[Cite as *State v. Gillian*, 2017-Ohio-7386.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	Case No. 16CA11
Plaintiff-Appellee,	:	
v.	:	DECISION AND ORDER
SARA R. GILLIAN,	:	
Defendant-Appellant.	:	RELEASED 08/21/2017

APPEARANCES[1]:

Thomas E. Saunders, Gallipolis, Ohio, for appellant.

Hoover, J.

{¶1} A jury in the Gallipolis Municipal Court convicted Sara R. Gillian of operating a motor vehicle while under the influence of alcohol ("OMVI") and failure to control. Gillian appealed; but her counsel advises us that he has reviewed the record and can discern no meritorious claim for appeal. Counsel moved for leave to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). However, in the time after counsel moved for leave to withdraw, this Court decided *State v. Wilson*, 4th Dist. Lawrence No. 16CA12, 2017-Ohio-XXX (released June 23, 2017). In *Wilson*, we held that this Court would no longer accept motions to withdraw and briefs under *Anders*. *Id.* at ¶¶ 1, 36. Accordingly, we discharge current counsel and will appoint new counsel by separate entry. Newly appointed counsel should prepare an amended merit brief that complies with the procedure outlined in *Wilson* and restated herein.

I. Facts and Procedural History

[1] The State of Ohio has not entered an appearance or otherwise participated in this appeal.

{¶2} A jury found Gillian guilty of OMVI in violation of R.C. 4511.19(A)(1)(a) and failure to control in violation of R.C. 4511.202. The trial court sentenced Gillian to three days in jail and community control, and imposed a fine, court costs, and license suspension for the OMVI charge. Gillian timely appealed her OMVI sentence but this Court determined that there was not a final appealable order because the trial court failed to sentence Gillian on the failure to control charge. Therefore, we dismissed the appeal and remanded the matter back to the trial court to enter a final judgment disposing of both charges. *See State v. Gillian*, 4th Dist. Gallia No. 15CA3, 2016-Ohio-3232.

{¶3} On remand, the trial court sentenced Gillian on the failure to control conviction; and the sentencing entry was journalized on July 5, 2016.

II. Motion to Withdraw and *Anders* Brief

{¶4} Although Gillian appealed her conviction, her appellate counsel filed a motion for leave to withdraw and an *Anders* brief. The Supreme Court of the United States established what has come to be known as the *Anders* procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if counsel reviews the record and determines that the case is frivolous, counsel informs the court that the appeal is frivolous and files a motion to withdraw as counsel, but also "submits a brief referring to anything in the record that might arguably support the appeal." The indigent criminal defendant receives a copy of the brief and may raise additional issues. Then the court reviews the motion, the brief and the entire record to determine if any arguably meritorious issues exist. If an issue exists, the court must discharge current counsel and appoint new counsel to prosecute the appeal. If the appeal is wholly frivolous, the court grants the request to withdraw and dismisses the appeal or proceeds with a decision in accordance with state law. *Anders* at 744. "Wholly frivolous" and "without merit"

both mean "the appeal lacks any basis in law or fact." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 438, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), fn. 10 (the Court explained, "The terms 'wholly frivolous' and 'without merit' are often used interchangeably in the *Anders*, brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact."). *Accord Wilson*, 2017-Ohio-XXX, at ¶ 6.

{¶5} Gillian's counsel complied with these requirements, and Gillian was furnished with a copy of the brief submitted by her counsel. Gillian had an additional 30 days to file a pro se brief, but chose not to.

III. The Fourth District's Reconsideration and Abandonment of the *Anders* Procedure

{¶6} As mentioned above, this Court recently reexamined the *Anders* procedure as well as the ethical and constitutional obligations appointed appellate counsel has to an indigent criminal defendant when counsel believes there are no meritorious grounds for an appeal. *See State v. Wilson*, 4th Dist. Lawrence No. 16CA12, 2017-Ohio-XXXX. In *Wilson*, we noted that the *Anders* procedure is an alternative, rather than constitutional mandate. *Id*. at ¶ 9, quoting *Smith v. Robbins*, 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) ("[W]e hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier in their doing so."). We also discussed the many criticisms of the *Anders* procedure, including: (1) the inherent prejudice to the defendant; (2) the tension it creates between counsel's duty to the client and to the court; (3) the precarious and odd position it places on the appellate

courts to essentially act as advocate in its review of the record and on defense counsel to act as judge; (4) the heavy burden it places on the appellate court and its judges and staff; and (5) the lack of nationwide and even statewide uniform guidelines among the courts that follow the *Anders* procedure. *Id*. at ¶¶ 10-22. The *Wilson* decision also addressed alternative *Anders* procedures utilized by jurisdictions throughout the United States. *Id*. at ¶¶ 12, 14, 15, 17, 18, 24, 35. With these criticisms and considerations in mind, the *Wilson* decision announced this Court's abandonment of the *Anders* procedure, and held the following: "After counsel is appointed to represent an indigent client during appeal on a criminal matter, we will not permit counsel to withdraw solely on the basis that the appeal is frivolous. Instead, counsel will file a brief on the merits." (Citation omitted.) *Id*. at ¶ 23.

