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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-20-207

JOSEPH BENNION APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered June 1, 2022 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CR-16-1944] HONORABLE ROBIN F. GREEN, JUDGE AFFIRMED AS MODIFIED; MOTION TO WITHDRAW GRANTED

KENNETH S. HIXSON, Judge

Appellant Joseph Bennion appeals after the Benton County Circuit Court revoked his probation on the charges of possession of drug paraphernalia and two counts of failure to appear and sentenced him to serve an aggregate sentence of 312 months' imprisonment in the Arkansas Department of Correction. Appellant's counsel has filed a no-merit brief and a motion to withdraw as counsel pursuant to Arkansas Supreme Court Rule 4-3[1] and

[1]We note that counsel erroneously cites to a different rule in his motion. We also note that Rule 4-3 was amended January 17, 2020, which made electronic filing of appeals mandatory for cases in which the notice of appeal was filed on or after June 1, 2021. *See In re Rules for Acceptance of Records on Appeal in Elec. Format*, 2020 Ark. 421 (per curiam). However, because appellant's notice of appeal in this case was filed before June 1, 2021, a conventional paper appellate record was filed, and therefore, counsel's brief properly includes an abstract and addendum.

Anders v. California, 386 U.S. 738 (1967), asserting that this appeal is wholly without merit. The motion is accompanied by an abstract and addendum of the proceedings below, alleged to include all objections and motions decided adversely to appellant, and a brief in which counsel explains why there is nothing in the record that would support an appeal.[2] The clerk of this court mailed a copy of counsel's motion and substituted brief to appellant's last-known address informing him of his right to elect to stand on his original pro se points or to raise any additional pro se points for reversal. Appellant has filed substituted pro se points for reversal. Consequently, the attorney general has filed a brief in response. We grant counsel's motion to withdraw and affirm as modified.

I. *Relevant Facts*

Although we already set out much of the pertinent facts in our previous opinion ordering rebriefing, we summarize them here. *See Bennion*, 2021 Ark. App. 297, at 2–6. On November 5, 2016, appellant was driving a motor vehicle in Benton County, Arkansas, and his three-year-old grandson was in a child resistant car seat in the back seat. Appellant was lawfully stopped, and during the search, the law enforcement officer discovered a used syringe between the front seats and a package of seven unused syringes and towelettes in the passenger seat floorboard. Law enforcement performed a field test on the used syringe, and

[2]This is appellate counsel's second attempt in filing a no-merit appeal. In the first attempt, we denied counsel's motion to be relieved and ordered rebriefing. *Bennion v. State*, 2021 Ark. App. 297.

it tested positive for "meth/cocaine."[3] Appellant was thereafter charged by amended information with possession of drug paraphernalia, a Class D felony, in violation of Arkansas Code Annotated section 5-64-443(a)(2) (Supp. 2021) and two counts of failure to appear, a Class C felony, in violation of Arkansas Code Annotated section 5-54-120(b) (Supp. 2021). Appellant subsequently entered a negotiated plea of guilty, and the circuit court filed a sentencing order on November 15, 2017, placing appellant on thirty-six months' probation on all three counts. Appellant signed that he understood the terms and conditions of his probation agreement.

On May 1, 2019, the State filed a petition for revocation of probation alleging that appellant had violated the conditions of his probation by committing the following acts:

1. On or about April 26th, 2019, the Defendant committed the offense of Domestic Battery in the 2nd Degree, Class C Felony, in Benton County, Arkansas.
2. The Defendant has failed to pay fines, fees and costs as ordered by the court.
3. The Defendant has failed to pay supervision fees.

On June 6, 2019, appellant appeared in court on the petition for revocation. However, at the beginning of the hearing, the court ordered appellant to undergo a drug examination forthwith, and appellant tested positive for THC. The circuit court held appellant in contempt of court and ordered appellant to be incarcerated for ten days. The revocation hearing was continued.

[3]The syringe was sent to the Arkansas State Crime Laboratory for analysis.

