

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-819

DERRYL SEAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JANUARY 13, 2010

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT,
[CR-2005-1024B]

HONORABLE JOHN N.
FOGLEMAN, JUDGE

REBRIEFING ORDERED

RITA W. GRUBER, Judge

In December 2005, appellant Derryl Seay pleaded guilty to theft of property, for which he was sentenced to sixty months' probation. The State filed a petition for revocation on May 9, 2007, alleging that appellant violated the terms of his probation by failing to pay fines, costs, and fees; failing to report to probation; failing to pay probation fees; and failing to notify the sheriff and probation of his current address and employment. After a hearing, the trial court granted the petition to revoke and sentenced appellant to six years' imprisonment.

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 ground that this appeal is wholly without merit. Rule 4-3(k)(1) requires this motion to be accompanied by a brief which contains an argument section that lists all

rulings adverse to the appellant made by the trial court with an explanation as to why each adverse ruling is not a meritorious ground for reversal. We order rebriefing because counsel has not fulfilled his obligations under the rule.

Counsel for appellant stated there were two rulings adverse to appellant in the revocation hearing: (1) the overruling of defense counsel's hearsay objection to the introduction of records from the probation department; and (2) the overruling of defense counsel's renewal of the hearsay objection. Appellant's counsel contends that the court did not abuse its discretion in allowing these records and therefore the court's ruling is not reversible error. While we note that counsel does not indicate why the court did not abuse its discretion—that is, perhaps because certain rules of evidence are not applicable in revocation proceedings, *see, e.g., Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000), or because the testimony fell within a noted hearsay exception—we must order rebriefing for another reason.

While appellant did not challenge the sufficiency of the evidence in the revocation hearing, counsel must address the sufficiency of the evidence in a no-merit appeal from a revocation. The requirements of Ark. R. Crim. P. 33.1, that a defendant must move for a dismissal to preserve the issue of sufficiency of the evidence, do not apply to revocation hearings. *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001). The decision to revoke is an adverse ruling that must be addressed by counsel in an *Anders* brief. *Brown v. State*, 85 Ark. App. 382, 393, 155 S.W.3d 22, 29 (2004). Therefore, we order counsel to file a substituted

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brief that complies with the rule within thirty days from the date of this opinion.¹ When the brief is filed, the motion and brief will be forwarded by the Clerk to appellant so that he may raise within thirty days any points he chooses in accordance with Ark. Sup. Ct. R. 4-3(k)(2).

Rebriefing ordered.

ROBBINS and KINARD, JJ., agree.

¹We note that counsel did not place a copy of the conditions in the addendum as is required by Rule 4-2(a)(8) (2009) and a long line of cases, *see, e.g., Taylor v. State*, 63 Ark. App. 82, 973 S.W.2d 840 (1998).