DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JUAN DIEGO MATEO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-3768

June 4, 2021

Appeal from the Circuit Court for Lee County; Thomas S. Reese, Judge

Howard L. Dimmig, II, Public Defender, and Richard P. Albertine, Jr., Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and William Stone, Jr., Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Juan Diego Mateo appeals the judgment and sentences entered following a jury trial. The jury found him guilty of burglary

and criminal mischief but found him not guilty of aggravated assault. It also found that no assault or battery occurred in connection with the burglary. However, as the State concedes, the judgment erroneously reflects a conviction for criminal mischief and first-degree burglary *with* assault or battery.

As a result, we affirm the convictions and sentences but remand for correction of the judgment. *See Rodriguez v. State*, 223 So. 3d 1053, 1054 (Fla. 2d DCA 2017) ("Because the judgment lists a conviction for the incorrect offense, remand is appropriate for correction of this error."); *see also Pittman v. State*, 310 So. 3d 970, 971 (Fla. 2d DCA 2020) ("[C]orrecting written sentencing documents to comport with an oral pronouncement does not require a de novo sentencing hearing; instead, such an error constitutes only a scrivener's error that may be corrected as a ministerial act."). Mateo need not be present when this error is corrected. *See Rodriguez*, 223 So. 3d at 1055.

Affirmed; remanded to correct scrivener's error.

ATKINSON and SMITH, JJ., Concur.

LUCAS, J., Concurs separately.

LUCAS, Judge, concurring separately

I concur fully with the court's opinion. I write separately only to call attention to the manner in which this sentencing issue came to our attention. This case is before us on plenary appeal. As such, Mr. Mateo had a right to counsel to represent him. *See Penson v. Ohio*, 488 U.S. 75, 79 (1988). The Office of the Public Defender, which represented Mr. Mateo at trial, appeared on his behalf in this appeal.

The assistant public defender assigned with that representation, however, filed what is commonly called an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967); *In Re Anders Briefs*, 581 So. 2d 149 (Fla. 1991). When an attorney "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court," *Anders*, 386 U.S. at 744, by filing a "brief referring to every arguable legal point in the record that might support an appeal," *In re Anders Briefs*, 581 So. 2d at 151. The now-unrepresented defendant is given an opportunity to file a pro se brief. *Id.* Regardless of whether a subsequent brief is filed, our court is then tasked with the obligation to review the entire case record to determine whether reversible error has occurred. *See* Fla.

R. App. P. 9.140(g)(2)(A) ("If appointed counsel files a brief stating that an appeal would be frivolous, the court shall independently review the record to discover any arguable issues apparent on the face of the record."); *State v. Causey*, 503 So. 2d 321, 322 (Fla. 1987) ("[P]ursuant to *Anders*, in order to assure indigents fair and meaningful appellate review, the appellate court must examine the record to the extent necessary to discover any errors apparent on the face of the record."). That is the process our court followed here.

But Mr. Mateo's attorney misunderstood the applicable standard for filing a no-merits *Anders* brief. The standard is not, as appellate counsel posited in his *Anders* brief, the inability to find a meritorious argument that the "trial court committed *significant* reversible error" in the case. (Emphasis added.) I am not sure what measurement counsel may have had in mind by qualifying "reversible error" with the word "significant," but I know that is not the standard under this procedure. As we explained in *Chapman v. State*, 186 So. 3d 3, 5 (Fla. 2d DCA 2015):

> In order to ensure that criminal defendants are afforded their constitutional right to counsel, before filing an *Anders* or "no merits" brief, appellate counsel must

> conscientiously follow the procedure for *Anders* appeals set forth by the U.S. Supreme Court. Appellate counsel must "master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on Appeal." *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991) (quoting *McCoy v. Court of Appeals*, 486 U.S. 429, 438–39, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988)). Counsel is justified in proceeding pursuant to *Anders* "only after such an evaluation has led counsel to the conclusion that the appeal is 'wholly frivolous.' " *Id.*; *Anders*, 386 U.S. at 744–45, 87 S.Ct. 1396. An appeal that is wholly frivolous is one in which there are no "legal points arguable on their merits," *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, or one that "lacks any basis in law or fact." *McCoy*, 486 U.S. at 438 n.10, 108 S.Ct. 1895. Moreover, in order to assist both the appellant in identifying issues for his pro se brief and the appellate court in its own review to determine whether the appeal is in fact wholly frivolous, appellate counsel must in its *Anders* brief "refer[ ] to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744, 87 S.Ct. 1396.

(Alteration in original) (footnotes omitted). We went on to explain that a frivolous appeal, for purposes of *Anders* briefs, is one "so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research." *Id.* at 5 n.1 (quoting Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 Fla. St.

U. L. Rev. 625, 664 (1996)). We also cited the Eleventh Circuit's observation about *Anders* appeals:

> If the *Anders* procedure is to work . . . the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of the proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious.

Id. at 5 n.2 (alteration in original) (quoting *United States v. Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985)).

The *Anders* benchmark, then, is whether the argument for reversal would be wholly frivolous, not whether the reversible error was significant.[1] This is not the first time I have seen this misstatement of the *Anders* standard. *See Hubbard v. State*, 248 So. 3d 177, 178 & n.1 (Fla. 2d DCA 2018) (striking *Anders* brief where assistant public defender represented she "can find no meritorious argument to support the contention that the trial court

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[1] And that heightened standard makes sense since "[t]he entire reason for the *Anders* procedure is counsel's obligation not to assert frivolous claims." *Ex parte Owens*, 206 S.W.3d 670, 677 (Tex. Crim. App. 2006) (Womack, J., concurring).

committed significant reversible error"). Hopefully, it will be the last. If it isn't, perhaps the next time a lawyer repeats this erroneous notion in a representation to our court, our court should request that lawyer's appearance—in court—to explain why that misapprehension persists.

It may be that Mr. Mateo's attorney felt the scrivener's error on the judgment amounted to an insubstantial sentencing error, such that the entire case could be designated a no merits *Anders* appeal. *See Hamiter v. State*, 290 So. 3d 1003, 1005 (Fla. 2d DCA 2020) (recognizing that *In re Anders Briefs*, 581 So. 2d at 152, held that "minor sentencing errors" may be raised in *Anders* briefs). If so, counsel has incorrectly conflated the designation of insignificant sentencing errors with all other errors that may arise in a case. Indeed, on this point, counsel's brief acknowledged he had "found what is believed to be meritorious arguments on this issue," but elected to file an *Anders* brief because, in counsel's view, "it is such a minor issue." A judgment reflecting a first-degree felony punishable by life when the jury only found the defendant guilty of a second-degree felony could not possibly be said to be "insignificant" or "minor." *See, e.g.*, *In re Anders Briefs*, 581 So. 2d

at 152 ("[T]he *Anders* procedure is not appropriate where counsel raise substantial sentencing errors of any kind."). It may have been an inadvertent error; but it was not insignificant.[2]

In my view, *Anders* designations should be few and far between. The Supreme Court has said as much. Over time, though, I have seen it used with increasing frequency and impropriety. When this procedure is implicated, the defendant is deprived of a constitutional right. And the appellate court is placed in the position of having to find points of advocacy for a litigant, rather than review them. We do so because that is what *Anders* demands. But as *Anders* counsels, it ought to be an uncommon circumstance.

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[2] Without suggesting there ought to be any kind of special *Anders* pagination limit, I would also respectfully suggest that when, as here, it takes a lawyer forty-nine pages to explain why there are no issues of arguable merit in his or her case, the case is probably not "wholly frivolous."

Opinion subject to revision prior to official publication.