On October 16, 2019, the State filed an amended petition for revocation of probation alleging the following two additional violations:

> 4. On or about November 30th, 2018, the defendant tested positive for methamphetamine and THC.
>
> 5. On or about June 6th, 2019, [at the earlier revocation hearing,] the defendant tested positive for THC.

A revocation hearing was held on November 25, 2019.

Regarding the offense of domestic battery in the second degree that appellant allegedly committed on or about April 26, 2019, in Benton County, Arkansas, the evidence indicated that appellant had taken his grandson, J.W., to the hospital for a broken arm. At the hearing, the parties stipulated to the admission of medical records from Ozark Community Hospital. The following statement was noted in the records:

> PT PRESENTS TO ED WITH HIS GRANDPA. PT REPORTS TEARFULLY "I RAN TO THE NEIGHBOR'S HOUSE TO CALL MY STEP-DAD BC MY GRANDPA WAS HITTING US WITH A BELT. I WENT HOME TO CHECK ON MY LITTLE BROTHER WHEN MY GRANDPA PUSHED ME DOWN AND HURT MY ARM." "I WAS WORRIED ABOUT MY LITTLE BROTHER," MY GRANDPA SAID "I DIDN'T BREAK YOUR ARM" BUT WHEN HE LOOKED AT IT HE SAID "OH SHIT, LOOK AT WHAT YOU MADE ME DO," PT CRYING AND VISIBLY UPSET.

Due to the injury to the child, the hospital personnel apparently contacted law enforcement. Detective Braxton Handle testified that he responded to the dispatch after J.W. had been taken to the hospital for a broken arm. Upon arriving at the hospital, Detective Handle spoke with appellant. Detective Handle explained that he was wearing a body camera when he spoke with appellant, and the video from that camera was played for the circuit court. During the video, appellant told Detective Handle that his "grandson got

a broken arm. He came in the -- he came in the house and I shoved him right in the house and the front door fell on his arm I guess somehow. It looked like it snapped."

Officer David Guarno, appellant's supervising probation officer, testified that appellant had given him "trouble" during the term of his probation by testing positive for controlled substances, failing to maintain his monetary obligations as ordered by the court, and committing a new violent offense. Officer Guarno readily admitted that he was most concerned about the new pending charge for battery in the second degree against appellant and that it "was the main reason for the petition to revoke." Guarno testified that he tested appellant multiple times to determine if appellant was a habitual drug user. Appellant tested positive on November 30, 2018, for methamphetamine and THC. Also, appellant tested positive for THC on June 6, 2019, at the prior hearing for revocation. Officer Guarno further testified that although appellant had not paid his supervision fees in the past as ordered, he had since rectified that issue and was current. Officer Guarno additionally thought that appellant had "paid off" his court fines by the time of the revocation hearing.

Jeff Williams, J.W.'s stepfather, testified that appellant cares for J.W. and the other children in the household nearly every day when he and his wife are working. Mr. Williams further explained that he was aware of and recognized a letter that J.W. had written after the incident, which was subsequently filed with the circuit court. Although trial counsel sought the admission of the letter during Mr. William's testimony, the State objected on the basis of hearsay and lack of foundation. Trial counsel argued that it was not being offered for the truth of the matter asserted; however, the circuit court denied the letter's admission into

evidence on the basis that there was a lack of foundation. Mr. Williams testified that he did not have any concerns about appellant continuing to watch the children even after the incident because he now knew the "full story." Williams explained that his understanding was that J.W. was grounded from playing outside. Because J.W. failed to listen and was outside playing, appellant "kind of patted" and "guided" J.W. in the house when J.W. tripped and fell over the front doorway jamb, causing J.W. to fall down and break his arm. Mr. Williams also acknowledged that he was aware of "some drug use" by appellant.

