[Cite as *State v. Meyer*, 2004-Ohio-5229.]

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

State of Ohio — Court of Appeals No.WM-03-008

Appellee — Trial Court No. 02-CR-140

v.

Richard D. Meyer, Jr. — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: September 30, 2004

* * * * *

Susan K. Sharkey, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on appeal from a judgment of conviction and sentence entered by the Williams County Court of Common Pleas after defendant-appellant, Richard Meyer, Jr., was found guilty of one count of attempted aggravated arson.

{¶ 2} Appellant's appointed counsel has submitted a request to withdraw as counsel pursuant to *Anders v. California* (1967), 386 U.S. 738. In support of her request, counsel states that after a conscientious review of the record and applicable law, she can

find no reasonable basis for appeal in this matter. Counsel for appellant has, however, consistent with *Anders*, set forth the following potential assignments of error:

{¶ 3} "First Possible Assignment of Error

{¶ 4} "The conviction of appellant for attempted aggravated arson was against the manifest weight of the evidence.

{¶ 5} "Second Possible Assignment of Error

{¶ 6} "Appellant was prejudiced by the admission of statements elicited in violation of his constitutional right to legal representation.

{¶ 7} "Third Possible Assignment of Error

{¶ 8} "The sentence imposed upon appellant was inconsistent with the principles and purposes of Ohio sentencing guidelines."

{¶ 9} *Anders*, supra and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, supra at 744, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous she should so advise the court and request permission to withdraw. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish her client with a copy

{¶ 10} of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. Id. Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to

determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. Id.

{¶ 11} In the case before us, appointed counsel for appellant has satisfied the requirements set forth in *Anders*. This court notes further that appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel for appellant and of the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 12} On October 16, 2002, appellant was indicted and charged with one count of attempted aggravated arson in violation of R.C. 2909.02(A)(2), a felony of the third degree. Appellant waived his right to a trial by jury and the case proceeded to a trial to the bench at which the following evidence was submitted.

{¶ 13} Jeremy Viers, a patrol officer with the Bryan Police Department, testified that he was on duty monitoring the 911 phone line in the early morning hours of October 15, 2002, when he received a telephone call at about 4:30 a.m. reporting a fire. The caller was a man who simply reported that he needed the fire department at 207 South Lynn Street and then hung up. The screen indicated that the call came from Bryan Community Hospital and Viers suspected that it was from a pay phone. Viers then contacted his sergeant, Paul Zawodny, who stated that he would go to the South Lynn Street location.

Sergeant Zawodny went to that location but found no sign of a fire. Viers also dispatched a Patrolman Grimes to the hospital to track down the phone from which the call came. The officers subsequently learned that the phone call came from a pay phone that is owned by the hospital but which is on the northeast corner of Courthouse Square.

{¶ 14} Thereafter, another call came into the 911 system, again vaguely reporting a fire at 207 South Lynn Street. That call was received by a different dispatcher as Patrolman Viers had gone to join Sergeant Zawodny. Sergeant Zawodny in the meantime had encountered a subject, appellant, on the north side of Courthouse Square near the pay phone. In discussions with the officers, appellant denied calling 911, but then referred to the arson at 207 South Lynn Street. When Patrolman Viers asked him where he lived, appellant responded "207 South Lynn." The officers' conversation with appellant was then recorded by the audio/visual recorder in Patrolman Viers' patrol vehicle. During that conversation, appellant revealed that there was an "arson" occurring at that address. The conversation continued:

{¶ 15} "Q. Do you want us to go check your apartment?

{¶ 16} "A. If you want to.

{¶ 17} "Q. Do you have a key for it?

{¶ 18} "A. (Inaudible)

{¶ 19} "Q. Did you check both those doors, Sergeant?

{¶ 20} "SERGEANT: I didn't see if they were locked or not

{¶ 21} "A. I'm sure it's probably on fire then.

{¶ 22} "Q. Which one? Which one should he go to?

{¶ 23} "A. Well, probably just go upstairs. Thank you very much.

{¶ 24} "Q. Would you agree you were standing next to the phone when the call came in?

