

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-08-008

Appellee

Trial Court No. 07CR165

v.

Orlando Williams

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Gary Smith, Assistant Prosecuting Attorney, for appellee.

Aaron J. Maassel, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Orlando Williams, appeals the judgment of the Fulton County Court of Common Pleas. His appointed appellate counsel has filed a "no merit" brief and requested leave to withdraw as counsel, pursuant to *Anders v. California* (1967), 366 U.S. 738. For the following reasons, we grant appellant's counsel's motion to withdraw. However, an arguable issue exists requiring appointment of new appellate counsel.

{¶ 2} Williams was indicted for trafficking in cocaine, a felony of the second degree; possession of cocaine, a felony of the third degree; and one count of receiving stolen property, a felony of the fourth degree. Pursuant to an initial plea agreement, Williams entered a plea of guilty to trafficking in cocaine; in exchange, the state dismissed the remaining counts.

{¶ 3} Before sentencing, Williams filed a motion to withdraw his guilty plea. The trial court granted the motion. During that same hearing, however, Williams changed his mind and notified the court that he wished to "reinstate" his former guilty plea. In exchange, the state stipulated to an agreed-upon sentence of four years incarceration for the count of trafficking in cocaine and agreed not to seek any fines. The matter proceeded immediately to sentencing, and the trial court imposed the agreed-upon sentence of four years incarceration.

{¶ 4} From that judgment, Williams appealed. His appointed appellate counsel has filed a brief in accordance with *Anders v. California* (1967), 386 U.S. 738, requesting that he be allowed to withdraw. Counsel states that, after careful review of the record and legal research, he can discern no errors by the trial court prejudicial to Williams which present issues meriting review. Counsel states that a copy of both the brief and motion to withdraw have been served upon Williams. Williams has not filed a brief on his own behalf. The state has not filed a brief in response. Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders, supra*, and *Person v. Ohio* (1988), 488 U.S. 75.

{¶ 5} We are required, pursuant to *Anders*, supra, to review the record and independently determine whether counsel has made a diligent effort and that the proceedings below were free from prejudicial error. *Anders*, 386 U.S. at 744.

{¶ 6} Counsel for appellant raises one potential assignment of error:

{¶ 7} "Mr. Williams was deprived of his rights to effective assistance of counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

{¶ 8} Counsel points to several instances where Williams asserted to the trial court that he was unsatisfied with his appointed trial counsel. Counsel concludes, however, that the proposed assignment of error has no merit. Upon review of the matter, we agree and find that William's trial counsel rendered effective assistance.

{¶ 9} However, upon review of the entire record, we find that an arguable issue exists for appeal. We cannot conclude, therefore, that this appeal lacks merit and is wholly frivolous.

{¶ 10} Williams entered a guilty plea to trafficking in cocaine, a felony of the second degree. Pursuant to R.C. 2929.14(F)(1) and 2967.28, for this second-degree felony, Williams was subject to a mandatory period of three years postrelease control. Trial courts are required to inform a defendant of mandatory postrelease control during a guilty plea colloquy. "If a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion

to withdraw the plea or upon direct appeal." *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph one of the syllabus. Upon review of appellant's plea hearing, it appears that the trial court failed to comply with *Sarkozy* at Williams' plea hearing.

{¶ 11} An *Anders* brief is not a substitute for an appellate brief argued on the merits. *McCoy v. Court of Appeals of Wisconsin, District 1* (1988), 486 U.S. 429, 439. Because we have found an arguable issue exists for appeal, we must "appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief * * *" before we can decide the merit of the issue. *Id.* at 444. See, also, *Penson v. Ohio* (1988), 488 U.S. 75, 85.

{¶ 12} Accordingly, appellate counsel's motion to withdraw is found well-taken and is, hereby, granted. We appoint Chad Huber, 105 Louisiana Avenue, Perrysburg, Ohio, 43551, as appellate counsel in this matter, and direct him to prepare an appellate brief discussing the arguable issue identified in this decision, and any further arguable issues which may be found in the record within thirty days of the date of this decision.

MOTION GRANTED.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
