

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0355

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MISTY JADE MITCHELL,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Sixteenth Judicial District Court, Custer
County, the Honorable Michael Hayworth, Presiding

APPEARANCES:

CAITLIN BOLAND AARAB
Boland Aarab PLLP
11 5th Street North, Suite 207
Great Falls, MT 59401
(406) 315-3737
cbaarab@bolandaarab.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SHAWN QUINLAN
Custer County Attorney's Office
1010 Main St # 5
Miles City, MT 59301

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

Table of Authorities..... ii

Statement of the Issues..... 1

Statement of the Case and Facts 1

Standard of Review 5

Summary of the Argument 6

Argument 6

 I. Counsel for Appellant should be permitted to withdraw from this
 appeal pursuant to *Anders v. California* and § 46-8-103, MCA..... 6

 II. Mitchell may assert that there was insufficient evidence to support
 the revocation of her suspended sentence. 9

Conclusion..... 11

Certificate of Compliance 13

Certificate of Service..... 14

TABLE OF AUTHORITIES

Cases

<i>Anders v. California</i> , 386 U.S. 738 (1967)	1, 6, 7, 8
<i>State v. Adams</i> 2002 MT 202, 311 Mont. 202, 54 P.3d 50	6, 8
<i>State v. Goff</i> , 2011 MT 6, 359 Mont. 107, 247 P.3d 715	5, 6
<i>State v. Howard</i> , 2020 MT 279, 402 Mont. 54, 475 P.3d 392	11
<i>State v. Oropeza</i> , 2020 MT 16, 398 Mont. 379, 456 P.3d 1023	6, 9

Statutes

§ 45-9-102, MCA	1
§ 46-8-103, MCA	1, 6, 7, 8
§ 46-18-203, MCA	9, 11

Rules

Mont. Rules of Prof. Conduct 3.1	7
Mont. Rules of Prof. Conduct 3.3	7

Constitutional Provisions

Mont. Const. art. II, § 17	6
----------------------------------	---

Mont. Const. art. II, § 24.....	6
U.S. Const. amend. VI.....	6

STATEMENT OF THE ISSUES

I. Should counsel be permitted to withdraw from this case in accordance with *Anders v. California*, 386 U.S. 738 (1967), and § 46-8-103, MCA?

II. Mitchell may wish to have the following issue considered on appeal: was the revocation of her suspended sentence based upon sufficient evidence?

STATEMENT OF THE CASE AND FACTS

A Custer County jury found Misty Mitchell guilty of one count of Criminal Possession of Dangerous Drugs, in violation of § 45-9-102, MCA, on July 30, 2014. (D.C. Doc. 87). The court deferred imposition of sentence for a term of three years, contingent on her satisfactory compliance with the conditions of her supervision. (D.C. Doc. 99.) Sentence was imposed on September 29, 2014. (D.C. Doc. 99.)

In November of 2015, the State petitioned to revoke Mitchell's deferred sentence due to nine alleged violations of the conditions of her supervision. (D.C. Docs. 103, 101.) At an adjudicatory hearing on December 14, 2015, Mitchell admitted to all nine violations. (D.C. Doc. 113.) However, the Court examined Mitchell and concluded there was insufficient evidence to support three of the alleged violations. (D.C.

Doc. 113.) Therefore, the Court found Mitchell committed six violations of the terms of her supervision and revoked her deferred sentence. The Court committed Mitchell to the Department of Corrections for a term of five years with all time suspended. The Court also ordered her to apply to Treatment Court and complete that program if admitted. (D.C. Doc. 114.)

In March of 2016, the State petitioned to revoke Mitchell's suspended sentence due to eight alleged violations of her conditions of supervision. (D.C. Docs. 116, 115.) The petition was later amended to add three additional alleged violations. (D.C. Docs. 132, 129.) Following a hearing during which Mitchell admitted to ten violations and the State withdrew one, the Court revoked Mitchell's suspended sentence, sentenced her to five years in the Department of Corrections with two years suspended, and recommended that the Department of Corrections place her at Elkhorn Treatment Center. (D.C. Docs. 133, 134.) Mitchell was placed at Passages and Passages Prerelease Center until she discharged to supervision on November 30, 2017. (Doc. 136 at 2.) For the next two years, her probation officer imposed various sanctions for each of Mitchell's violations of her conditions of supervision, but the

probation officer did not seek to revoke her suspended sentence until February of 2020. (D.C. Doc. 136 at 2.)

