

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CACR 12-271

ANTHONY FORSTER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JANUARY 23, 2013

APPEAL FROM THE CRITTENDEN  
COUNTY CIRCUIT COURT  
[NO. CR-08-676]

HONORABLE JOHN N. FOGLEMAN,  
JUDGE

AFFIRMED; MOTION GRANTED

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**KENNETH S. HIXSON, Judge**

In July 2008, appellant Anthony Forster pleaded guilty to possessing marijuana with intent to deliver before the Crittenden County Circuit Court in exchange for a three-year probationary term. Among the conditions of appellant's probation were requirements that he (1) pay all fines, costs, and fees as directed; (2) report to probation as directed and pay the probation fee; (3) notify his probation officer and the sheriff of any change in his address or employment; (4) not use or possess alcohol; and (5) not violate any state, federal, or municipal law. In April 2011, the State filed a petition to revoke his probation, contending that appellant violated these conditions, specifying the violations of the law as DWI, driving with a suspended license, refusal to take a breath test, and obstruction of governmental operations. After a revocation hearing, in which appellant admitted that he was in violation of his conditions, the trial judge revoked his probation and sentenced him to four years in prison for



the underlying drug offense. Specifically, the trial judge noted from the bench that appellant possessed and used alcohol, provided a false identification to police officers, and failed to report to his probation officer as directed.

Appellant's attorney filed a timely notice of appeal from the judgment upon revocation. Subsequently, appellant's attorney filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(k) (2012), along with a motion to be relieved as counsel, asserting that there is no issue of arguable merit to present on appeal. A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract and addendum. Ark. Sup. Ct. R. 4-3(k)(1). The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court with an explanation as to why each adverse ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 4-3(k)(1). It is imperative that counsel follow the appropriate procedure when filing a motion to withdraw as counsel. *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004). In furtherance of the goal of protecting constitutional rights, it is both the duty of counsel and of this court to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001).

Although the clerk of our court attempted to provide appellant with a copy of his attorney's brief and motion at his last known address, advising him of his right to file pro se points, the postal service determined that these materials were undeliverable due to an insufficient address. Thus, appellant did not file any pro se points. The State elected not to



file a brief with our court. After a full examination under the proper standards, we hold that counsel provided a compliant no-merit brief demonstrating that an appeal would be wholly without merit, and further, that counsel's motion to be relieved should be granted.

As noted by appellant's attorney, the only adverse ruling was the decision to revoke probation. The burden upon the State in a revocation proceeding is to prove by a preponderance of the evidence that the defendant inexcusably failed to comply with at least one condition of his probation. *Amos v. State*, 2011 Ark. App. 638. This court will not reverse unless the trial court's findings are clearly erroneous. *Id.*

The evidence at the December 2011 revocation hearing included the testimony of Deborah Wiseman, a sheriff's department employee in charge of collection of fines and costs. She recited the terms of appellant's probation that required him to pay \$2,345 in \$120 per month installments to commence in October 2008. She testified that appellant made no payments at all, except one \$200 payment two days prior to the revocation hearing.

Appellant's probation officer, Mary Marshall, testified that in April 2011, appellant admitted to alcohol use and an arrest for driving while intoxicated. She said that for the months she supervised him in 2010, he reported about half the time.

A West Memphis police officer, Dewayne O'Claire, testified that in the early morning hours of April 2, 2011, he observed a vehicle cross Highway 77's center line several times. Upon stopping the vehicle, the officer approached, noting that appellant was in the driver's seat and smelled strongly of intoxicants. Appellant failed the horizontal-gaze nystagmus test. At first, appellant gave the officer someone else's driver's license, but he later realized that he

should not lie about his identity. Officer O'Claire arrested appellant for DWI, and appellant subsequently refused to take the breathalyzer test.

Appellant admitted to missing several of his probation-reporting dates. Appellant testified that he tried to report to his probation officer, but oftentimes she was not there. He testified that he was having financial difficulty paying the fines and costs with intermittent employment. Appellant admitted that he did drink a few beers, although he was aware he was not permitted to drink alcohol while on probation. He said he did not believe that it affected him the night he was pulled over by Officer O'Claire. He admitted, however, that he knew he did not have a valid driver's license. Appellant said, "I shouldn't have been driving; and I shouldn't have been drinking those few beers."

The trial judge found by a preponderance of the evidence that appellant violated the terms of his probation by (1) possessing and using alcohol, (2) providing a false identification to a law-enforcement officer, and (3) not reporting to his probation officer as directed. The trial judge's decision to revoke his probation was not clearly erroneous or clearly against the preponderance of the evidence. Appellant admitted to several violations. Based upon our standard of review, any appeal of the sufficiency of the evidence to revoke would be wholly frivolous.

Appellant's counsel notes that there were several objections raised with regard to the admission of prior criminal convictions. Counsel also notes that all rulings were in favor of the defendant, so they were not adverse.

Cite as 2013 Ark. App. 34

Having considered this under the proper standards required for no-merit appeals, we affirm the revocation of appellant's probation and grant counsel's motion to be relieved.

Affirmed; motion granted.

WOOD and BROWN, JJ., agree.

*Shaun Hair*, Deputy Public Defender, for appellant.

No response.