Cite as 2023 Ark. App. 77

# ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-22-322

| | |
|---|---|
| | Opinion Delivered February 15, 2023 |
| BRANDON GOLDSMITH<br>APPELLANT | APPEAL FROM THE DREW COUNTY CIRCUIT COURT<br>[NO. 22CR-20-85] |
| V. | HONORABLE ROBERT B. GIBSON III, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED; MOTION TO WITHDRAW GRANTED |

**WENDY SCHOLTENS WOOD, Judge**

Brandon Goldsmith appeals the Drew County Circuit Court's sentencing order revoking his probation and sentencing him to six years' imprisonment. Goldsmith's attorney seeks to be relieved as appellate counsel and has filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(b)(1) (2022). We affirm and grant counsel's motion to withdraw.

In December 2020, Goldsmith entered a plea of guilty to possession of a controlled substance, a Class D felony. He was sentenced to twenty-four months' supervised probation. The terms of probation included, among others, the requirements that Goldsmith not possess any firearms and not commit any criminal offenses punishable by imprisonment. On

October 11, 2021, the State petitioned to revoke Goldsmith's probation as a result of his arrest for possession of a firearm, aggravated assault, battery in the second degree, and rape.

At the revocation hearing, the State presented testimony from Mark Zintel, who said that Goldsmith pointed a 9mm pistol at his head and told Zintel, "I'm fixing to kill you." Zintel stated that Goldsmith hit him in the back of the head, rendering him unconscious, and that Zintel later learned at the hospital that he had been shot near his temple. He said he has a scar by his temple and another where the bullet exited his lip. Two police officers who responded to the shooting testified that Zintel was found unconscious with blood on his face and that Goldsmith, after being given his *Miranda* warnings, admitted he had a gun, shot it, and hid it where the officers later retrieved it. While Goldsmith denied that he shot Zintel, he admitted to the officers that he hit Zintel with the butt of the gun. After the State rested its case, Goldsmith presented no evidence or testimony. In closing argument, his counsel conceded that the State's proof sufficiently demonstrated that Goldsmith had committed the offense of possession of a firearm by a felon. At the conclusion of the hearing, the circuit court orally found that Goldsmith had violated the terms and conditions of probation by possessing a firearm and shooting a man in the head. The court sentenced Goldsmith to six years in prison. The court's sentencing order revoking Goldsmith's probation was entered on February 3, 2022.

Goldsmith's attorney has filed a motion to withdraw from the appeal, stating it has no merit. As required by *Anders* and Ark. Sup. Ct. R. 4-3(b)(1), counsel's motion is accompanied by a brief that lists all rulings adverse to his client and explains why each ruling

does not present a meritorious ground for reversal. Goldsmith was notified of his right to file pro se points for reversal but did not do so.

The first adverse ruling identified by Goldsmith concerns the circuit court's decision to revoke Goldsmith's probation. Our task on review of a decision to revoke probation is to determine whether the circuit court's finding that the appellant violated a condition of his probation is against the preponderance of the evidence. *Green v. State*, 2015 Ark. App. 291, at 3, 461 S.W.3d 731, 733. A single violation is sufficient to support the court's revocation decision. *Id.*, 461 S.W.3d at 733. When reviewing the decision, we defer to the circuit court's superior position to determine the credibility of witnesses and the weight of the evidence. *Id.*, 461 S.W.3d at 733. Considering these standards, the testimony of Zintel and the officers, and Goldsmith's concession that the State had proved possession of a firearm by a felon, we hold that the circuit court's revocation of Goldsmith's probation was not clearly against the preponderance of the evidence. Therefore, this adverse ruling presents no nonfrivolous basis for appeal.

The second adverse ruling Goldsmith's counsel identifies concerns an objection made when the State asked Zintel, "So you had some cuts on your face that required you to get attention that you believe were possibly a gunshot wound?" Goldsmith's counsel objected, stating, "I don't remember [Zintel] saying that he thought it was a gunshot wound." The court overruled the objection, explaining, "I heard his testimony." We find no reversible error in this ruling.

A circuit court enjoys broad discretion in ruling on evidentiary objections. *Perkins v. State*, 2018 Ark. App. 18, at 5. It is presumed that the circuit court, sitting as trier of fact, will consider only competent evidence. *Marshall v. State*, 342 Ark. 172, 175, 27 S.W.3d 392, 394 (2000). This presumption can be overcome only when there is an indication that the judge gave some consideration to inadmissible evidence. *Id.*, 27 S.W.3d at 394. Even if a circuit court errs in receiving evidence, if the evidence of guilt is overwhelming, any error will be deemed harmless. *Perkins*, 2018 Ark. App. 18, at 5.

Here, Goldsmith's counsel's objection was that the question posed to Zintel assumed facts not in evidence. As we construe the circuit court's ruling, it overruled the objection on the ground that it was aware that Zintel had not testified that he thought he had a gunshot wound, the implication being that the court would not consider it. There is no indication the court did consider it and thus no abuse of discretion. Furthermore, on the record before us, assuming the circuit court erred in overruling Goldsmith's objection, it was harmless because the evidence of Goldsmith's guilt is overwhelming. Zintel's testimony firmly established that Goldsmith possessed a gun, fired the gun, and pointed the gun at Zintel's head; that Zintel has scars near his temple and his lip; and that he was told at the hospital that he suffered a gunshot wound that entered near his temple and exited his lip. Significantly, Goldsmith conceded that he possessed a firearm. Therefore, we hold that this adverse ruling presents no nonfrivolous basis for an appeal.

The final adverse ruling identified by Goldsmith's counsel occurred during sentencing. In closing argument, he asked the court to impose a sentence of less than six

years, which was the maximum. Ark. Code Ann. § 5-4-401(a)(5) (Repl. 2013). He reasoned that the State had only proved possession of a firearm by a felon and no other offenses or violations. The circuit court, however, found the evidence established that, in addition to possessing a firearm, Goldsmith had shot a man in the head while on probation and that, as a result, the maximum sentence of six years was justified.

When a circuit court revokes a defendant's probation and enters a judgment of conviction, it has discretion to impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty. Ark. Code Ann. § 16-93-308(g)(1)(A) (Supp. 2021); *Talbert v. State*, 2018 Ark. App. 412, at 4, 558 S.W.3d 396, 399. If a sentence is within the limits set by the legislature, the appellate court is not at liberty to reduce it. *Talbert*, 2018 Ark. App. 412, at 5, 558 S.W.3d at 399. The circuit court did not abuse its discretion by imposing the maximum term of six years' imprisonment. Accordingly, this issue presents no nonfrivolous basis for an appeal.

From our review of the entire record and the brief presented by Goldsmith's counsel, we conclude an appeal would be wholly frivolous in this case. Therefore, we affirm the order of revocation and grant Goldsmith's counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

THYER and BROWN, JJ., agree.

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

One brief only.