{¶ 25} "A. (Inaudible)

{¶ 26} "Q. If he opens that door is he going to get hurt?

{¶ 27} "A. (Inaudible)

{¶ 28} "Q. What's that?

{¶ 29} "A. He might want to (inaudible). I don't think anybody else is in there.

{¶ 30} "Q. So the gas is on?

{¶ 31} "A. It's on.

{¶ 32} "Q. When he walks in that door and there's a spark, is he going to blow up?

{¶ 33} "A. It's on fire.

{¶ 34} "Q. It's on fire? So the gas is on and it's on fire and if he goes in there he's not going to get hurt?

{¶ 35} "A. There's always that possibility. You might want to call the gas company to shut down the gas.

{¶ 36} "Q. We may need some assistance if the gas is on and there's a fire inside. May get hurt if you enter. Not a driver, huh? Don't drive?

{¶ 37} "A. I lost my license in Michigan.

{¶ 38} "Q. Come right down here and I'll give you a ride, okay?"

{¶ 39} Sergeant Zawodny testified that when he first encountered appellant, appellant insisted that there was an arson fire at 207 South Lynn Street and told the officer that he had better get down there because flames were shooting out of the windows. When Zawodny eventually entered the apartment, he found smoke but no flames. Upon further investigation, he found a coffee table turned upside down on the floor next to the gas stove. One of the legs of the table was charred and the left rear burner on the stove was still ignited.

{¶ 40} In addition to the officers' testimony, Faith Votow, the owner of 207 South Lynn Street, testified that the building is a two story structure with retail space on the first floor and two apartments on the second floor. In October 2002, appellant was the only apartment tenant in the building although the first floor retail space was also occupied. Votow further testified that the second apartment had been rented but that the new tenant had not yet moved in. At the conclusion of the trial, the court found appellant guilty of attempted aggravated arson.

{¶ 41} In his first potential assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "'*** weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial ordered.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The rule of law in *Thompkins* applies equally to a matter tried before the bench or a jury. *State v. Fisher*, 6th Dist. No. L-02-1041, 2002-Ohio-7305, at ¶ 7.

{¶ 42} Appellant was convicted of attempted aggravated arson in violation of R.C. 2909.02(A)(2), which provides: "No person, by means of fire or explosion, shall knowingly do any of the following: *** (2) Cause physical harm to any occupied structure." The attempt statute, R.C. 2923.02, provides at paragraph (A) that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." Finally, an "occupied structure" is defined by R.C. 2909.01(C) as: "any house, building *** or other structure *** or any portion thereof, to which any of the following applies: (1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present. (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present. (3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present. (4) At the time, any person is present or likely to be present in it."

{¶ 43} We have carefully reviewed the record in this case, including the transcript of the trial below and the applicable law, and cannot conclude that the court clearly lost

its way and created a manifest miscarriage of justice in convicting appellant of attempted aggravated arson. The first potential assignment of error is therefore not well taken.

{¶ 44} In his second potential assignment of error, appellant asserts that the trial court erred in admitting the statements appellant made to police officers at the time of his arrest after he asked for an attorney. This assignment of error addresses the earlier part of the tape from Patrolman Viers' cruiser which was played at the trial below. That conversation is as follows:

{¶ 45} "Q. Are you living at 207 South Lynn

{¶ 46} "A. I was.

{¶ 47} "Q. Do you think there's an arson going on there now?

{¶ 48} "A. Right now?

{¶ 49} "Q. Uh, huh. Why do you say that?

{¶ 50} "A. I don't know.

{¶ 51} "Q. You don't know? You just walked over from there?

{¶ 52} "A. Huh?

{¶ 53} "Q. Did you just walk here from there?

{¶ 54} "A. I don't know.

{¶ 55} "Q. You don't know? (inaudible) You just don't know much? Only that there's an arson going on at your place?

{¶ 56} "A. Yea.

{¶ 57} "Q. Are you in A or B? Or is there just one 207?

{¶ 58} "A. (Inaudible)

{¶ 59} "Q. Which one do you live in, the upstairs or downstairs?

{¶ 60} "A. What's my license say?

