

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-413

KIRK JOHNSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 12, 2011

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CR-2003-676-2-5]

HONORABLE JODI DENNIS,
JUDGE

REBRIEFING ORDERED; MOTION
TO WITHDRAW DENIED

DAVID M. GLOVER, Judge

Appellant, Kirk Johnson, entered a negotiated plea of guilty in March 2007 to four drug charges—attempt to manufacture a controlled substance (crystal methamphetamine), possession of a controlled substance (methamphetamine), possession of a controlled substance (marijuana), and use of drug paraphernalia to manufacture methamphetamine. He was placed on probation for a total of five years. In September 2007, the State filed a petition to revoke Johnson’s probation, alleging various violations. At a hearing held November 10, 2008, Johnson waived his right to a hearing and admitted that he had violated the terms of his probation. Though stating that it believed Johnson had violated the terms of his probation, the trial court then gave Johnson until January 12, 2009, to correct his failure to do what he was supposed to have been doing.

Following the November 2008 hearing, Johnson's case was continued on several occasions for various reasons until February 16, 2010, when Johnson again appeared in court. The trial court stated that the purpose of the hearing was to determine sentencing because Johnson had admitted to violating his probation. However, the trial court then proceeded to take testimony from Johnson's probation officer, Brooke Norsworthy, and Bryan Stewart, a counselor in training at Sobriety Living Center.

Norsworthy testified that she had taken over the case from another probation officer; that since she had taken over the case, Johnson's reporting had been sporadic; and that when he did report, he tested positive for amphetamines. Norsworthy stated her notes indicated that Johnson was told at the November 10, 2008 hearing that he was continued on probation with "strict-compliance" terms and that any mistakes would cause his probation to be revoked. She also recounted that Johnson had failed to complete any of his community service; had been dropped from a substance-abuse program for failure to report for assessment, although he had been ordered to undergo mandatory alcohol/drug treatment; and had not made any payments to the sheriff's office as required by the terms of his probation. Stewart testified that Johnson was in inpatient treatment at Sobriety Living Center; that when he signed himself into the program, Johnson tested positive for methamphetamine; that he had tried to fake a drug screen by bringing in clean urine; and that he was not in compliance.

After hearing this testimony, the trial court told Johnson that when he appeared on November 10, 2008, and admitted that he was in violation of the terms of his probation, it

specifically told him what he had to do to stay out of the penitentiary, and Johnson had chosen not to do that. The trial court then sentenced him to the Arkansas Department of Correction for ten years.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4–3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant’s counsel has filed a motion to withdraw on the grounds that the appeal is without merit. Counsel’s motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to appellant made by the trial court on all objections, motions, and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished appellant with a copy of his counsel’s brief and notified him of his right to file *pro se* points; appellant has not filed any points.

We order rebriefing in this case. Johnson’s counsel’s entire argument is as follows:

APPELLANT WAS SENTENCED BY THE COURT AFTER ADMITTING THAT HE HAD VIOLATED THE TERMS OF HIS PROBATION—THERE WERE NO ADVERSE RULINGS BY THE COURT ON WHICH TO BASE AN APPEAL

Appellant was sentenced by the Court as a result of a negotiated plea to a total of sixty months of probation. A Petition to Revoke and Violation Report were later filed by the State. Appellant admitted to the Court that he had violated his probationary terms and conditions and waived a hearing.

Appellant was sentenced by the Court at a subsequent hearing at which evidence was presented. There were no adverse evidentiary rulings by the Court. The Court sentenced Appellant to a term of ten years in the Arkansas Department of Correction.

In conclusion, Appellant's appeal presents no points of merit.

If the trial court had revoked Johnson's probation in November 2008, this argument would be sufficient. However, although Johnson admitted in November 2008 that he had violated the terms of his probation and waived a hearing, the trial court did not revoke his probation at that time, but rather continued it, giving Johnson time to comply with the conditions of his probation. When Johnson was finally brought back into court in February 2010, the trial court heard testimony and then revoked Johnson's probation. Johnson did not admit at that hearing that he had violated the conditions of his probation, and he did not waive a hearing on the issue. Instead, the trial court took testimony regarding whether Johnson had abided by or violated the terms of his probation, and ultimately determined that Johnson had violated the terms of his probation, revoked his probation, and sentenced him to a term of imprisonment in the Arkansas Department of Correction.

The revocation of Johnson's probation was an adverse ruling, and it must be addressed by counsel seeking to withdraw from representation. *Holt v. State*, 2009 Ark. App. 544. Counsel failed to do this because he erroneously thought that Johnson had admitted that he had violated the terms of his probation and waived a hearing. While Johnson did that in November 2008, the trial court did not revoke at that time, but continued him on probation. Probation was not revoked until February 2010 after a hearing where testimony was taken regarding whether Johnson had violated the terms of his probation since November 2008.

Cite as 2011 Ark. App. 26

We remand this case for counsel to discuss whether there was sufficient evidence to support the revocation.

Remanded for rebriefing.

VAUGHT, C.J., and HART, J., agree.