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ARKANSAS COURT OF APPEALS

DIVISION III

No. CR-21-385

CHRISTOPHER DEMOND HARVEY
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 1, 2022

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. 66FCR-17-1271]

HONORABLE STEPHEN TABOR,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

RITA W. GRUBER, Judge

This is a no-merit appeal filed on behalf of appellant Christopher Harvey following the Sebastian County Circuit Court's revocation of his suspended imposition of sentence. Appellant's counsel has filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(b)(1) (2021), along with a motion to be relieved as counsel, asserting that there is no issue of arguable merit for an appeal. Appellant was notified, via certified mail, of his right to file pro se points for reversal but has not done so. The State has not filed a brief. We affirm the conviction and grant counsel's motion to withdraw.

On May 30, 2018, appellant pled guilty to possession of cocaine (less than 2 grams) and possession of drug paraphernalia. Pursuant to the May 31 sentencing order, appellant

was sentenced to three years' imprisonment to be followed by three years suspended imposition of sentence for each offense, with the sentences to run concurrently. The terms and conditions of his suspended sentence included that he not violate any federal, state, or municipal law and that he pay fines and fees as directed.

The State filed a petition to revoke on May 8, 2019, alleging that appellant had been released from the Arkansas Department of Correction on September 26, 2018, and on April 27, 2019, he violated the conditions of his suspended sentence by committing the offenses of possession of methamphetamine with purpose to deliver and possession of drug paraphernalia. The petition alleged that charges were pending in Sebastian County. It further alleged that appellant had failed to pay fines, costs, and fees as ordered.

On March 11, 2020, the court entered an order which provided:

Now on this 11 day of March, 2020, comes before the Court the above-referenced matter set for sentencing on a Petition to Revoke, and the Court, being duly and sufficiently advised, finds as follows: The Defendant has paid his fines/costs/fees in full, and is to therefore remain on his suspended sentence that was ordered at the time of his plea on May 30th, 2018. All terms and conditions of that suspended sentence remain in full force and effect.

On October 2, 2020, the State again filed a petition to revoke. It alleged that on September 16, 2020, appellant violated the terms and conditions of his suspended sentence by committing the offenses of third-degree domestic battering and first-degree criminal mischief with charges pending in Sebastian County.

On March 11, 2021, the State filed an amended petition to revoke. It alleged that in addition to committing the September 16, 2020 offenses, appellant violated the terms and

conditions of his suspended sentence by committing the offenses of possession of cocaine, possession of hydrocodone, possession of drug paraphernalia, and criminal impersonation on March 4, 2021. The petition stated that charges were pending in Sebastian County. On April 13, 2021, the State filed another amended petition to revoke with the same alleged violations as the March 11 petition.

A revocation hearing took place on May 13, 2021. At the outset of the hearing, appellant's counsel moved for a continuance indicating that appellant wanted to hire private counsel. When the court asked appellant if he had taken steps to hire an attorney, appellant responded that he was waiting until his ninety days were up to post bond for the charge for which he was being held and had ten more days remaining. The court denied the motion, explaining that notice had originally been sent on March 12 for an April 15 hearing, which was continued. The court thought appellant was trying to manipulate the proceedings to get out of jail with no promise of hiring another attorney, and if he was going to hire another attorney, it could have been done before the hearing.

The State presented the testimony of two witnesses. Officer Al Crelia of the Fort Smith Police Department testified that he had been flagged down by a concerned citizen on March 5 reporting a male in the area acting strangely. Officer Crelia, along with Officer James, encountered appellant, who matched the citizen's description. Officer Crelia testified that Officer James first located appellant and stopped to talk with him at which time appellant was trying to reach into his pockets. Officer Crelia pulled up and observed Officer James asking appellant not to put his hands in his pockets, but appellant continued to do

so. Officer James detained appellant to keep him from reaching for anything. Officer Crelia said that appellant initially gave the name Seneca Harvey, which dispatch reported had returned a search waiver for Seneca Harvey. The officers started checking appellant's pockets and found an ID for Christopher Harvey. Once they confirmed they were speaking to Christopher Harvey, he was placed under arrest for criminal impersonation. They continued to search his pockets and found in his jacket pocket a small bag with a green leafy substance with a harder white crystal substance inside the green leafy substance, along with pills. The substances were transferred to the Arkansas State Crime Laboratory for testing.

