Cite as 2023 Ark. App. 336

ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-22-691

JONATHAN HODNETT APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered May 31, 2023 APPEAL FROM THE POPE COUNTY CIRCUIT COURT [NO. 58CR-20-923] HONORABLE JAMES DUNHAM, JUDGE AFFIRMED; MOTION TO BE RELIEVED GRANTED

CINDY GRACE THYER, Judge

Appellant Jonathan Hodnett was charged by amended information with one count of driving while intoxicated, fourth offense, and refusal to submit to a chemical test. A Pope County jury convicted him of both offenses and sentenced him to five years in the Arkansas Department of Correction, a $900 fine, and the suspension of his driver's license for 180 days. After filing a timely notice of appeal and obtaining an extension of time to lodge the record, Hodnett's counsel filed a no-merit brief and a motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(b)(1), contending there are no issues of arguable merit to raise on appeal. In addition, the clerk of our court notified Hodnett of counsel's brief and motion and advised him of his right to file pro se points; however, he has not done so.

I. *Background*

On July 12, 2020, the Russellville Police Department received a disturbance call. Officer Brandon Murphy was advised that one of the parties involved was sitting in a silver Ford Explorer in the parking lot of an apartment complex on West J Street. When Murphy arrived at the scene, he found Hodnett sitting alone behind the wheel of a silver Explorer; the door was closed, the keys were in the ignition, and the vehicle was running. Murphy saw a bottle of rum in a brown paper bag on the passenger seat. As Murphy began speaking with Hodnett, he noticed that Hodnett's pupils were dilated, his eyes were glassy, his speech was slow and slurred, and his breath bore the odor of intoxicants.

Murphy asked Hodnett to step out of the vehicle in order to administer field-sobriety tests. When Hodnett attempted to get out of the Explorer, he lost his balance and had to grab onto a nearby car to hold himself up. As he tried to walk toward Murphy, he began to lose his balance again. Murphy, believing he had sufficient cause to believe Hodnett was intoxicated, placed Hodnett in handcuffs and took him to his patrol unit; Hodnett had to lean on Murphy for balance. Hodnett subsequently refused to cooperate with either field-sobriety testing or chemical testing.

At trial, in addition to Murphy's testimony, a dash-camera video of the arrest showed the interaction between Murphy and Hodnett at the scene. Murphy asked what was in the bottle in the passenger seat, and Hodnett replied that it was rum, although he denied drinking it. When Murphy asked Hodnett to "blow in that tube for me," Hodnett said, "Well, no. I'm not doing that." Once at the police station, Murphy asked Hodnett if he

would "do some standard field sobriety real quick . . . before we walk inside." Hodnett again declined to cooperate, saying "Well, that's not going to look good for me."

As noted above, the jury convicted Hodnett of driving while intoxicated and refusal to submit to a chemical test. During the sentencing portion of the trial, the State introduced, without objection, copies of Hodnett's multiple prior DWI convictions. The jury subsequently returned with verdict forms reflecting that Hodnett, having previously been convicted of DWI on three occasions within the past five years, should be sentenced on the DWI–fourth to five years in the Arkansas Department of Correction and a fine of $900. For the refusal to submit to a chemical test, the jury recommended a punishment in the form of suspension of his driving privileges for 180 days. A sentencing order reflecting Hodnett's convictions and sentences was entered on May 18, 2022, and Hodnett filed a timely notice of appeal. His attorney has now filed a no-merit brief and motion to be relieved, arguing there are no issues of arguable merit to be presented on appeal.

II. *No-Merit Framework*

A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief. Ark. Sup. Ct. R. 4-3(b)(1) (2022). The brief shall 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.* The brief's statement of the case and the facts shall contain, in addition to the other material

parts of the record, all rulings adverse to the defendant made by the circuit court and the page number where each adverse ruling is located in the appellate record. *Id.*

III. *Discussion*

A. Sufficiency of the Evidence

In this no-merit appeal, counsel first concedes that there was sufficient evidence to support Hodnett's conviction. In a related point on appeal, counsel asserts that any challenge to the sufficiency of the evidence would be waived due to trial counsel's failure to make a sufficient motion for directed verdict. We agree with counsel that an argument regarding the sufficiency of the evidence would not be preserved for appeal.