IV. The New Approach

{¶7} The *Wilson* decision sets forth the new procedure in this Court of how to deal with appeals of an indigent criminal defendant when counsel believes there are no meritorious grounds for an appeal:

> Counsel should discuss the case with the defendant and decide whether to appeal. If counsel believes the appeal is frivolous, counsel should inform the defendant and try to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with the appeal nonetheless, counsel must file a merit brief and argue the defendant's appeal as persuasively as possible regardless of any personal belief that the appeal is frivolous. This does not mean counsel must argue every issue the defendant believes meritorious. Counsel may exercise strategic judgment in the presentation of the issues in the brief. *See Jones v. Barnes*, 463 U.S. 745,

751, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983) (holding that a defendant has no constitutional right to compel appointed counsel to raise issues, if counsel, as a matter of professional judgment, decides not to present them).

If counsel files a brief that fails to raise an issue that the appellant still believes has arguable merit, appellant may proceed under App. R. 15(B) and App. R. 16(C) to seek leave to file a supplemental brief. App. R. 15(B) allows the court to grant a procedural motion at anytime without awaiting a response from opposing counsel. And App. R. 16(C) provides the court with authority to grant leave for supplemental briefing. Accordingly, an appellant may file a motion seeking leave to file a supplemental brief to raise purported errors that counsel has not addressed. The motion should include a statement of the error(s) the appellant wishes to raise, along with references to the record and legal authority that support appellant's position. If the court grants the motion, appellant will be directed to file a brief within 30 days that conforms with App. R. 16 and 19 and Loc.R.10.

It is important to note that this approach is available to all parties regardless of whether their appeal is civil or criminal in nature and regardless of their economic status. This approach also allows an appellant to first read and consider counsel's brief before deciding whether to seek leave to raise additional arguments. However, we caution appellants to exercise their option to seek leave in a timely manner so as not to delay our deliberations. In that regard, 45 days after the date of the certificate of service of counsel's brief would seem to be a reasonable

period, absent extraordinary circumstances. The brief should conform with App.R. 16 and 19 and Loc.R. 10.

* * *

We will give counsel's merit brief the same level of review we afford all other appellate briefs: We will review the assignments of error identified by counsel, and by the appellant if leave is granted, but will not "scour" the record for issues not specifically raised in the brief. As with all criminal appeals, we will exercise our discretion in noticing plain errors or defects affecting substantial rights in accordance with Crim.R. 52(B).

Counsel should submit the case on the briefs without requesting oral argument pursuant to Loc.R. 12. If the court sua sponte requires oral argument under Loc.R. 12(A), counsel may choose not to appear. *See* App.R. 21(F). "A lawyer who has filed a brief advocating as well as possible only grounds which he finds weak or hopeless need not be called upon to stand up in court and attempt to make an oral argument that conceal the deficiencies in the case." *State v. Gates*, 466 S.W.2d 681, 683 (Mo. 1971) quoting the ABA Standards, The Prosecution Function and the Defense Function, Advisory Committee.

After we journalize our judgment, the defendant will be afforded the same safeguards other appellants receive and may apply for reopening of the appeal as provided in App.R. 26(B).

Id. at ¶¶ 25-30.

V. Ethical Concerns

{¶8} *Wilson* also addressed counsel's ethical obligations under Rules 3.1 and 3.3 of the Ohio Rules of Professional Conduct, and concluded that the procedure set forth above did not violate those ethical obligations. *Id*. at ¶¶ 31-33. Importantly, the *Wilson* decision notes that Comment 3 to Rule 3.1 makes explicitly clear that counsel's obligation to avoid frivolous conduct is subordinate to a criminal defendant's constitutional right to the assistance of counsel. *Id*. at ¶ 32. The *Wilson* decision also notes that if "the client insists that counsel make false statements or otherwise breach the duty of candor to the court in violation of Rule 3.3, counsel may request to withdraw." *Id*. at ¶ 33. However, "[t]his has always been true"; the *Wilson* decision only prohibits withdrawal when the sole ground for the motion is counsel's belief the appeal is frivolous. *Id*.

VI. Conclusion

{¶9} As this Court announced in *State v. Wilson*, *supra*, we no longer accept *Anders* motions and briefs. However, because counsel filed his motion and *Anders* brief in the case sub judice prior to the filing and publication of *Wilson*, we grant counsel's motion to withdraw. We will appoint new counsel by separate entry and new counsel is ordered to file a merit brief in conformity with this decision and the decision in *Wilson* within 60 days from the journalization of the entry of appointment.

Abele, J.: Concurs in Decision and Order.
McFarland, J.: Dissents with attached dissenting opinion.

MOTION GRANTED WITH CONDITIONS. IT IS SO ORDERED.

For the Court

By: _____
Marie Hoover, Judge

{¶10} I respectfully dissent and note I was not on the panel in *State v. Wilson, supra.* While I recognize that the *Anders* process used in Ohio may not be perfect, I believe a better approach, if change is warranted, would have been to seek rule changes at the Ohio Supreme Court because of the constitutional and ethical harmonics at play. This approach allows any stakeholders involved to have input via the public comment period if they so desire and assists in the interests of judicial economy.

{¶11} Now, I encourage my colleagues to certify a conflict. My hope is the Ohio Supreme Court expeditiously resolves this split among Ohio Courts of Appeals as to the application of *Anders* and provides guidelines for Ohio attorneys and judges alike in this important area of the law.