Patricia William's, J.W.'s mother and appellant's daughter, testified that she did not have any cause for concern about leaving the children in appellant's care. She testified that she recognized J.W.'s handwriting in the same letter previously excluded during Mr. William's testimony and that J.W. had asked to write the letter. The State objected on the basis of hearsay to Ms. William's testimony that J.W. had mentioned the letter first to Mr. Williams, which the circuit court sustained. The State further objected to the renewed motion to admit the letter J.W. allegedly wrote, which the circuit court ruled should be excluded on the basis of a lack of proper foundation. Trial counsel proffered a copy of this letter for our review on appeal. Upon further examination, Ms. Williams testified that she did not think that appellant would intentionally hurt J.W. and that she was aware of appellant's drug use. She further agreed that appellant was "very honest" but maintained that appellant must have been "usher[ing]" J.W. into the house "in the heat of the moment" when J.W. fell, despite the statements appellant made to Detective Handle.

After all evidence had been presented, appellant's trial counsel orally argued the following:

> Judge, the allegation – the first allegation that he committed, the offense of battery in the second degree, I don't know that the evidence today presented today rises to battery in the second degree. I think there's been testimony – the understanding of what happened that day was that [J.W.] broke his arm. Whether or not that was knowingly for purpose of sec – battery in the second degree for a C felony, I think that's still up in dispute.
>
> I don't know that that's – there's substantial evidence to find him guilty of violating his probation as far as to count one. His probation officer testified that but for this he would not have filed a probation revocation, so I think *I'm going to ask the Court to hold off any kind of sentencing until we can have a finding of fact on whether or not he is guilty of committing a Class C felony* because I think it does matter if – if it was reckless or knowingly.
>
> A child was injured that day; however, *I would point out that we haven't had a full trial as to that fact*. And I understand we're here for an evidentiary hearing; however, I think there are minor differences to show whether this case was accidental or knowingly for the purposes of deciding whether or not this is a child abuse case or – or something that – just an accident that – could have been avoided.

(Emphasis added.) Thereafter, the circuit court orally stated that it was revoking appellant's probation on all five grounds alleged in the amended petition and sentenced appellant to serve a total of twenty-six years' imprisonment. This appeal followed.

II. *Sufficiency of the Evidence to Support Revocation*

We first address whether the evidence was sufficient to support the revocation. A challenge to the sufficiency of the evidence may be raised for the first time in an appeal of a revocation in the absence of a motion for a directed verdict. *See Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001). In a revocation proceeding, the circuit court must find by a preponderance of the evidence that the defendant has inexcusably failed to comply with a

condition of his or her suspension or probation, and on appellate review, we do not reverse the circuit court's decision unless it is clearly against the preponderance of the evidence. *Flemons v. State*, 2014 Ark. App. 131; Ark. Code Ann. § 16-93-308(d) (Supp. 2021). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation or suspended-sentence revocation. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the circuit court's superior position. *Id.* Furthermore, the State need only prove that the appellant committed one violation of the conditions in order to revoke appellant's sentence. *Peals v. State*, 2015 Ark. App. 1, 453 S.W.3d 151.

Appellant's counsel alleges that there would be no merit to an appeal from the revocation, and we agree. Here, the State alleged, and the circuit court found, five separate violations of conditions. Regardless of the outcome of the pending second-degree domestic-battery charge and whether appellant was current on his fees and fines, the undisputed testimony was that appellant tested positive on November 30, 2018, for methamphetamine and THC and on June 6, 2019, for THC in violation of a condition forbidding him from using, selling, distributing, or possessing any controlled substance. Therefore, we hold that there would be no merit to an appeal of the sufficiency of the evidence supporting the revocation.