Brandon Davis from the Arkansas State Crime Laboratory testified that the hard crystal substance was identified as cocaine with a weight of .1018 gram. Davis stated that no conclusions were made about the pills.

After the State rested, appellant called Officer James. The prosecutor indicated Officer James was not there because she had surgery. The court asked appellant's counsel if Officer James had been subpoenaed, and counsel stated that she had not. The defense rested without calling any witnesses. The circuit court revoked appellant's suspended sentence, finding that the preponderance of the evidence established that appellant had committed the offenses of possession of cocaine, possession of drug paraphernalia, and criminal impersonation in violation of the terms of his suspended sentences. The court sentenced appellant to three years' imprisonment for each offense to run concurrently. Appellant filed a timely notice of appeal from the May 24, 2021 sentencing order.

Rule 4-3(b) requires the argument section of a no-merit brief to contain “a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests . . . with an explanation as to why each . . . is not a meritorious ground for reversal.” The requirement for briefing every adverse ruling ensures that the due-process concerns in *Anders* are met and prevents the unnecessary risk of a deficient *Anders* brief resulting in an incorrect decision on counsel’s motion to withdraw. *Vail v. State*, 2019 Ark. App. 8. 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.

The first adverse ruling occurred when the court denied appellant’s motion for continuance to hire private counsel on the day of the revocation hearing. The denial of a motion for a continuance is reviewed for abuse of discretion. *Davis v. State*, 2019 Ark. App. 502, 588 S.W.3d 790. In order to warrant reversal, an appellant must demonstrate both that the circuit court abused its discretion in denying the continuance and also show prejudice from the denial of the continuance that amounts to a denial of justice. *Id.*

Here, appellant advised his attorney the day of the hearing that he was dissatisfied with counsel’s services and wanted a continuance to hire a private attorney. The court asked appellant why he had not hired an attorney prior to that day, and appellant responded that he was waiting until his ninety days were up to post bond. He added that he did not know any attorneys but that someone had given him a name but no contact information. The court noted that the hearing had been set for April 15; notice of the hearing was given on March 12; and a continuance was granted on April 13. In denying the motion, the court said that

the matter was continued and that appellant could have looked for and hired a lawyer by the time of the revocation hearing. The court added that it appeared as though appellant was attempting to “manipulate the proceedings so [he could] get out of jail with no promise of hiring another attorney.” We agree that the denial of appellant’s motion for continuance would not be an abuse of discretion.

The other adverse ruling was the revocation itself. In revocation proceedings, the State has the burden of proving by a preponderance of the evidence that a defendant violated the terms of his or her suspended sentence as alleged in the revocation petition, and we will not reverse the circuit court’s decision to revoke a suspended sentence unless it is clearly against the preponderance of the evidence. *Mathis v. State*, 2021 Ark. App. 49, 616 S.W.3d 274. The State need only show that the appellant committed one violation to sustain a revocation. *Id.*

In his no-merit brief, counsel accurately states that there can be no meritorious challenge to the sufficiency of the evidence supporting the revocation. The State’s petition to revoke was based on appellant’s committing new offenses, including possession of cocaine, possession of drug paraphernalia, and criminal impersonation. The testimony established appellant initially gave an incorrect name to the officers. Further, there was testimony by Officer Crelia that a small bag with a green leafy substance with a harder white crystal substance had been found in appellant’s jacket when he was searched. Brandon Davis from the crime lab testified that the substance was determined to be cocaine. Therefore, we agree

that the circuit court's decision to revoke appellant's suspended sentences was not clearly against the preponderance of the evidence.

Having reviewed the record and the brief presented, we conclude that there has been compliance with Rule 4-3(b)(1) and that this appeal from the revocation of appellant's suspended sentence is without merit. Consequently, appellant's counsel's motion to withdraw is granted, and the revocation is affirmed.

Affirmed; motion to withdraw granted.

WHITEAKER and HIXSON, JJ., agree.

Jones Law Firm, by: *F. Parker Jones III* and *Vicram Rajgiri*, for appellant.

One brief only.