

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

State of Ohio

Court of Appeals No. L-08-1112

Appellee

Trial Court No. CR07-3619

v.

Latron Tall

DECISION AND JUDGMENT

Appellant

Decided: October 16, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

BOYLE, J.

{¶ 1} Appellant, Latron Tall, was convicted by a jury of aggravated burglary, a violation of R.C. 2911.11(A)(1) and a felony of the first degree. He was sentenced to a term of five years incarceration. His appointed appellate counsel has filed a "no merit"

brief and a motion to withdraw as appointed counsel pursuant to *Anders v. California* (1967), 386 U.S. 738.

{¶ 2} Pursuant to *Anders*, counsel for appellant asserts that she has thoroughly reviewed the record and can find no arguable issues for appeal. Tall was notified of his counsel's submission and has not submitted his own brief. The state has also not filed an appellate brief.

{¶ 3} Tall's appellate counsel has identified three possible issues for review: whether Tall's conviction was against the manifest weight of the evidence; whether the trial court erred by failing to instruct the jury on a lesser included offense to aggravated burglary; and whether Tall's trial counsel rendered ineffective assistance. Pursuant to *Anders*, we must independently review the record to determine whether the issues are "wholly frivolous." *Id.* at 744. If we find any legal issue that is arguable on the merits, and therefore, not wholly frivolous, new appellate counsel must be appointed to argue the appeal.

{¶ 4} At trial, conflicting evidence was presented as to whether Tall "by force, stealth or deception, trespass[ed]" into an occupied structure, "with purpose to commit in the structure * * * any criminal offense." At trial, and on appeal, counsel for Tall argued that he was not without privilege to enter the residence. Conflicting evidence was also presented as to whether Tall had the requisite mens rea for aggravated burglary when he entered the residence.

{¶ 5} After Tall's motion for acquittal was denied, counsel and the trial judge had a bench conference on the issue of jury instructions. Tall's counsel asked that the jury be given a lesser included instruction for aggravated trespass. The trial judge rejected the proposed instructions, correctly holding that aggravated trespass is not a lesser-included offense of aggravated burglary. *State v. Hazel*, 5th Dist. No. 2002CA00355, 2003-Ohio-3578; *State v. Goldwire*, 2d Dist. No. 19659, 2003-Ohio-6066. Tall's trial counsel did not request instructions on the lesser-included offense of burglary. R.C. 2911.12. Nor did Tall's trial counsel preserve an objection to the trial court's failure to instruct on a lesser-included offense. On appeal, Tall's appellate counsel also asserts, incorrectly, that aggravated trespass is the lesser-included offense to aggravated burglary; she therefore concludes that the possible issue is frivolous.

{¶ 6} Given the record, these possible issues are arguable on their merits. Therefore, they are not "wholly frivolous" as required to request leave to withdraw as appellate counsel pursuant to *Anders*. Rarely will an *Anders* brief be appropriate for appellate review of a jury trial.

{¶ 7} "*Anders* equated a frivolous appeal with one that presents issues lacking in arguable merit. An issue is not lacking in that regard merely because the prosecution can be expected to present a strong argument in reply. An issue lacks arguable merit if, on the facts and the law involved, *no responsible contention* can be made that it offers a basis for reversal." *State v. Pullen*, 2d Dist. No. 19232, 2002-Ohio-6788, ¶ 4. In appeals as of right, defendants are entitled to an appellate brief which advocates on the

defendant's behalf. When an *Anders* brief is filed inappropriately, it "delays resolution of the appeal and is more costly to funding sources." Id. at ¶ 3.

{¶ 8} Because an *Anders* brief is not a substitute for an appellate brief argued on the merits, see *McCoy v. Court of Appeals of Wisconsin, District I* (1988), 486 U.S. 429, 439, 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. Newly appointed counsel must also be free to argue any other issue he or she may find after a review of the record.

{¶ 9} Accordingly, appellate counsel's motion to withdraw is found well-taken and is, hereby, granted. We appoint James Popil, 6452 Scarsdale Road, Toledo, Ohio, 43537, as appellate counsel in this matter, and direct him to prepare an appellate brief discussing the arguable issues identified in this decision, and any further arguable issues which may be found in the record within 30 days of the date of this decision and judgment.

MOTION GRANTED.

Peter M. Handwork, P.J.

Arlene Singer, J.

Mary J. Boyle, J.
CONCUR.

JUDGE

JUDGE

JUDGE

Judge Mary J. Boyle, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.