{¶ 61} "Q. I'm asking you.

{¶ 62} "A. I'm telling you.

{¶ 63} "Q. You don't know if you live in the upstairs or downstairs?

{¶ 64} "A. What are you looking for?

{¶ 65} "Q. I'm just asking.

{¶ 66} "A. I need a lawyer.

{¶ 67} "Q. You need a lawyer?

{¶ 68} "A. (Inaudible)

{¶ 69} "Q. Okay. Do you have the keys to your place? Do you want us to go in and make sure there's not a fire going on or --."

{¶ 70} At that point, appellant's trial counsel objected to the admission of any statements made by appellant after he requested a lawyer. The court took the issue under advisement and continued to play the tape, hearing the evidence quoted previously. Subsequently, the court determined that the tape from the cruiser's recording system would not be admitted into evidence. Then, however, during appellant's counsel's closing argument, the court determined that it would in fact admit the statements that appellant made to the officers after requesting an attorney. Appellant now asserts that the admission of those statements violated his Fifth Amendment right to counsel.

{¶ 71} Officer Viers testified below that in his view, appellant was in custody from the moment the officers first encountered him. "Statements made by a suspect during custodial interrogation are inadmissible unless the suspect is informed of his *Miranda* rights and voluntarily waives such rights. *Miranda v. Arizona* (1966), 384 U.S. 436, 444 ***. In *New York v. Quarles* (1984), 467 U.S. 649 *** the United States Supreme Court set forth a public safety exception to the *Miranda* requirement. The public safety exception allows the police, under certain circumstances, to temporarily forgo advising a suspect of his *Miranda* rights in order to ask questions necessary to securing their own immediate safety or the public's safety." *State v. Santiago* (Mar. 13, 2002), 9th Dist. No. 01CA007798. The questions posed by an officer under this exception, however, must be "circumscribed by the exigency which justifies [them]." *Quarles*, supra at 658.

{¶ 72} In the current case, Officers Viers and Zawodny were investigating a report of a fire. Concerns for the officers' safety as well as the safety of potential inhabitants of the building justified Officer Viers' questioning of appellant. Indeed, all of Officer Viers' questions were aimed at discovering any dangers posed by the possible fire. Accordingly, appellant's statements to Officer Viers were not elicited in violation of his constitutional rights and the court did not err in admitting them. The second potential assignment of error is not well-taken.

{¶ 73} In his third potential assignment of error, appellant challenges his sentence. Appellant asserts that the two year sentence imposed by the trial court for a third degree felony was contrary to law in that it was inconsistent with the principles and purposes of

Ohio sentencing guidelines. For the following reasons, we find merit in this assignment of error.

{¶ 74} Initially, we note that when appellant's appellate counsel filed her brief in this appeal, this assignment of error would likely have been without merit in that the trial court's sentencing entry indicates that the court considered the relevant statutory factors in sentencing appellant to two years imprisonment. Since that brief was filed, however, the Supreme Court of Ohio released its decision in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. In paragraph two of the syllabus, the court in *Comer* held: "Pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing." In a decision and judgment entry of July 2, 2004, we granted the state an opportunity to respond to this issue by filing a brief in opposition. It has declined to do so. The transcript from the sentencing hearing in this case reveals that the trial court did not make its statutorily sanctioned findings at the sentencing hearing. Accordingly, the third potential assignment of error has merit.

{¶ 75} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. We recognize that pursuant to *Anders*, if we find any of the legal points presented by appellate counsel arguable on their merits, we are to afford appellant's new counsel the opportunity to argue the appeal. Under the unique circumstances of this case, however, and given that the sentence is clearly contrary to law, we find that justice requires an immediate remand to the trial court for resentencing.

Moreover, given that the third potential assignment of error became meritorious after appellate counsel filed the current brief, we must deny counsel's motion to withdraw and find the potential assignment of error well-taken.

{¶ 76} On consideration whereof, the judgment of the Williams County Court of Common Pleas is affirmed in part and reversed in part. Appellant's sentence is hereby vacated and the cause is remanded to the trial court for resentencing. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J . _____
CONCUR.
JUDGE