importance of the witness's testimony in the State's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted; and the overall strength of the State's case.

[6]*Phillips v. State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988).

[7]Ark. Code Ann. § 5-4-309(d) (Repl. 2006).

[8]*Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002).

[9]*Anglin v. State*, 98 Ark. App. 34, 249 S.W. 3d 836 (2007).

[10]*Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

To revoke probation or a suspended imposition of sentence, the State need only prove that the defendant committed one violation of the conditions.[11] At the revocation hearing, Daniel Scott, appellant's probation officer, testified that he performed appellant's probation intake on August 2, 2010, and explained appellant's conditions of probation to him, which appellant acknowledged by signature. Scott testified that appellant was scheduled to report to him on September 2, 2010, but failed to do so; that he tried to reach appellant by telephone, but the numbers appellant had given were disconnected; and that a home visit on November 10, 2010, revealed that appellant had not lived there for two months.

Appellant testified that when he began probation he was living with a friend, but that the friend kicked him out after they started having disagreements. Appellant testified that he did not have a phone and could not find employment because he did not have an identification card. With regard to his failure to report to his probation officer, appellant testified that he reported once but did not have a ride for the second appointment and did not want to leave his child, whom he was babysitting. When the circuit court asked appellant why he did not report to his probation officer, appellant replied that he was afraid Scott would lock him up for not getting his GED, working, paying his fines, or otherwise being able to show that he was "at least trying to do what was right." Appellant further testified that, although he had seen the bus to the probation office drive by, he had never ridden it.

[11] *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

The circuit court found that, although appellant might have had an excuse for the first time he failed to report, his subsequent failures to report in September, October, and November 2010 were inexcusable violations of the terms and conditions of his probation. Because this finding was not clearly against the preponderance of the evidence, there would be no grounds to reverse the revocation of appellant's probation. Since there are no meritorious grounds for an appeal in this case, we affirm the circuit court's findings and grant counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

WYNNE and GLOVER, JJ., agree.

C. Brian Williams, for appellant.

No response.