

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR10-829

NATHANIEL FITZGERALD
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered January 26, 2011

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. CR-2006-1550]

HONORABLE RANDY
PHILHOURS, JUDGE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

DAVID M. GLOVER, Judge

This is a no-merit appeal from the revocation of a suspended imposition of sentence. Appellant, Nathaniel Fitzgerald, entered a negotiated plea of guilty on March 4, 2009, to the offense of breaking or entering, a Class D felony. He was given a seventy-two-month suspended imposition of sentence and assessed fines and costs of \$770. One of the conditions of his suspended sentence was that he not violate any federal, state, or municipal laws. The State filed a petition to revoke Fitzgerald's suspended sentence in March 2009, and then filed an amended petition for revocation in August 2009, alleging, in pertinent part, that Fitzgerald had committed the offense of battery in the second degree. After a hearing, the trial court

revoked Fitzgerald's suspended sentence and sentenced him to four years in the Arkansas Department of Correction.

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, Fitzgerald'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 Fitzgerald 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 Fitzgerald with a copy of his counsel's brief and notified him of his right to file pro se points. Fitzgerald has filed points, and the State has filed a responsive brief regarding Fitzgerald's points on appeal.

At the revocation hearing, Officer David Boykin testified that on July 30, 2009, while a jailer at the Crittenden County jail, he was instructed to bring Fitzgerald from his cell to the sallyport to be placed on suicide watch because Fitzgerald was diabetic and had been hoarding sweets in his cell that could be harmful to him. While performing this task, he testified that Fitzgerald struck him in the back of the head with his fist. Boykin stated that he was in fear for his safety after Fitzgerald struck him. Officer John Dexter testified that he was with Officer Boykin and was removing items from Fitzgerald's cell when Fitzgerald hit Boykin. Dexter said that Fitzgerald continued to fight and be combative even after he and Boykin had taken him down to the ground. Charlton Beard, an inmate disciplinary officer, testified that he answered

an assistance call and observed Fitzgerald and Boykin in an altercation. Beard said that he intervened to get the officers to stop hitting Fitzgerald, but that Fitzgerald had begun the altercation and was fighting back.

Fitzgerald testified that he was totally disabled, and that there were previous incidents in which Boykin had injured him. He said that he purchased about \$100 of items from the commissary each week, and that on the day in question, Boykin was giving his “shit” away. Fitzgerald claimed that someone hit him, that Boykin sprayed him, and that Boykin and Dexter beat him until Beard made them stop.

At the close of the hearing, the trial court found that Fitzgerald had violated the conditions of his suspended sentence based upon the officers’ testimony regarding the altercation with them in Fitzgerald’s cell. The trial court based the revocation solely on that altercation. Fitzgerald’s suspended sentence was revoked, and he was sentenced to four years in the Arkansas Department of Correction.

The only adverse ruling during the hearing was the revocation of Fitzgerald’s suspended sentence. A circuit court may revoke a defendant’s suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Supp. 2009). In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). Evidence that would be insufficient for a criminal conviction may be sufficient for a

revocation because of the differing burdens of proof. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006).

On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Stultz, supra*. The appellate courts defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Id.* In order to revoke a suspended sentence, the State need only prove one violation. *Id.*

A person commits battery in the second degree if he intentionally or knowingly, without legal justification, causes physical injury to a person he knows to be an employee of a correctional facility while the employee is acting in the line of duty. Ark. Code Ann. § 5-13-202(a)(4)(A)(i) (Supp. 2009). It is apparent that the trial court credited the officers' testimony at the revocation hearing, and a preponderance of the evidence, recited above, supports the trial court's finding that Fitzgerald committed this offense.

Fitzgerald has submitted a list of rambling pro se points, but his arguments can be fairly categorized into three arguments—sufficiency of the evidence; ineffective assistance of counsel; and complaints regarding his treatment during his incarceration. First, the sufficiency of the evidence to support the revocation, which Fitzgerald addresses in detail, has been discussed above. Next, with regard to the question of ineffective assistance of counsel, such claims must first be raised in the trial court in order to be considered on appeal. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). In the present case, that issue was never raised below; therefore, it is not preserved for appellate review. Lastly, Fitzgerald lists numerous complaints regarding his treatment during his incarceration; however, none of those

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complaints are germane to the question of whether there were any adverse rulings that might arguably support an appeal of the revocation of his suspended sentence.

From our review of the record and the brief presented to this court, Fitzgerald's counsel has complied with the requirements of Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals. Counsel's motion to be relieved is granted and Fitzgerald's revocation is affirmed.

Affirmed; motion to be relieved granted.

VAUGHT, C.J., agrees.

HART, J., concurs.