In February of 2020, the State petitioned to revoke Mitchell's suspended sentence due to two alleged violations of her conditions of release: a non-compliance violation of being charged with a new felony offense, and a compliance violation of failure to report. (D.C. Docs. 136, 135.) The petition was later amended to add two additional alleged compliance violations: use of alcohol and drugs, and failure to cooperate with law enforcement by harboring a fugitive. (D.C. Docs. 150, 144, 147, 147.1.) At a hearing on the violations, Mitchell's probation officer testified that Mitchell failed to report to her between January 16, 2020 and February 20, 2020, and that the probation officer's attempts to reach Mitchell by phone, by letter, and by collateral contact with an employer were all unsuccessful. (Transcript of 4/24/20 Evid & Dispo Hearing at pp. 19–22.) The probation officer also testified that Mitchell was charged on February 20, 2020, with the new offenses of Criminal Possession of Dangerous Drugs and Obstructing a Peace Officer. (Tr. of 4/24/20 Hrng. at p. 17.) The probation officer further testified that on March 12, 2020, she administered a UA to Mitchell. Mitchell's urine

tested positive for THC, methamphetamine, and amphetamine. During her own testimony, Mitchell admitted to recent use of all three drugs. (Tr. of 4/24/20 Hrng. at p. 23.)

Finally, the probation officer testified that during a probation search of Mitchell's residence on March 14, 2020, law enforcement officers found a fugitive in Mitchell's bedroom closet. (Tr. of 4/24/20 Hrng. at pp. 23–25.) However, the probation officer acknowledged that she was not present during the probation search of Mitchell's residence that revealed the fugitive, and therefore the officer had no information about whether Mitchell was being untruthful or uncooperative when she maintained that she did not know a fugitive was hiding in her closet. (Tr. of 4/24/20 Hrng. at p. 31.) Mitchell testified that she did not know the fugitive was in her closet and did not knowingly hide him from law enforcement. (Tr. of 4/24/20 Hrng. at p. 38.)

Based on the testimony at the hearing, the Court found sufficient evidence supported the allegations that Mitchell was charged with new offenses, consumed illegal drugs, and failed to report. (Tr. of 4/24/20 Hrng. at pp. 39–40.) However, the Court found insufficient evidence

supported the allegation that she harbored a fugitive. (Tr. of 4/24/20 Hrng. at p. 40.)

At a disposition hearing on May 11, 2020, the defense recommended the Court revoke the two-year suspended sentence, sentence Mitchell to two-years with the Department of Corrections, and give her five months' street time credit and 28 days' credit for time served. (Transcript of 5/11/20 Disposition Hearing. at p. 24.) The State recommended the same disposition with the exception that Mitchell not be awarded any street time credit. (Tr. of 5/11/20 Hrng. at 25.) The Court imposed the disposition recommended by the defense, including the five months' street time credit. (Tr. of 5/11/20 Hrng. at 26.) Mitchell timely appealed. (D.C. Doc. 163.)

STANDARD OF REVIEW

“The standard for revocation of a suspended or deferred sentence is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty.” *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715. This Court reviews a district court's decision to revoke a suspended or deferred sentence to determine whether the

district court's decision was supported by a preponderance of the evidence in favor of the State, and if so, whether the court abused its discretion. *State v. Oropeza*, 2020 MT 16, ¶ 14, 398 Mont. 379, 456 P.3d 1023 (citing *Goff*, ¶ 13).

SUMMARY OF THE ARGUMENT

This Court should grant counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and § 46-8-103, MCA, because a thorough review of the factual record and the relevant law has revealed no meritorious issues to raise in this appeal.

Mitchell may argue that there was insufficient evidence to support the revocation of her suspended sentence.

ARGUMENT

I. Counsel for Appellant should be permitted to withdraw from this appeal pursuant to *Anders v. California* and § 46-8-103, MCA.

Both the US Constitution and the Montana Constitution guarantee defendants the rights to due process and the effective assistance of counsel. *Anders v. California*, 386 U.S. 738, 744 (1967); *State v. Adams*, 2002 MT 202, ¶ 15, 311 Mont. 202, 54 P.3d 50; *see also* U.S. Const. amend. VI; Mont. Const. art. II, §§ 17, 24. In addition to providing effective assistance to her client, an appellant's counsel also

has a duty of candor towards the court, and an obligation not to raise claims without having “a bona fide basis in law and fact for the position to be advocated.” Mont. Rules of Prof. Conduct 3.1, 3.3. When these rights and duties conflict, and appellate counsel “finds [her] case to be wholly frivolous, after a conscientious examination of it, [s]he should so advise the court and request permission to withdraw.” *Anders*, 386 U.S. at 744.

The State of Montana has codified the *Anders* requirements. Section 46-8-103(2), MCA. If, after thoroughly reviewing the record and researching the applicable law, counsel “determines that an appeal would be frivolous or wholly without merit, counsel shall file a motion with the court requesting permission to withdraw.” Section 46-8-103(2), MCA . Counsel’s motion to withdraw “must be accompanied by a memorandum discussing any issues that arguably support an appeal.” Section 46-8-103(2), MCA . The memorandum must include the factual, procedural, and jurisdictional history of the case, as well as citations to pertinent statutes, case law, or procedural rules. Section 46-8-103(2), MCA . An *Anders* brief is not meant to “force appointed counsel to brief [her] case against [her] client,” but rather to “afford the [client] that

advocacy which a nonindigent defendant is able to obtain,” and to “induce the court to pursue all the more vigorously its own review [of the case] because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.” *Anders*, 386 U.S. at 745. Indeed, this Court has explained that “§ 46-8-103(2), MCA, serves a vital function. It notifies prospective pro se litigants of potentially viable issues for appellate review. It also provides assistance to a court deliberating over the merit of a motion to withdraw from appellate representation.” *Adams*, ¶ 16.

