Cite as 2019 Ark. App. 238

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-17-1031

SHAWN PAUL VAIL APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 24, 2019 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. 18CR-15-697] HONORABLE RALPH WILSON, JR., JUDGE AFFIRMED; MOTION TO WITHDRAW GRANTED

N. MARK KLAPPENBACH, Judge

This no-merit appeal returns to us after we ordered rebriefing and denied counsel's motion to withdraw. *Vail v. State*, 2019 Ark. App. 8. The briefing deficiencies have been corrected by counsel, and we affirm the revocation of Vail's probation and grant counsel's motion to withdraw.

Appellant Shawn Paul Vail pleaded guilty in 2015 to the crime of financial identity fraud and received a six-year term of supervised probation. The State filed a petition to revoke in May 2017 alleging six violations of probation. Following a hearing, the Crittenden County Circuit Court revoked his probation and sentenced him accordingly. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals, Vail's attorney has filed a no-merit brief, along with a motion to withdraw as counsel, asserting that there is no issue of arguable merit for an

appeal. Vail was notified of his right to file pro se points for reversal, but he has not filed any such points.

On appeal of a revocation, we review whether the circuit court's findings are clearly against the preponderance of the evidence. *Jones v. State*, 2013 Ark. App. 466. To revoke probation, the State has the burden of proving by a preponderance of the evidence that a condition of probation was violated. *Id.* Because the burden of proof is by a preponderance of the evidence rather than beyond a reasonable doubt, evidence that is insufficient to support a criminal conviction may be sufficient to support a revocation. *Joiner v. State*, 2012 Ark. App. 380. Proof of just one violation of the probation terms and conditions is sufficient to support revocation. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

A request to withdraw because the appeal is wholly without merit must be accompanied by a brief that contains a list of all rulings adverse to appellant and an explanation as to why each ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 4-3(k)(1). The brief must 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. *Id.* In deciding whether to allow counsel to withdraw from appellate representation, the test is not whether counsel thinks the circuit court committed no reversible error but whether the points to be raised on appeal would be wholly frivolous. *Brown v. State*, 2018 Ark. App. 367, 553 S.W.3d 787. Pursuant to *Anders*, we are required to determine whether the case is wholly frivolous after a full examination of all the proceedings. *T.S. v. State*, 2017 Ark. App. 578, 534 S.W.3d 160.

In this case, although the circuit court found that the State had proved four of the alleged violations by a preponderance of the evidence, we need to address only one because a single violation is sufficient to affirm the revocation of probation. *Richardson*, *supra*. The State alleged that Vail had violated the condition of living a law-abiding life and not breaking the law. Specifically, Vail was accused of possessing methamphetamine. The evidence, presented through the testimony of law enforcement officers and crime-laboratory personnel, showed that while Vail was in a hotel room occupied by several people, a baggie of methamphetamine was found in the bathroom where Vail had just been. Vail openly admitted that he was an addict who had relapsed and that the drugs were his. Chemical testing proved that the drug was methamphetamine. With a preponderance-of-the-evidence standard, counsel is correct that there can be no issue of arguable merit raised on appeal about whether the State proved this alleged violation.

Counsel recites that there were two evidentiary objections raised during the revocation hearing but that neither of the rulings on those objections were adverse to Vail. Both objections were raised by defense counsel and alleged that (1) a witness's answer was conclusory and (2) one of the prosecutor's questions was posed in a conclusory fashion. The first objection was sustained by the circuit court, and the second objection resulted in withdrawal of the question. We agree that these rulings were not adverse to Vail.

Counsel states that the circuit court denied Vail's motion to continue the sentencing hearing for eleven days, which was an adverse ruling, but counsel explains why this would not support a meritorious argument for appeal. After Vail was found to have inexcusably failed to comply with the terms of probation, the circuit court set a sentencing hearing for

one month later to permit Vail an opportunity to "immediately" apply for the county drug court or mental-health court. If Vail did not gain entry into one of those programs, the circuit court was "looking at a community correction sentence of two to four years."

At the sentencing hearing, Vail stated that his application had been denied by the mental-health court but that he had not completed the application process with drug court, which he had started in the previous two weeks, so he wanted a continuance for eleven more days. Defense counsel echoed the request for eleven more days to see that process through. The prosecutor told the circuit court that he had contacted drug court and had been told with certainty that Vail would not be admitted. The circuit court considered the request, believed that drug court would likely send Vail to treatment, and then sentenced Vail to two years in a regional correctional facility that would "most likely have a treatment center." Counsel correctly states that the circuit court is given wide discretion on whether to grant a continuance, the court had already given Vail a month in order to seek entry, Vail delayed applying to drug court for two weeks, and Vail ultimately would receive treatment in custody. We agree with counsel that no issue of arguable merit could be raised on appeal regarding the court's discretionary decision not to grant an additional continuance in this circumstance.

Based on our review of the record and counsel's brief, we hold that counsel has complied with the requirements of *Anders* and Arkansas Supreme Court Rule 4-3(k)(1) and that the appeal has no merit. We affirm the revocation of Vail's probation and grant his counsel's motion to be relieved.

Affirmed; motion to withdraw granted.

GRUBER, C.J., and MURPHY, J., agree.

S. Butler Bernard, Jr., for appellant.

One brief only.