

NOTICE
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2019 IL App (5th) 160351-U

NO. 5-16-0351

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Clinton County. |
| |) | |
| v. |) | No. 15-CF-66 |
| |) | |
| JEREMY GINTZ, |) | Honorable |
| |) | William J. Becker, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* This case does not present any issue of arguable merit, and therefore appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Jeremy Gintz, pleaded guilty to multiple counts of felony retail theft. He was admitted into the drug court program, but was later dismissed from it and was sentenced to imprisonment. He now appeals from the judgment of conviction. The defendant's court-appointed attorney in this appeal, the Office of the State Appellate Defender (OSAD), has concluded that the appeal does not present any issue of arguable merit. OSAD has filed a motion to withdraw on that basis. In its motion, OSAD cites to

Pennsylvania v. Finley, 481 U.S. 551 (1987). OSAD should have relied on *Anders v. California*, 386 U.S. 738 (1967), since the instant appeal is a direct appeal from a judgment of conviction, and not, *e.g.*, an appeal from the denial or dismissal of a postconviction petition. Nevertheless, OSAD has met the (stricter) requirements of *Anders* by accompanying its motion with "a brief referring to anything in the record that might arguably support the appeal" (*Anders*, 386 U.S. at 744), and this court will treat OSAD's motion as an *Anders* motion. OSAD furnished the defendant with a copy of its motion and brief. This court provided the defendant with ample opportunity to file a pro se brief or other document responding to OSAD's motion or explaining why he thinks this appeal has merit, but the defendant did not take advantage of that opportunity. Having examined OSAD's motion and brief, and having examined the entire record on appeal, this court concludes that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel on appeal, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 The defendant was charged with three counts of retail theft (720 ILCS 5/16-25(a) (West 2014)), a Class 3 felony (720 ILCS 5/16-25(f)(3) (West 2014)). On June 25, 2015, the defendant, his public defender, and an assistant state's attorney appeared in court. Pursuant to an agreement between the parties, the defendant pleaded guilty to all three counts, and the court admitted the defendant into the drug court program pursuant to the Drug Court Treatment Act (Drug Court Act) (730 ILCS 166/1 *et seq.* (West 2014)). Before accepting the pleas and admitting him into the drug court program, the court

admonished the defendant as to the nature of the charges and the possible penalties, including extended-term sentencing made possible by the defendant's prior conviction for a Class 3 felony, and advised him about the drug court program and its requirements. The defendant indicated his understanding of all these matters. The court also admonished the defendant as to his rights, including his rights at a trial, and the waiver of those rights, and the defendant indicated his understanding. The State offered factual bases for the pleas. The defendant indicated that the factual bases were correct and that his pleas were voluntary. The defendant signed a drug-court agreement and waiver. See 730 ILCS 166/25(c) (West 2014).

¶ 5 The record on appeal suggests that the defendant was generally required to report to drug court biweekly. A court reporter was present for most of these court appearances but not all of them, resulting in some minor gaps in the record on appeal. In early July and mid-July of 2015, the court found that the defendant was in compliance with the conditions of the drug court program. In late July 2015, the court found that the defendant had consumed beer, in violation of a condition. As sanctions for this violation, the court ordered the defendant to spend 24 hours in jail and to write an essay.

¶ 6 In early August and the middle of August of 2015, the court found the defendant to be in compliance. In late August 2015, the court noted that the defendant had tested positive for amphetamine but stated that the test result needed to be investigated, and the court also stated that the defendant was otherwise in compliance.

¶ 7 In early September 2015, the court found three violations of drug-court conditions, *viz.*: the defendant ingested a dietary supplement without obtaining prior approval, the

defendant left the State of Illinois without prior approval, and the defendant was late for a required appointment. The court imposed a sanction of studying the rules set forth in the drug-court agreement and waiver.

¶ 8 In mid-September 2015, the defendant appeared in open court, and the circuit court noted that he was serving a "48 hour sanction" for a "positive drug test." From there, the defendant admitted that he had drunk beer at a St. Louis Cardinals baseball game. The court reminded the defendant that under the drug-court agreement, he was never allowed to consume alcoholic beverages and was not allowed to leave the State of Illinois without prior approval. However, the court found that the defendant was otherwise in compliance with his agreement, having attended all required treatment sessions and other meetings. The court commented that the defendant seemed to be learning, albeit "the hard way," valuable lessons about his addiction and how to handle it.