III. *Evidentiary Rulings*

Counsel also addresses evidentiary rulings related to evidence that appellant committed second-degree domestic battery in violation of a condition forbidding him from committing a criminal offense punishable by imprisonment. Appellant twice attempted to introduce a letter that J.W. wrote to the judge to help his grandfather "come home." The State objected on the basis of hearsay and improper foundation. The circuit court ruled that it should be excluded on the basis of a lack of proper foundation. Our appellate courts have repeatedly noted that the rules of evidence do not strictly apply in probation-revocation proceedings. *Walker v. State*, 2020 Ark. App. 559. Regardless, even assuming the rules did apply, any alleged evidentiary error would be harmless in light of the overwhelming evidence of his drug-related violation, which is unrelated to the purported hearsay testimony and admission of the letter. *Id.*; *McKinney v. State*, 2020 Ark. App. 473, 612 S.W.3d 172. Only one violation is necessary to support revocation. As such, there could be no issue of arguable merit to raise on appeal of these adverse rulings.

IV. *Sentencing*

After all evidence was presented at the revocation hearing, trial counsel asked the circuit court to "to hold off any kind of sentencing until we can have a finding of fact on whether or not he is guilty of committing a Class C felony." Trial counsel went on to explain that there had not yet been a trial on the pending second-degree domestic-battery charge. Despite this request, the circuit court immediately thereafter found appellant in violation and sentenced him to serve a total of twenty-six years. Arkansas Code Annotated section 16-93-308(d) provides that the circuit court may revoke the suspension of sentence or probation

of a defendant "at any time prior to the expiration of the period of suspension of sentence or probation." *See also Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992) (noting that the supreme court has consistently upheld a circuit court's decision to revoke probation on the basis of a subsequent crime prior to conviction for that crime). Thus, there could be no merit to an appeal from the circuit court's decision to sentence appellant for violating the terms and conditions of his probation even though he had not been convicted of the new crime, and again, it should be noted that there was undisputed evidence that appellant violated independent conditions of his probation by testing positive for drugs on November 30, 2018, and June 6, 2019.

Although we affirm appellant's revocation, there is an issue with the sentencing order that was raised in appellant's pro se points that must be addressed and corrected. In Arkansas, sentencing is entirely a matter of statute. *See* Ark. Code Ann. § 5-4-104 (Supp. 2021); *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909. We view an issue of a void or an illegal sentence as being an issue of subject-matter jurisdiction in that it cannot be waived by the parties and may be addressed for the first time on appeal. *Norton v. State*, 2018 Ark. App. 507, 563 S.W.3d 584; *Holmes-Childers v. State*, 2016 Ark. App. 464, 504 S.W.3d 645. A sentence is void or illegal when the circuit court lacks the authority to impose it. *Holmes-Childers*, *supra*. Here, the circuit court's sentencing order states, "Additional Info: . . . 2) No contact with 'J.A.'. 3) No contact with any minors." Appellant argues that the circuit court lacked the legal authority to impose a no-contact order under these circumstances, and the State simply responds that the no-contact provisions were supported because the "evidence

established the Bennion committed second-degree domestic battering by breaking J.W.'s arm" without any further citation or explanation.

Although we acknowledge Arkansas Code Annotated section 5-4-106 (Supp. 2021) permits a circuit court to extend a postconviction no-contact order under the procedures described in the statute where a defendant is convicted of domestic battering in the second degree, appellant in this case was convicted of possession of drug paraphernalia and two counts of failure to appear. As such, absent any other statutory authority, the circuit court lacked the authority to include the no-contact provisions for these convictions in the sentencing order, and appellant's argument has merit. *See Richie*, *supra* (holding a sentence of incarceration with a special condition that defendant complete a drug program was an illegal sentence). However, in the interest of judicial economy and because the illegal sentence has nothing to do with culpability and relates only to the sentencing order, we will correct the sentence in lieu of remanding for rebriefing or remanding it to the circuit court. *See Norton*, *supra*. Thus, we affirm the sentencing order with the modification that the provisions requiring appellant to have "[n]o contact with 'J.A.'" and "[n]o contact with any minors" be deleted. *See Black v. State*, 2022 Ark. App. 66 (holding that Black's sentencing order may be affirmed but modified to delete the provision that required his sentence to "be served straight").

