Cite as 2013 Ark. App. 432

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-12-20

	Opinion Delivered June 26, 2013
TERRY DOUGLAS REED APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [Nos. CR-2006-58, CR-2008-74]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	REBRIEFING ORDERED; MOTION TO WITHDRAW DENIED

LARRY D. VAUGHT, Judge

This is an appeal from a judgment and commitment order entered by the Sebastian County Circuit Court revoking the suspended imposition of sentences (SIS) of Terry Douglas Reed. Upon revocation, the trial court sentenced Reed for possession of methamphetamine to twelve years' imprisonment and seven years' SIS; for possession of marijuana to six years' imprisonment; and for possession of drug paraphernalia to twelve years' imprisonment and seven years' SIS, to run concurrently. Reed's attorney has filed a motion to withdraw as counsel and a no-merit brief under *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k)(1) (2012), asserting that an appeal would be wholly frivolous and that this case should be affirmed.[1] Reed filed pro se points, arguing that the trial court's sentence is illegal, and

[1]This is Reed's counsel's second attempt to file a no-merit appeal. In the first, *Reed v. State*, 2013 Ark. App. 14, we held that counsel failed to comply with *Anders* and Ark. Sup. Ct. R. 4-3(k), ordered rebriefing, and denied counsel's motion to withdraw.

the State has filed a brief in response. Because Reed may have received an illegal sentence, an appeal would not be wholly frivolous; thus, we order rebriefing.

The record reveals that on January 23, 2006, a criminal information was filed against Reed charging him with two counts—possession of methamphetamine (a Class C felony) and being a habitual criminal. On March 14, 2006, Reed entered a guilty plea to possession of methamphetamine and was sentenced to imprisonment for one year with a nine-year SIS.[2] Reed was paroled on July 14, 2006.

On December 11, 2007, the State of Arkansas filed a petition to revoke Reed's suspended sentence alleging that on December 6, 2007, he committed the offenses of possession of marijuana (a Class D felony) and possession of drug paraphernalia (a Class C felony). On February 5, 2008, a second judgment and commitment order was entered. In the 2008 order, relevant to this appeal, Reed pled guilty to the 2006 possession-of-methamphetamine charge and to the new charges of possession of marijuana and possession of drug paraphernalia. He was sentenced to two years' imprisonment plus a four-year SIS on the marijuana conviction, two years' imprisonment plus an eight-year SIS on the methamphetamine conviction, and two years' imprisonment plus an eight-year SIS on the drug-paraphernalia conviction—all terms to run concurrently. Reed was released from prison on October 22, 2008.

The State, on October 13, 2011, filed another petition to revoke Reed's suspended sentence based on allegations that on October 7, 2011, Reed committed new offenses of possession of methamphetamine and possession of drug paraphernalia. At the revocation

[2]The terms and conditions of his SIS stated that Reed shall not violate any federal, state, or municipal law.

hearing, police officer Daniel Kasper testified that on October 7, 2011, he stopped Reed for failing to signal a turn. During the stop, Officer Kasper noticed Reed trying to hide something in his pocket. The officer performed a pat-down search of Reed and found a baggie with what was believed to be methamphetamine residue in it.[3] Officer Kasper arrested Reed and transported him to jail. According to the officer, on the way to jail Reed said that he had a glass drug smoking pipe in his pants. Reed also testified at the hearing, admitting that he had been smoking methamphetamine for fifteen years, that it had become a problem in his life, and that he wanted help.

The trial court revoked Reed's SIS and sentenced him to twelve years' imprisonment with an additional seven-year SIS for the 2006 possession of methamphetamine; six years' imprisonment for the 2008 possession of marijuana; and twelve years' imprisonment and seven years' SIS for the 2008 possession of drug paraphernalia, to run concurrently. A third judgment and commitment order detailing these sentences was entered on December 8, 2011. Reed's counsel's no-merit appeal and motion to withdraw as counsel followed.