¶ 9 In late September 2015, the court noted that the defendant had missed a group session two days earlier and had missed an appointment with his counselor, though he did meet with the counselor subsequently. As a sanction, the court ordered the defendant to write an essay on time management and to perform 10 hours of public service work. The court emphasized the salutary effect of attending group sessions and counseling sessions.

¶ 10 On October 1, 2015, a judge other than the usual drug-court judge presided at a review hearing. The judge opined that the defendant's essay on time management was inexcusably bad. He ordered the defendant to rewrite the essay for the drug-court judge.

¶ 11 In late October 2015, the usual drug-court judge found that the defendant was "in complete compliance," though she had not had an opportunity to read the time-

management essay he had rewritten. The judge praised the defendant for his "positive attitude." The defendant asked the judge to reduce the frequency of required group sessions from seven per week to five per week. The court granted his request.

¶ 12 In mid-November 2015, the court found that the defendant had recently tested positive for alcohol and had been socializing with a known drug user, both in violation of the drug court agreement. The court sent him to jail for a week, with work release.

¶ 13 In early December 2015, the defendant, while addressing the court, referred to an "overdose" that he had recently experienced, and the court referred to his recent "relapse." The record does not include any detail about this "overdose" or "relapse." However, the court congratulated the defendant on making the best of a "really bad" situation by growing in insight and determination. Without any objection by the defendant's counselor or probation officer, the court ended the requirement of daily drug testing of the defendant, returning to random drug testing.

¶ 14 In mid-December 2015, the court noted that the defendant had performed only 17 of 20 hours of community service work that he had been ordered to perform. The court ordered him to perform the three hours not yet performed plus an additional 10 hours, to be completed by the next court review in late January 2016. The court found that the defendant was otherwise in compliance.

¶ 15 In late February 2016, the defendant admitted to using drugs the preceding Saturday and Sunday. For failure to use his "relapse prevention plan," the court sentenced the defendant to 24 hours in jail and ordered him to write a 30-day plan for

remaining in compliance with drug-court conditions. The court reminded the defendant that unless he complied, he could be sent to prison.

¶ 16 On March 3, 2016, the defendant admitted that he was late in arriving at the jail to begin his sanction, and that he recently had "missed a meeting" and had used "meth." The court was dissatisfied with the 30-day plan he had submitted, finding that it was not really a plan at all. The court sent the defendant to jail and ordered him to write a new 30-day plan for complying with the program's conditions. The court expressed uncertainty over whether the drug court program had benefitted the defendant and whether he should remain in the program. The court told the defendant that he could not be trusted to refrain from using drugs, and that he was "very close to getting kicked out of this program."

¶ 17 On March 10, 2016, the court found the defendant's revamped 30-day plan inadequate, and ordered him to speak with his substance abuse counselor and to write a new plan. The court told the defendant that he was "on a short leash," and the defendant stated that he understood.

¶ 18 On March 17, 2016, the court told the defendant that he had "tested positive for meth this morning." The court also commented that the defendant's appearance had "gone downhill," that he looked thinner, and that he needed to return to "rehab." After speaking with the defendant, the court ordered him to report to the jail at 3:30 that afternoon, and to remain there until he could be placed in rehab. The court told the defendant that "this is your last shot."

¶ 19 On March 17, 2016, the court entered a written judgment sentencing the defendant to incarceration in the county jail, specifying that he was to be released for inpatient treatment when a bed became available.

¶ 20 On March 30, 2016, the State filed a petition to revoke the defendant's eligibility to participate in the drug court program, alleging that he had failed to meet the conditions of the program in various ways. The State's specific allegations, restated by this court, were as follows: (1) "from February 17, 2016, through March 17, 2016," the defendant tested positive for methamphetamine; (2) on March 6, 2016, the defendant constructively possessed methamphetamine; (3) "from February 25, 2016, through February 29, 2016," the defendant possessed a mood-altering substance, Adderall; (4) on March 24, 2016, the defendant failed to appear at the county jail, and ever since that date, he failed to report for scheduled appointments with his counselor and probation officer; and (5) the defendant failed to perform satisfactorily in the drug court program, and failed to benefit from the education, treatment, and rehabilitation offered by the program, making him unsuitable for the program. The State asked the circuit court to dismiss the defendant from the drug court program and to reinstate criminal proceedings against him.

¶ 21 On April 14, 2016, the defendant appeared in custody on a bench warrant. The court arraigned him on the petition to revoke his eligibility for drug court.