After a thorough review of the entire factual record and the relevant law, counsel has not found any meritorious issues to raise in this appeal. Counsel provides this memorandum to the Court not to argue against her client, but to provide the Court with citations to the record and the applicable law sufficient to help the Court conduct its own review of the case and determine whether to grant counsel’s motion to withdraw. Pursuant to § 46-8-103(2), MCA, the appellant has been advised of counsel’s decision and of the appellant’s right to file a response.

II. Mitchell may assert that there was insufficient evidence to support the revocation of her suspended sentence.

In its recent Opinion in *State v. Oropeza*, 2020 MT 16, 398 Mont. 379, this Court included a comprehensive summary of the sweeping changes to Montana’s criminal justice system that took effect in 2017. *See Oropeza*, ¶¶ 3–7. Among those changes were probation and parole reforms that bifurcated violations into compliance and non-compliance violations. The former were to be addressed initially through application of the Montana Incentives and Interventions Grid for Adult Probation & Parole (“MIIG”), which offered a host of offender-specific incentives or interventions. Section 46-18-203(8)(a), MCA. Non-compliance violations—of which there are only five—could be addressed by proceeding directly to revocation. Section 46-18-203(7)(a)(iii), MCA. One of the main goals of these reforms was to help reduce prison overcrowding, a primary cause of which was probation and parole revocations. *Oropeza*, ¶ 3. These reforms are retroactively applied to all suspended and deferred sentences, regardless of a defendant’s original conviction date. Section 46-18-203(12), MCA.

The February 2020 petition to revoke Mitchell’s suspended sentence alleged four violations of her conditions of release: a non-

compliance violation of being charged with a new felony offense, and three compliance violations of failure to report, use of alcohol and drugs, and failure to cooperate with law enforcement by harboring a fugitive. (D.C. Docs. 136, 135, 150, 144, 147, 147.1.) The Court found the fourth alleged violation was not proven by a preponderance of the evidence. (Tr. of 4/24/20 Hrng. at pp. 39–40.)

Mitchell admitted to the third alleged violation, use of alcohol and drugs, (Tr. of 4/24/20 Hrng. at p. 23), but she may wish to argue that the MIIG was not exhausted on this compliance violation prior to the revocation of her suspended sentence, (*see* D.C. Docs. 144, 147, 147.1). The second alleged violation—failure to report—was based upon the probation officer’s testimony that she was unable to reach Mitchell by phone, by letter, or by collateral contact with an employer. (Tr. of 4/24/20 Hrng. at pp. 19–22.) However, on cross examination, the probation officer acknowledged that Mitchell was ultimately found in the residence known to her probation officer. (Tr. of 4/24/20 Hrng. at p. 28.) Mitchell may wish to argue that she did not fail to report because she continued to reside in the same residence known to her probation officer throughout her supervision.

Finally, Mitchell may wish to argue that although the first non-compliance violation of a “new criminal offense” need not be addressed through MIIG first, § 46-18-203(7)(a)(iii), MCA, there was insufficient evidence of this violation to support a revocation of her suspended sentence. The evidence that Mitchell had been charged with a new offense came solely from the probation officer’s testimony at the revocation hearing. The probation officer did not have first-hand knowledge of the conduct that occasioned the new charges, and the State did not ask the Court to take judicial notice of the existence of the charging documents. (Tr. of 4/24/20 Hrng. at p. 17.) Mitchell may wish to argue, as the Defendant did in *State v. Howard*, 2020 MT 279, ¶ 12, 402 Mont. 54, 475 P.3d 392, that the State needed to prove she committed a new offense (rather than simply engaged in criminal conduct) before it could seek revocation of her suspended sentence.

CONCLUSION

After a thorough review of the entire factual record and the relevant law, counsel has not found any meritorious issues to raise in this appeal. The Court should therefore grant counsel’s motion to withdraw.

Respectfully submitted this 23rd day of June, 2021.

By: /s/ Caitlin Boland Aarab
Caitlin Boland Aarab
BOLAND AARAB PLLP
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 2,188 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

By: */s/ Caitlin Boland Aarab*
Caitlin Boland Aarab
BOLAND AARAB PLLP
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing *Anders* Brief to be mailed or electronically served to:

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SHAWN QUINLAN
Custer County Attorney's Office
1010 Main St # 5
Miles City, MT 59301

MISTY JADE MITCHELL
Defendant/Appellant
c/o Passages Prerelease Center
1001 South 27th Street
Billings, MT 59101

By: /s/ Caitlin Boland Aarab
Caitlin Boland Aarab
BOLAND AARAB PLLP
Attorney for Defendant/Appellant