

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-20-503

TERRY CORTEZ STEWART
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered June 2, 2021

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. 18CR-18-1197]

HONORABLE DAN RITCHEY,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

STEPHANIE POTTER BARRETT, Judge

The Crittenden County Circuit Court revoked Terry Cortez Stewart’s probation and sentenced him to six years’ imprisonment. Stewart was convicted of theft by receiving, a Class D felony, by a negotiated plea of guilty on January 31, 2019, and was placed on three years of unsupervised probation.

Pursuant to Arkansas Supreme Court Rule 4-3(k) and *Anders v. California*, 386 U.S. 738 (1967), Stewart’s counsel has filed a motion to withdraw on the ground that this appeal is wholly without merit. The motion is accompanied by a brief with an abstract and addendum of the proceedings below that explains why there is nothing in the record that would support an appeal. The clerk of this court provided Stewart with a copy of his counsel’s brief and notified him of his right to file a pro se statement of points for reversal; Stewart has filed no points. We affirm the revocation of Stewart’s probation and grant counsel’s motion to withdraw.

The State filed a petition for revocation of probation on October 8, 2019, alleging the following five violations: (1) failure to pay fines, costs, and fees as directed; (2) failure to live a law-abiding life, be of good behavior, and not violate any state, federal, or municipal law; (3) on or about April 21, 2019, Stewart committed the offense of possession of a firearm by a certain person in case No. 18CR-19-557; (4) on or about June 13, 2019, Stewart committed the offense of possession of a firearm by a certain person in case No. 18CR-19-752; and (5) on or about April 12, 2019, Stewart committed the offenses of murder in the first degree and terroristic act x13 in case No. 18CR-19-786.

A revocation hearing was held on May 27, 2020. At the close of the State's case, Stewart moved for a directed verdict on all five of the alleged violations. The circuit court granted this motion in regard to the fifth alleged violation—that Stewart on or about April 12, 2019, committed the offense of murder in the first degree and terroristic act x13 in case No. CR-2019-786. After the defense rested, the circuit court granted Stewart's renewed motion for directed verdict in regard to the fourth alleged violation—that Stewart, on or about June 13, 2019, committed the offense of possession of a firearm by a certain person in case No. 18CR-19-752. However, the court found Stewart guilty of the three remaining violations alleged by the State and sentenced him to six years' imprisonment.

In a no-merit brief, counsel is required to list each ruling adverse to the defendant and explain why it does not present a meritorious ground for reversal. *Eads v. State*, 74 Ark. App. 363, 365, 47 S.W.3d 918, 919 (2001). After a full examination of the proceedings, we are required to determine whether an appeal would be wholly frivolous. *Tennant v. State*, 2014 Ark. App. 403, at 2, 439 S.W.3d 61, 63. In counsel's no-merit brief, counsel first identifies two objections, neither of which was adverse to Stewart. The only adverse

rulings were the circuit court's denial of Stewart's motion for directed verdict, the circuit court's denial of Stewart's renewed motion for directed verdict, and Stewart's subsequent revocation of probation. Stewart's counsel has addressed each adverse ruling and explained why the evidence supported the circuit court's decision to revoke Stewart's probation.

To revoke probation, the State must prove by a preponderance of the evidence that the defendant violated a condition of his probation. *Green v. State*, 2010 Ark. App. 174, at 4. We will not reverse the circuit court's findings unless they are clearly against the preponderance of the evidence. *McClain v. State*, 2016 Ark. App. 205, at 3, 489 S.W.3d 179, 181 (citing *Green v. State*, 2015 Ark. App. 291, 461 S.W.3d 731). Evidence that would not support a criminal conviction in the first instance may be enough to revoke probation or a suspended sentence. *Id.* Determining whether a preponderance of the evidence exists turns on questions of credibility and weight to be given to the testimony. *Id.* We hold that the circuit court properly revoked Stewart's probation for failure to pay ordered amounts.

When the alleged violation involves the failure to pay ordered amounts, after the State has introduced evidence of nonpayment, the burden shifts to the probationer to provide a reasonable excuse for the failure to pay. *Vail v. State*, 2014 Ark. App. 407, at 3, 438 S.W.3d 286, 288 (citing *Scroggins v. State*, 2012 Ark. App. 87, at 9, 389 S.W.3d 40, 45). It is the probationer's obligation to justify his failure to pay, and this shifting of the burden of production provides an opportunity to explain the reasons for nonpayment. *Id.* If the probationer asserts an inability to pay and provides evidence demonstrating that inability, then the State must demonstrate that the probationer did not make a good-faith effort to pay. *Id.* Despite the shifting of the burden of production, the State shoulders the ultimate burden of proving that the probationer's failure to pay was inexcusable. *Id.* If the

probationer offers no reasonable explanation for his failure to pay, then it is difficult to find clear error in a circuit court's finding of inexcusable failure to pay. *Id.*

Here, Stewart stipulated to the admission of State's exhibit No. 1. This exhibit—the payment history from the Crittenden County Sheriff's Department for Stewart's fines, costs, and fees associated with his theft-by-receiving charge in case No. 18CR-18-1197—shows that Stewart had never made a payment toward his fines, fees, and costs and still owes \$920. Though the circuit court found that Stewart had committed three separate violations, the State need only show that the defendant committed one violation to sustain a revocation. *Mosley v. State*, 2016 Ark. App. 353, at 2, 499 S.W.3d 226, 228 (citing Ark. Code Ann. § 16-93-308(d) (Supp. 2015)). Because the State sufficiently demonstrated that Stewart violated his probation by failing to pay fines, costs, and fees as directed, the circuit court properly revoked Stewart's probation for failure to pay ordered amounts.

From our review of the record and the brief presented to us, we find counsel has complied with *Anders* and Rule 4-3(k) and hold that the appeal is without merit. Accordingly, we grant counsel's motion to withdraw and affirm the revocation.

Affirmed; motion to withdraw granted.

GRUBER and WHITEAKER, JJ., agree.

S. Bernard Butler, Jr., for appellant.

One brief only.