

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE EARL BROWN,

Defendant-Appellant.

UNPUBLISHED

June 11, 2009

No. 283290

Cass Circuit Court

LC No. 07-010123-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant Willie Earl Brown appeals in propria persona as of right his jury trial convictions for possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7403(2)(a)(v); maintaining a drug house, MCL 333.7405(1)(d); and possession of a controlled substance (marijuana), MCL 333.7403(2)(d). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 months to 15 years' imprisonment for the possession of less than 25 grams of cocaine conviction, 30 months to 15 years' imprisonment for the maintaining a drug house conviction, and 180 days in jail for the possession of marijuana conviction, to run concurrently to each other and consecutively to his parole status. In lieu of deciding this appeal on the merits, we remand to the trial court for the appointment of substitute appellate counsel for defendant.

Defendant contends that the trial court violated his constitutional rights in permitting his appointed appellate counsel to withdraw before filing a brief in accordance with *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967). We agree.

The right to appellate counsel in the first appeal as of right is crucial in order to "make that appeal more than a 'meaningless ritual.'" *People v Johnson*, 144 Mich App 125, 131; 373 NW2d 263 (1985) (citations omitted). In *Anders, supra* at 744, the United States Supreme Court held:

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full

examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

See also *Johnson, supra* (stating that appellate counsel must act as an active advocate and assist in preparing and submitting an appellate brief). Withdrawal of appointed appellate counsel is also governed by MCR 7.211(C)(5), which states in pertinent part:

A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) A motion to withdraw is made by filing:

(i) 5 copies of a motion to withdraw (one signed) which identifies any points the appellant seeks to assert and any other matters that the attorney has considered as a basis for appeal;

(ii) **5 copies of a brief conforming to MCR 7.212(C), which refers to anything in the record that might arguably support the appeal, contains relevant record references, and cites and deals with those authorities which appear to bear on the points in question[.]** [Emphasis added.]

Anders and MCR 7.211(C)(5) apply where the defendant appeals as of right, as is the case here. *People v Tooson (In re Withdrawal of Attorney)*, 231 Mich App 504, 505-506; 586 NW2d 764 (1998).

In the present case, appointed appellate counsel's motion to withdraw should have been filed with this Court and in accordance with the procedures in MCR 7.211(C)(5), i.e., it should have included a brief referring "to anything in the record that might arguably support the appeal." *Anders, supra*; MCR 7.211(C)(5)(a)(ii). Instead, the motion was filed in the trial court and appellate counsel failed to accompany the motion with an *Anders* brief; appellate counsel merely asserted in his motion that he found no meritorious issues to raise on appeal. The trial court granted appellate counsel's motion to withdraw on June 16, 2008, without indicating that it reviewed defendant's case to assess whether there were appealable issues. More egregiously, although the trial court indicated on July 16, 2008 that it would appoint substitute counsel, it denied defendant's motion for substitution of counsel the next day, stating that "defendant is not entitled to substitute counsel based on the circumstances which resulted in the withdrawal of his Court-appointed appellate attorney." From the record, it appears that the trial court denied substitute counsel because defendant did not agree with appellate counsel that there were no meritorious appellate issues. Defendant was left to pursue his appeal as of right in propria persona and filed his appellate brief on October 28, 2008.

Defendant clearly requested appointment of appellate counsel after he was sentenced and then requested substitute counsel when his first appointed appellate counsel informed him that he

believed an appeal would be frivolous and moved to withdraw. The trial court's decision amounted to a complete deprivation of defendant's right to appellate counsel to pursue his appeal as of right. *Johnson, supra* at 130.

We remand this case to the trial court for the appointment of substitute appellate counsel for defendant. We further direct the trial court to file a Claim of Appeal and Order of Appointment on behalf of defendant. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Kurtis T. Wilder

/s/ Alton T. Davis