¶ 22 On April 28, 2016, the court held a hearing on the petition to revoke. The defendant stipulated to the truth and accuracy of the allegations that he had tested positive for methamphetamine, had constructively possessed methamphetamine, had possessed a mood-altering substance, had failed to appear at the jail when required, and had failed to

report for scheduled appointments with his counselor and probation officer. Addressing the defendant personally, the court asked whether he was stipulating that the State could prove all of those allegations and whether he was "basically admitting" that those allegations were true, and the defendant answered those two questions in the affirmative. The defendant acknowledged that at a hearing the prior week, the court and the defendant's attorney had reviewed those allegations with him in detail.

¶ 23 The defendant disputed the allegation that he was not benefitting from the drug court program and had become unsuitable for it. In regard to the disputed allegation, and by agreement of the parties, the court admitted into evidence two documents from the Clinton County Sheriff's Office. These documents showed that on April 8, 2016, jail personnel found chewing tobacco and several over-the-counter, non-narcotic pills (*e.g.*, Excedrin) in the defendant's cell, and the defendant admitted that he had smuggled those contraband items into the jail.

¶ 24 The defendant testified on his own behalf. He testified that he had been incarcerated in the county jail, in solitary confinement, for 21 days, and that this difficult experience had helped to change his view of the drug court program. Beforehand, he viewed the program "from an addict's perspective," *i.e.*, as a way to avoid jail, but he had come to see the program as a means to sobriety and to becoming the person he wanted to be, which included being a better father to his three-year-old son. He thought that his relapse resulted, at least in part, from over-extending himself by simultaneously working and attending college. When he relapsed and used methamphetamine, he did not know how to handle the relapse, in part because he did not understand the addictive power of

that particular drug. He acknowledged that in November, he almost died from using heroin, but testified that he had stopped using that drug. He wanted to remain in the drug court program in order to better himself, and he vowed to "take it more serious this time."

¶ 25 After hearing the arguments of counsel, the court noted that the defendant had been in the drug court program for 10 months. According to the court, the defendant performed well in the program at times. However, despite the many opportunities for counseling, therapy, 12-step meetings, and cognitive behavioral therapy during those 10 months, and despite the use of incentives and sanctions during those 10 months, the defendant remained in phase 1 of the program. The court concluded that the defendant had not demonstrated that he was benefitting from the program. Finding that the State had proved by a preponderance of the evidence the allegations in its petition, the court revoked the defendant's participation in the drug court program. The court ordered the preparation of a presentence investigation report (PSI).

¶ 26 On June 1, 2016, the defendant, his public defender, and an assistant state's attorney appeared in open court for a sentencing hearing. The assistant state's attorney informed the court that the parties had agreed on a sentence—"four years in the Illinois Department of Corrections with a boot camp recommendation." The parties and the court were aware that a PSI had not been completed. The court asked the defendant, "You want me to agree and impose a four-year sentence as opposed to having a presentence investigation?", and the defendant answered, "Yes, sir." The State informed the court that the defendant had prior convictions for deceptive practices, unlawful possession of drug paraphernalia, and residential burglary; he was "on parole" for the residential

burglary when he committed the retail thefts in the instant case. On each of the three counts of retail theft, the court sentenced the defendant to imprisonment for a term of four years, to be followed by one year of mandatory supervised release, with all sentences concurrent, and with credit for time served and with day-for-day credit. The court entered a written judgment reflecting those sentences. The defendant reminded the court of the boot-camp recommendation, and the court stated that it had signed a recommendation for impact incarceration. The court entered a separate "judgment order and recommendation for impact incarceration," wherein the court stated that it "approves and recommends the Defendant for the Impact Incarceration Program of the Department of Corrections." The order further stated that "if the Illinois Department of Corrections accepts Defendant into the Impact Incarceration Program and if the Defendant successfully completes the Impact Incarceration Program to the satisfaction of the Illinois Department of Corrections," his sentence would be reduced to time served, but "[i]f Defendant is not accepted for placement in the Program or if Defendant fails to successfully complete the Program," he would serve the prison term specified in the sentencing order.

¶ 27 On August 10, 2016, the defendant filed a pro se late notice of appeal. This court appointed OSAD to represent the defendant. Ultimately, this court granted the defendant leave to file a late notice of appeal, and this appeal was perfected.

