[Cite as *State v. Marbury*, 2003-Ohio-3242.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19226

vs. : T.C. CASE NO. 99-CR-3532

CEDRIC J. MARBURY : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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DECISION AND ENTRY

Rendered on the _____ day of June, 2003.

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Mathias H. Heck, Jr., Pros. Attorney; Johnna M. Shia, Asst. Pros. Attorney, P.O. Box 972, Dayton, Ohio 45422, Atty. Reg. No. 0067685
Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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PER CURIAM:

{¶1} Defendant, Cedric Marbury, appeals from his convictions for felonious assault and kidnapping, both with gun specifications, and the resulting sentences of incarceration that the trial court imposed.

{¶2} Counsel appointed to represent Marbury in this appeal

has filed an *Anders*[1] brief, in which counsel represents that he finds no meritorious issues for appellate review. However, counsel did identify several potentially meritorious issues.

{¶3} We advised Marbury of his attorney's conclusions and representations and invited Marbury to file a pro se brief should he disagree. Marbury has filed a brief containing three assignments of error. One of the issues which his counsel proposed, and which Marbury also presents, involves the instructions to the jury.

{¶4} The alleged victim of the assault and kidnapping of which Marbury was convicted is Terry Bell, who suffered a serious gunshot wound in their altercation. The State's evidence showed that when Bell drove past Defendant's house, Defendant ran into the street to stop Bell's vehicle, and a few moments later the Defendant pulled a gun from behind his back and shot Bell. Defendant then drove off in the car, with Bell inside. Bell eventually fell from the car several blocks away.

{¶5} Defendant Marbury's evidence was that Bell stopped his car and parked in the street at the entrance to Defendant's driveway. Defendant was then in his garage. When he walked down his driveway to where Bell's vehicle was parked, the two argued and Bell pulled a gun. Defendant then jumped into the

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[1] ***Anders v. California*** **(1967), 386 U.S. 738.**

car to wrestle the gun away from Bell in order to protect himself from harm. The two men fought as the cart drifted slowly down the street. Shortly, the gun discharged, resulting in Bell's injuries.

{¶6} Defendant requested a jury instruction on self-defense, and the court gave the instruction. Bell also requested a related "no duty to retreat" instruction. The court declined to give that instruction

{¶7} We are charged by *Anders* to determine whether any issues involving potentially reversible error that are raised by appellate counsel or by a defendant in his pro se brief are "wholly frivolous." (*Id.* A p. 774) If we find that any issue presented or which an independent analysis reveals is not wholly frivolous, we must appoint different appellate counsel to represent the defendant. *State v. Pullen* (Dec. 6, 2002), Montgomery App. No. 19232.

{¶8} Anders equates a frivolous appeal with one that presents issues lacking in arguable merit. An issue does not lack arguable merit merely because the prosecution can be expected to present a strong argument in reply, or because it is uncertain whether a defendant will ultimately prevail on that issue on appeal. An issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal. *Pullen, supra.*

{¶9} Self-defense is an affirmative defense which, if proved, relieves an accused of criminal liability arising from his conduct. "The burden of going forward with the evidence of an affirmative defense, and the proof, by a preponderance of the evidence, for an affirmative defense, is on the accused." R.C. 2901.05(A).

{¶10} To establish self-defense the following must be shown: (1) the accused was not at fault in creating the situation giving rise to the affray, (2) the accused has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of force, and (3) the accused must not have violated any duty to retreat or avoid the danger. *State v. Melchiot* (1978), 56 Ohio St.2d 15. In most circumstances, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation. *State v. Williford* (1990), 49 Ohio St.3d 247. However, there is no duty to retreat from one's home. *Id.*, at p. 250.

{¶11} If requested special instructions to the jury correctly state the law involved, and are pertinent to the evidence presented and timely filed, they must be included in the general charges, at least in substance. *State v. McCarthy* (1992), 65 Ohio St.3d 589. An instruction is pertinent to the evidence when the evidence, if believed, would permit the trier

of fact to convict or acquit on the facts which the evidence portrays.

{¶12} Defendant's evidence, if believed, could support a finding that Bell was the aggressor and that Defendant was on the curtilage of his own property when Bell's aggression began; that is, when Bell pulled a gun and threatened Defendant. Therefore, if a self-defense instruction was given, an argument may be made that the jury should also have been instructed concerning the "no duty to retreat" element of self-defense. Being a claim with arguable merit, an assignment of error complaining of the trial court's refusal to give the requested instructions is not frivolous for purposes of *Anders*

{¶13} Having found that at least one claimed error arising from the trial proceeding is not frivolous, we will set aside counsel's *Anders* brief and appoint other counsel to represent Defendant on appeal. Counsel is, of course, free to raise any other issues which counsel concludes has arguable merit. SO ORDERED.

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JAMES A. BROGAN, JUDGE

_____

THOMAS J. GRADY, JUDGE

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FREDERICK N. YOUNG, JUDGE

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