In the context of no-merit appeals, in furtherance of the goal of protecting a defendant's constitutional rights, it is the duty of both 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. *Wakeley v. State*, 2012 Ark. App. 448, at 2–3 (citing *Walton v. State*, 94 Ark. App. 229, 231, 228 S.W.3d 524, 526 (2006)). Further, counsel's no-merit brief must contain an argument section that consists of a discussion of all rulings adverse to the defendant made by the trial court on all

[3]The State Crime Laboratory report later confirmed that the residue in the baggie was methamphetamine.

objections, motions, and requests with an explanation as to why each adverse ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 4-3(k)(1). Our precedent requires full compliance with the rule. *Boen v. State*, 2009 Ark. App. 535, at 1–2, 336 S.W.3d 883, 883 (citing *Brady v. State*, 346 Ark. 298, 302, 57 S.W.3d 691, 694 (2001); *Brown v. State*, 85 Ark. App. 382, 393–94, 155 S.W.3d 22, 29 (2004)).

Reed's counsel's no-merit brief correctly states that there were no adverse evidentiary rulings during the revocation hearing. The brief also abstracts and explains why the trial court's denials of the motion for continuance and for appeal bond are without merit. Additionally, the brief discusses the sufficiency of the evidence supporting the revocation of Reed's suspended sentence. Finally, counsel's brief includes an argument that the trial court's sentence is not illegal. Counsel argues that the sentence imposed on revocation was not illegal because it fell within the statutory range set forth in Ark. Code Ann. § 5-4-501(a)(2)(D)–(E) (Supp. 2011). Specifically, it is argued that for a Class C felony, the sentencing range is not less than three years and not more than twenty and for a Class D felony, the term of imprisonment cannot exceed twelve years. Counsel argues that because Reed was sentenced to twelve years' imprisonment and seven years' SIS for each of the Class C felonies and six years' imprisonment for the Class D felony (to run concurrently), the sentences were not illegal.

However, we note that the statutory authority on which Reed's counsel relies is sentencing for habitual offenders. And while the record establishes that Reed was charged in 2006 with possession of methamphetamine and as a habitual offender, it does not establish that Reed pled guilty to being a habitual offender. Neither the 2006 nor the 2008 judgment and commitment order reflects that Reed was sentenced as a habitual offender. Moreover, in the

record there is a document entitled, "Additional Terms/Conditions of Disposition," that relates to Reed's 2006 judgment and commitment order, and it expressly provides that "habitual criminal is not pursued." While it appears that at the revocation hearing the State and Reed's counsel were under the impression that Reed's exposure was within the sentencing range of the habitual-offender statute, there is no evidence in the record that Reed was sentenced as a habitual offender. Thus, the applicable sentencing range for Reed's Class C felonies is three to ten years. Ark. Code Ann. § 5-4-401(a)(4) (Repl. 2006). Because Reed was sentenced on revocation in excess of that amount for each of the two Class C offenses, there is an argument that these sentences are illegal.

Moreover, upon revocation, Reed was sentenced to six years' imprisonment for Class D possession of marijuana. Again, because there is no evidence in the record that Reed was sentenced as a habitual offender, the applicable sentencing range for a Class D felony is zero to six years. Ark. Code Ann. § 5-4-401(a)(5) (Repl. 2006). While on its face, the 2011 sentence is within that range, we note that in 2008 Reed was sentenced to two years' imprisonment for that conviction and was later released from prison on October 22, 2008. Thus, the maximum imprisonment sentence Reed could receive upon revocation in 2011 for the Class D felony possession of marijuana was four years. Therefore, there is an argument that this sentence is illegal as well.

Because Reed's sentences may be illegal as explained above, and because his counsel failed to address these potentially meritorious grounds for reversal, we must order rebriefing in adversary form. *Stribling v. State*, 2011 Ark. App. 386, at 3.

Rebriefing ordered; motion to withdraw denied.

WHITEAKER and HIXSON, JJ., agree.
Lesley Freeman Burleson, for appellant.
Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.