In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence; in addition, the directed-verdict motion shall state the specific grounds therefor. Ark. R. Crim. P. 33.1(a). The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsection (a) will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c). A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. *Id.* A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. *Id.*

At the close of the State's case, Hodnett's trial counsel moved for directed verdict, stating, "At this time, we'd make a directed verdict––ask for a directed verdict that the State

has failed to meet their burden." The court denied the motion, and counsel offered nothing further. This general motion was insufficient to preserve the issue; therefore, because the issue is not preserved, a challenge to the sufficiency of the evidence would be wholly frivolous. *See Brewer v. State*, 2017 Ark. App. 119, at 4, 515 S.W.3d 629, 631.

B. Sentencing

Appellate counsel's no-merit brief next addresses Hodnett's sentence and concludes that there are no issues regarding the sentence that would present a meritorious argument for appeal. We agree. A person who is found guilty of driving while intoxicated for a fourth offense within five years is guilty of an unclassified felony and may be imprisoned for not less than one year but no more than six years. Ark. Code Ann. § 5-65-111(d) (Supp. 2019).[1] Additionally, a person found guilty of driving while intoxicated may be fined no less than $900 nor more than $5,000 for the third or subsequent offense occurring within five years of the first offense. Ark. Code Ann. § 5-65-112(3) (Repl. 2016).

During the sentencing phase of the trial, the State introduced, without objection, certified copies of Hodnett's previous convictions for driving while intoxicated. *See State v. Sola*, 354 Ark. 76, 87, 118 S.W.3d 95, 101 (2003) (holding that proof of earlier offenses is not appropriate until the sentencing phase of a DWI trial); *see also Peters v. State*, 286 Ark. 421, 425, 692 S.W.2d 243, 245–46 (1985) ("[W]e agree the trial should be bifurcated. The

[1]The "lookback" period for sentencing under section 5-65-111 was changed to ten years in Act 274 of 2021; however, Hodnett was charged in 2020, and sentencing "shall be in accordance with the statute in effect at the time of the commission of the crime." *Lawrence v. State*, 2022 Ark. App. 468, at 4, 655 S.W.3d 544, 547.

jury must first hear evidence of guilt or innocence. If the defendant is found guilty of the instance of DWI alleged, the jury will then hear evidence of previous convictions."). In addition, Hodnett himself admitted during sentencing that he had three prior DWI convictions during the previous five years. Appellate counsel therefore correctly concludes that Hodnett's sentence of five years' incarceration and a $900 fine is within the statutory sentencing range for a fourth-offense DWI conviction, and there would be no meritorious argument on appeal to the contrary.

C. Appeal Bond

Finally, counsel addresses the circuit court's refusal to set an appeal bond. At the conclusion of the trial, Hodnett asked the court to set an appeal bond; the court replied that a request for an appeal bond had to be filed after the entry of the sentencing order, "so in that regard, you have an option to do that later."

Arkansas Rule of Appellate Procedure–Criminal 6(b)(1) provides, in relevant part:

> (b)(1) When a defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to an offense . . . and he is sentenced to serve a term of imprisonment, and he has filed a notice of appeal, the trial court shall not release the defendant on bail or otherwise pending appeal unless it finds:
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> (A) By clear and convincing evidence that the defendant is not likely to flee or that there is no substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and
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> (B) That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

Hodnett's request for bail pending appeal was properly denied because no notice of appeal had yet been filed. *See Guthrie v. State*, 2017 Ark. App. 681. Moreover, the issue of an appeal bond is now moot because any ruling on this issue would not afford Hodnett any relief. *See Loyd v. State*, 2022 Ark. App. 13, at 6 (citing *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003)). Therefore, we agree with counsel that this point can provide no meritorious ground for reversal.[2]

Having reviewed the record and the brief presented by counsel, we conclude that there has been compliance with Rule 4-3(b)(1) and that an appeal from Hodnett's conviction would be without merit. Consequently, Hodnett's counsel's motion to be relieved is granted, and his convictions are affirmed.

Affirmed; motion to be relieved granted.

BARRETT and WOOD, JJ., agree.

Melissa Sawyer, for appellant.

One brief only.

[2]Counsel also points out that, given the fact that Hodnett had incurred his third and fourth DWIs within a month of each other, there was "no guarantee that [he] would not commit a subsequent driving while intoxicated." Counsel additionally argues that filing a no-merit brief indicates the appeal does not raise a substantial question of law or fact.