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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-23-275

KAMEN WINSTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 17, 2024

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. 35CR-19-622]

HONORABLE JODI RAINES DENNIS,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

STEPHANIE POTTER BARRETT, Judge

This is a no-merit appeal filed on behalf of appellant Kamen Winston after the Circuit Court of Jefferson County revoked his probation and sentenced him to forty-eight months' imprisonment in a previous case in which he was placed on thirty-six months' probation in July 2021 for the Class C felony offenses of second-degree forgery and possession of a Schedule I/II controlled substance with purpose to deliver. Appellant's counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(b) of the Rules of the Arkansas Supreme Court and Court of Appeals along with a motion to withdraw on the ground that this appeal is wholly without merit. Winston was notified of his right to file pro se points in response to counsel's brief but did not file pro se points.

A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief, including 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. *Bohanon v. State*, 2020 Ark. App. 22, 594 S.W.3d 92. In considering a no-merit brief, we must determine whether there is any nonfrivolous basis for an appeal after a full examination of the proceedings. *Id.* Counsel's no-merit brief identifies three adverse rulings that counsel deems frivolous: the denial of counsel's argument that there was insufficient evidence to support a revocation petition, the denial of a motion to reduce bond, and the denial of a request in closing arguments for the court to reinstate Winston's probation.

A brief summary of the facts and procedural history follows. Probation officers on two occasions received complaints from Winston's neighbors that he was firing a gun in the early-morning hours of July 21 and August 3, 2022. Agents went to his home on July 21 and found a metal marijuana pipe, a Beretta 9mm handgun in a room where Winston's cell phone and clothes were also found, and marijuana roaches on a table. The second complaint was investigated, and another 9mm pistol and ammunition were found along with glass methamphetamine pipes in Winston's bedroom. Winston was questioned by Detective Wieland after having waived his *Miranda* rights in writing. Winston admitted that he had fired a gun about a month prior to August 4. Winston denied that the guns and drug paraphernalia were his. On August 5, 2022, the State filed a petition to revoke Winston's probation alleging violations of the terms and conditions of his probation. The State introduced without objection Winston's signed conditions of probation filed July 8, 2021. The State alleged that Winston had violated his probation by being in possession of a firearm by certain persons; testing positive for THC; and on August 4, 2022, being found in possession of a firearm and drug paraphernalia

at his residence. A revocation hearing was held December 7, 2022, wherein Winston was represented by his appointed counsel. Winston was found to have violated the terms and conditions of his probation by the court and sentenced to forty-eight months in the Arkansas Department of Correction.

In arguing that there was not sufficient evidence that Winston had violated his probation, counsel stated that the burden of proof was not met and that the pending charges should be handled prior to the revocation. To revoke probation, the State must prove by a preponderance of the evidence that the defendant violated a condition of his or her probation. *Stewart v. State*, 2021 Ark. App. 289, 624 S.W.3d 357. We will not reverse the circuit court's findings unless they are clearly against the preponderance of the evidence. *Id.* Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the circuit court's superior position to resolve those matters. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). To revoke a probation or suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d) (Repl. 2013); *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). In a proceeding to revoke a defendant's probation, the State must prove by a preponderance of the evidence that the defendant violated at least one condition of the probation. *Gonzales v. State*, 2020 Ark. App. 219, at 3, 599 S.W.3d 341, 343; *Jones v. State*, 2012 Ark. App. 69, at 4, 388 S.W.3d 503, 506.

Counsel admitted it would be frivolous to argue that there was not one condition of probation that was violated when Winston admitted possessing and discharging a firearm in violation of his probation. This admission provides sufficient evidence to prove by a preponderance of the evidence that a condition of probation was violated. The court also referred to the guns and drug paraphernalia found in the searches of his home. There was no meritorious argument that the court abused its discretion or erred by finding by a preponderance of the evidence that Winston had violated the terms and conditions of his probation.

The second adverse ruling was the denial of Winston's motion to reduce his bond. Defense counsel filed a motion to reduce bond arguing that the bonds were excessive. The motion to reduce bond was denied by the court pursuant to Ark. R. Crim. P. 9.2. The amount of bail rests in the reasonable discretion of the circuit court upon consideration of the factors in Rule 9.2. *Mun. Ct. of Huntsville v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987). In considering the factors set forth in Rule 9.2, the court did not abuse its discretion in denying Winston's request for a bond reduction when the evidence showed Winston had multiple pending felony cases; a prior criminal felony record involving distribution of controlled substances, possession of firearms, and ammunition; no evidence he was employed; and a high probability of conviction and incarceration at his upcoming revocation hearing. There was no meritorious argument that the court abused its discretion in the denial of his request to reduce bond.

In counsel's closing arguments, counsel asked the court to sentence Winston to continued probation on his revocation and to allow the other cases stemming from this arrest to go to trial. The court denied this request, revoked Winston's probation, and sentenced him to four years in the Arkansas Department of Correction. The court did not abuse its discretion

in denying his request for alternative sentencing or in proceeding with the case. We have noted that “[a] defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself.” *Bond v. State*, 374 Ark. 332, 340, 288 S.W.3d 206, 212 (2008). The decision to allow alternate sentencing is reviewed for an abuse of discretion. This standard of review is a high threshold, and it requires that a circuit court act improvidently, thoughtlessly, or without due consideration. *Hoodenpyle v. State*, 2013 Ark. App. 375, 428 S.W.3d 547. Based on the facts in evidence, the court did not abuse its discretion since Winston had two felony charges pending at the time of the revocation hearing, he admitted he had possessed and fired a gun while on probation, and two guns were found in his residence along with drug paraphernalia in the two separate searches. The circuit court was correct in its ruling that Winston was in violation of the terms and conditions of his probation and that there was sufficient evidence to revoke same. No meritorious argument could be made that the circuit court abused its discretion in not reinstating his probation or allowing him to remain on probation until his current cases were tried.

From our review of the record and the brief presented to us, we find compliance with Rule 4-3(b) and that there is no issue of arguable merit to an appeal. *Whitmore v. State*, 2018 Ark. App. 44, 539 S.W.3d 596. We affirm the revocation of Winston’s probation and grant counsel’s motion to withdraw.

Affirmed; motion to withdraw granted.

MURPHY and BROWN, JJ., agree.

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

One brief only.