

Cite as 2024 Ark. App. 382
ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-23-763

JAMES KENNEDY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 5, 2024

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. 63CR-22-342]

HONORABLE KEN CASADY,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

STEPHANIE POTTER BARRETT, Judge

On July 5, 2022, appellant James Kennedy entered a negotiated plea of guilty to possession of a controlled substance (methamphetamine), a Class C felony; possession of drug paraphernalia, a Class D felony; and theft of property less than \$1,000, a Class A misdemeanor. The Saline County Circuit Court placed Kennedy on forty-eight months' probation for each of the felony offenses and twelve months' probation for the misdemeanor offense, with the periods of probation to run concurrently. Kennedy was assessed fines and court costs of \$1,090 as well as a monthly \$35 probation fee; ordered to perform forty hours of community service; and ordered to submit to a drug-and-alcohol assessment. A sentencing order to this effect was filed on July 7. Conditions of Kennedy's probation included

reporting to his probation officer; obeying all state and federal laws and court orders; and no possession or use of controlled substances without a prescription.

On January 17, 2023, the State filed a petition to revoke Kennedy's probation alleging, among other violations, that Kennedy had failed to report as directed; had tested positive for methamphetamine and amphetamine on several occasions; was behind in payment of his supervision fees and had made no payment on his fines and court costs; and had failed to provide proof of completion of his community service. On May 1, 2023, Kennedy appeared in circuit court and pled "true" to violating the terms and conditions of his probation. His attorney asked that sentencing be deferred for ninety days so that Kennedy could show compliance with his probation. The circuit court informed Kennedy that he would be sentenced in ninety days; if he was compliant with the terms of his probation at that time, probation could be reinstated, but if he was not in compliance, the State did not have to prove anything further, and he would be sentenced by the court, which could include incarceration in the Arkansas Department of Correction.

Kennedy returned for sentencing on August 7. The State called Kennedy's probation officer, Brandon Peachy, who testified regarding Kennedy's continued lack of compliance since pleading true to violating the terms and conditions of his probation, including testing positive on several occasions for methamphetamine and amphetamines; failing to report for his chemical-dependency group sessions on at least two occasions; failing to report to him on three occasions; and failing to remain current on his supervision costs and court costs.

Kennedy testified that transportation issues had made it difficult for him to attend his chemical-dependency classes and perform his community-service hours. Kennedy admitted that he had not completed all of his community-service hours and that his positive drug screens were problematic. He stated that he would be willing to go to an inpatient or outpatient rehabilitation facility if the circuit court would allow it, although he believed he could quit on his own; however, he also stated that he did not want any help and did not need drug treatment.

Kennedy's attorney requested that the court impose a ninety-day treatment and allow Kennedy to remain on probation, while the prosecutor recommended three years in the Regional Correctional Facility. The circuit court, stating that it did not believe Kennedy would conquer his drug problem by himself given the past ninety days, sentenced Kennedy to the Regional Correctional Facility—three years on each felony and one month for the misdemeanor, all to be served concurrently. Kennedy then asked the circuit court to place him in drug treatment, to which the court responded that was what it had done.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(b)(1) (2023), Kennedy's counsel has filed a no-merit brief along with a motion to be relieved as counsel asserting that there is no issue of arguable merit on appeal. The clerk of this court provided Kennedy with a copy of his counsel's brief and notified him of his right to file a pro se statement of points for reversal, which Kennedy did not do. We affirm the revocation and grant counsel's request to withdraw.

To revoke a defendant's probation, the circuit court must find by a preponderance of the evidence that the defendant has inexcusably violated a condition of his or her probation. *Page v. State*, 2024 Ark. App. 259, ___ S.W.3d ___. The State bears the burden of proof but need only prove one violation to sustain a revocation. *Id.* The circuit court's findings are affirmed on appellate review unless they are clearly against the preponderance of the evidence. *Clark v. State*, 2019 Ark. App. 362, 584 S.W.3d 680.

Kennedy pled true to violating the terms of his probation. The general rule is that a defendant waives the right to appeal when he or she pleads guilty; the only exception to this rule is found in Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, which addresses a conditional plea to obtain a review of an adverse determination of a pretrial motion to suppress evidence. *Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003). Because that exception is not applicable in this case, we hold that there would be no merit to an appeal of the sufficiency of the evidence supporting the revocation.

The only other adverse ruling occurred at the sentencing hearing when Kennedy asked the circuit court to consider placing him in a drug-treatment facility after he had been sentenced to three years in the Regional Correctional Facility. In a revocation proceeding, the circuit court has discretion in sentencing and is authorized to impose any sentence that it could have originally imposed. *Perkins v. State*, 2024 Ark. App. 169, 686 S.W.3d 569. A defendant who is sentenced within the statutory range—and short of the maximum sentence—cannot establish prejudice. *Id.* The decision to allow alternative sentencing is reviewed for an abuse of discretion, which is a high threshold requiring that a circuit court

act improvidently, thoughtlessly, or without due consideration. *Winston v. State*, 2024 Ark. App. 24, 683 S.W.3d 195. Here, the circuit court told Kennedy that three years in the Regional Correctional Facility would be drug treatment. As for sentencing, a Class C felony sentence shall be not less than three years nor more than ten years; a Class D felony sentence shall not exceed six years; and a Class A misdemeanor sentence shall not exceed one year. Ark. Code Ann. § 5-4-401(a)(4) & (5) and (b)(1) (Repl. 2013). Kennedy was sentenced to three years on each felony and one month for the misdemeanor—all sentences well below the maximum limit. We hold there would be no merit to an appeal of the length of the sentences Kennedy received after his probation was revoked.

From our review of the record and the brief presented to us, we find compliance with Rule 4-3(b), and there is no issue of arguable merit to an appeal. We affirm the revocation of Kennedy's probation and grant counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

THYER and BROWN, JJ., agree.

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

One brief only.