¶ 28 ANALYSIS

¶ 29 As previously mentioned, the defendant's court-appointed attorney on appeal, OSAD, has concluded that this appeal lacks merit, and has filed a motion to withdraw as

counsel. In its brief, OSAD identifies four potential issues, *viz.*: (1) whether the circuit court erred in dismissing the defendant from the drug court program; (2) whether the defendant's agreed sentence of imprisonment was contingent upon the defendant's acceptance into boot camp; (3) whether the circuit court, at the hearing on the State's petition to dismiss the defendant from the drug court program, properly admonished the defendant prior to his stipulating to several of the petition's allegations against him; and (4) whether the defendant can challenge the guilty pleas that he entered on June 25, 2015.

¶ 30 As to the first of the four potential issues, the record makes clear that the circuit court did not err in dismissing the defendant from the drug court program. Section 35 of the Drug Court Act governs the dismissal of a defendant from a drug court program. See 730 ILCS 166/35 (West 2014). The circuit court may dismiss a defendant from a program if it finds "from the evidence presented" that the defendant, *inter alia*, "is not performing satisfactorily" in the program or "is not benefitting from education, treatment, or rehabilitation." 730 ILCS 166/35(a)(1), (2) (West 2014). Here, the drug court handled the defendant's case admirably. The court combined empathy with firmness, employed rewards and sanctions, and provided the defendant with encouragement, praise, chastisements, and warnings, as appropriate. Despite the best efforts of the court, the defendant did not perform satisfactorily in the program and did not benefit from it. As detailed above, the defendant violated his drug court agreement in various ways—including the use of alcohol, heroin, and methamphetamine—resulting in sanctions that included jail time. While the defendant occasionally appeared to have a proper frame of mind for the program and appeared to be moving toward sobriety, he remained in phase 1

of the program after 10 months, as the court noted at the time it dismissed him from the program. OSAD suggests that this court should review the defendant's dismissal from drug court under the same standard that is used for orders revoking probation, *i.e.*, an abuse-of-discretion standard. See *People v. Cozad*, 158 Ill. App. 3d 664, 669 (1987). Under any standard of review, the record compels this court to affirm the defendant's dismissal from drug court.

¶ 31 The second of OSAD's potential issues—whether the defendant's agreed sentence of imprisonment was contingent upon the defendant's acceptance into boot camp—plainly lacks merit. The transcript of the June 1, 2016, sentencing hearing shows that the defendant and the State agreed on a sentence of imprisonment for a term of four years "with a boot camp recommendation." See 730 ILCS 5/5-8-1.1 (West 2014) (impact incarceration program). Boot camp was discussed only as something that the court would recommend. Nobody ever suggested that the defendant's placement in boot camp was assured, or even likely, and nobody ever suggested that the prison sentence was somehow contingent upon the defendant's acceptance into boot camp.

¶ 32 OSAD's third potential issue is whether the circuit court, at the hearing on the State's petition to dismiss the defendant from the drug court program, properly admonished the defendant prior to the defendant's stipulating to several of the petition's allegations against him. As to this issue, OSAD notes that the court's admonishments did not substantially comply with Illinois Supreme Court Rule 402A (eff. Nov. 1, 2003). The language of Rule 402A makes clear that the rule applies where a defendant admits to a petition to revoke probation and waives his right to a hearing on that petition, and the

circuit court revokes the defendant's probation without conducting such a hearing. See also *People v. Ellis*, 375 Ill. App. 3d 1041 (2007). In the instant case, the defendant admitted to some of the allegations in a petition to have him dismissed from a drug court program, and he denied another allegation in the petition, and the circuit court conducted a full hearing—complete with testimony and other evidence, and arguments by counsel—on that disputed allegation, and the court did not dismiss the defendant from the program until it found that the State had proved the disputed allegation. Rule 402A was inapposite to this case.

¶ 33 OSAD's fourth and final potential issue is whether the defendant can challenge the guilty pleas that he entered on June 25, 2015. If the defendant wanted to challenge his guilty pleas, he needed to file a motion to withdraw the pleas within 30 days after the imposition of sentence, pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). He did not do so. Indeed, he never filed a motion to withdraw the pleas. Therefore, he cannot challenge the pleas in this direct appeal.

¶ 34 **CONCLUSION**

¶ 35 None of the four potential issues presented by OSAD has any merit whatsoever. Also, this court has not discerned any issue of arguable merit. Therefore, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 36 Motion granted; judgment affirmed.