

Cite as 2018 Ark. App. 448
ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-17-934

JARMALL KELLEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 26, 2018

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. 35CR-15-246]

HONORABLE BERLIN C. JONES,
JUDGE

REBRIEFING ORDERED; MOTION
TO WITHDRAW DENIED

LARRY D. VAUGHT, Judge

Appellant Jarmall Kelley appeals his conviction by a Jefferson County Circuit Court jury of residential burglary, aggravated assault, theft by receiving, and interference with custody. Kelley previously submitted a merit brief that we sent back for rebriefing in *Kelley v. State*, 2018 Ark. App. 299. In that opinion, we held that Kelley’s brief failed to provide an impartial condensation of the transcript in that it omitted key testimony adverse to Kelley, and we noted that “this abstracting deficiency appears to be intentional” based on misleading arguments made in reliance on the inaccurate abstract. *Kelley*, 2018 Ark. App. 299, at 2. Kelley’s appointed counsel has now filed a no-merit brief and a motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). Kelley has been notified of his right to file pro se points and has not done so. Again, we cannot reach the merits of Kelley’s appeal because his

counsel's no-merit brief is flagrantly deficient. We therefore order rebriefing and deny counsel's motion to withdraw.

Our supreme court has explained that the purpose and substance of a brief in support of an attorney's motion to withdraw as counsel where an appeal would be without merit is governed in part by *Anders* and subsequent United States Supreme Court cases. *Sartin v. State*, 2010 Ark. 16, at 3, 362 S.W.3d 877, 879–80. Pursuant to those cases, the purpose of an *Anders* brief is both “to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients’ appeal to the best of their ability” and to aid the court in its “critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.” *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988). This framework imposes two important duties on an appellate court faced with an *Anders* brief. First, the court “must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client’s appeal.” *Penson v. Ohio*, 488 U.S. 75, 83 (1988) (citing *McCoy*, 486 U.S. at 442). Second, the court “must determine whether counsel has correctly concluded that the appeal is frivolous.” *Id.* at 83.

To fulfill the due-process safeguards necessary in no-merit withdrawal cases, the Arkansas Supreme Court promulgated Rule 4-3, which requires that a brief accompanying an attorney's request to withdraw from appellate representation of a criminal defendant on the ground that the appeal is wholly without merit shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the circuit 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. *Gordon v. State*, 2015 Ark. 191, at 2 (citing Ark. Sup. Ct. R. 4-3(k)(1)). In the present case, counsel has identified six adverse rulings: the court’s denial of Kelley’s motion for directed verdict and five evidentiary rulings. Counsel has failed, however, to sufficiently explain why each adverse ruling would not present grounds for a meritorious appeal. For each evidentiary ruling, counsel simply describes the circuit court’s ruling and provides a conclusory statement, such as “[t]he Court was correct in its actions.”

Counsel’s discussion of the adverse rulings fails to cite any convincing legal authority or make substantive arguments as to the merits of each issue. For example, in addressing the circuit court’s ruling that an audio recording of a 911 call could be played for the jury over Kelley’s hearsay objections because it was admissible under Arkansas Rule of Evidence 803 as a business record, counsel simply states that Rule 803 allows for the admission of business records, but he fails to address whether the audio recording at issue qualifies as such a record. In addressing the court’s decision to revoke Kelley’s bond, counsel simply states (without citation to authority) that “[t]he Court has wide discretion in assuring the appearance of a defendant for judicial proceeding,” without analyzing the application of that discretion to Kelley. “We cannot affirm an appellant’s conviction and allow an attorney to withdraw without adequate discussion as to why a particular ruling by the trial court should not be a meritorious ground for reversal.” *Sartin*, 2010 Ark. 16, at 4, 362 S.W.3d at 880 (citing *Brady v. State*, 346 Ark. 298, 302, 57 S.W.3d 691, 694 (2001); *Mitchell v. State*, 327 Ark. 285, 286–87, 938 S.W.2d 814, 815 (1997)).

Moreover, we note that the contents of the addendum fail to comply with Arkansas Supreme Court Rule 4-2(a)(8)(A)(i), which plainly requires an appellant to include in the

addendum exhibits, including computer disks, CDs, and DVDs, that are essential for the appellate court to understand the case. Here, both video and audio recordings were played for the jury. While these recordings are attached to the record, they have not been included in the addendum. These recordings are necessary for us to review counsel's arguments regarding the sufficiency of the evidence presented against Kelley. Moreover, at least two of the evidentiary objections at issue in this case related to the recordings. Therefore, copies of these key pieces of evidence must be included in the addendum. *Lewis v. State*, 2012 Ark. App. 540, at 1–2.

We must therefore again order rebriefing. Counsel's substituted brief, abstract, and addendum are due within fifteen days from the date of this decision. As is our practice, we express no opinion as to whether the substituted brief should be submitted pursuant to Rule 4-3(k) or on meritorious grounds. *Weaver v. State*, 2014 Ark. App. 34, at 2–3. If a no-merit brief is filed, counsel's motion to withdraw and brief will be forwarded to Kelley by our clerk so that, within thirty days, he will again have the opportunity to raise any pro se points he so chooses. Ark. Sup. Ct. R. 4-3(k)(2). Also, the State shall be afforded the opportunity to file a responsive brief. Ark. Sup. Ct. R. 4-3(k)(3).

We remind counsel of his duty to protect his client's due-process rights by representing the client's appeal to the best of his ability, and we caution counsel that repeated future failures to comply with our rules will be referred to the Committee on Professional Conduct.

Rebriefing ordered; motion to withdraw denied.

GLOVER and HIXSON, JJ., agree.

Potts Law Office, by: *Gary W. Potts*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Jacob H. Jones*, Ass't Att'y Gen., for appellee.