V. *Appellant's Other Pro Se Points*

Appellant mostly contests the sufficiency of the evidence in his pro se points. Regarding appellant's positive tests for controlled substances, appellant argues that the

evidence of his positive test for THC on June 6, 2019, at the first revocation hearing should not have been considered by the circuit court because the court had already found him in contempt of court and had him incarcerated for ten days on that basis. Therefore, he argues that revoking his probation on this basis constituted a double-jeopardy violation. However, even excluding the June 6, 2019, test, Officer Guarno's undisputed testimony that appellant also tested positive on November 30, 2018, for methamphetamine and THC was sufficient to support the revocation of his probation. Further, appellant's argument that the circuit court erred because his probation officer would not have sought revocation for these violations alone lacks merit. The circuit court has the authority to revoke appellant's probation on the basis of the State's revocation petition, and it could do so at any time prior to the expiration of the period of probation upon finding by a preponderance of the evidence that he inexcusably violated a condition of that probation. *See* Ark. Code Ann. § 16-93-308(d). The State need only prove that the appellant committed one violation of the conditions in order to revoke appellant's sentence; therefore, it is unnecessary for us to address any of appellant's other pro se points pertaining to the other alleged violations. *Peals*, *supra*.

Appellant additionally argues that his counsel was ineffective for various reasons. In order for a defendant to argue ineffective assistance of counsel on direct appeal, he must first have presented the claim to the lower court either during the trial or in a motion for new trial. *See McCoy v. State*, 2015 Ark. App. 453; *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000). The State correctly notes that appellant's letter to the circuit court filed almost

two months after the notice of appeal was filed is insufficient under this standard. That letter merely states that appellant requests "a conflict attorney due to the untrue, unlawful, and inadequate representation." It does not identify any specific acts of deficient performance, identify whether the request was related to the revocation proceedings or to the appeal, nor does it request a new trial. As such, appellant's ineffective-counsel claim as presented now on appeal was not presented below and is not preserved on appeal. *Id.*

Appellant's remaining claims include that (1) he was not allowed to speak, argue, or object at the revocation hearing; (2) he was entitled to a trial by jury at the revocation hearing; (3) there was prosecutorial misconduct; (4) defense counsel had a conflict of interest because counsel was appointed in other cases before the court; and (5) the circuit judge was biased against him. However, these arguments simply lack merit, are not preserved, or lack any factual support to support a ground for reversal. A defendant who invokes his right to counsel before trial by retaining an attorney or accepting appointment of counsel may be found to have waived his right to self-representation at trial and also in pretrial proceedings. *Brown v. Gibson*, 2012 Ark. 285, 423 S.W.3d 34 (per curiam). There is no right to hybrid representation. *Id.* Further, the right to self-representation does not confer a license to abuse the dignity of the courtroom, and it is not a license not to comply with relevant rules of procedural and substantive law. *Id.* Because appellant was represented by appointed counsel, he was not entitled to simultaneously act as his own attorney. *Id.*; *Monts v. Lessenberry*, 305 Ark. 202, 806 S.W.2d 379 (1991). Further, the supreme court has previously rejected the argument that a defendant is constitutionally entitled to a jury trial in a revocation case.

Hughes v. State, 264 Ark. 723, 574 S.W.2d 888 (1978); *Bullington v. State*, 2019 Ark. App. 244. Finally, there is no evidence in the record to support appellant's arguments that there was prosecutorial misconduct, counsel had a conflict of interest, or the circuit court was biased.

VI. *Conclusion*

Thus, from our review of the record and the brief presented, we find that counsel has complied with the requirements of *Anders* and Rule 4-3 and hold that any appeal would be wholly without merit except for the illegal sentencing issue discussed above. Accordingly, counsel's motion to withdraw is granted, and we affirm the sentencing order with the modification that the provisions requiring appellant to have "[n]o contact with 'J.A.'" and "[n]o contact with any minors" be deleted.

Affirmed as modified; motion to withdraw granted.

GRUBER and WHITEAKER, JJ., agree.

Graves Law Firm, by: *Josie N. Graves*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.