[Cite as *State v. Czech*, 2014-Ohio-3990.]

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

State of Ohio — Court of Appeals No. L-13-1141

Appellee — Trial Court No. TRC-12-32135

v.

David Czech — **DECISION AND JUDGMENT**

Appellant — Decided: August 20, 2014

* * * * *

Tim A. Dugan, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, David Czech, appeals from the judgment of the Toledo Municipal Court which found appellant guilty, after entering a plea of no contest, to one count of operating a motor vehicle while under the influence in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(b), a misdemeanor of the first degree. His appointed counsel has filed a "no

merit" brief and requested leave to withdraw as counsel, pursuant to *Anders v. California*, 386 U.S. 783, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 2} In the early morning hours of November 4, 2012, David Czech was arrested while driving his vehicle through the village of Ottawa Hills, Lucas County, Ohio. The arresting officer issued a complaint for operating a motor vehicle while under the influence ("OVI") in violation of R.C. 4511.19(A)(1)(a), open container in violation of R.C. 4301.62(B)(4), driving with a suspended license in violation of R.C. 4510.21(A), and "OVI Breath" in violation of R.C. 4511.19(A)(1)(d). Czech was ordered to appear in the Toledo Municipal Court on November 8, 2012. He failed to appear and a bench warrant was issued.

{¶ 3} Czech was served with the warrant on March 15, 2013, and arrested. Three days later, with the assistance of a public defender, Czech entered pleas of not guilty to all four counts of the complaint.

{¶ 4} When the case was called for trial on March 27, 2013, Czech entered a plea of no contest to one count of OVI in violation of R.C. 4511.19(A)(1)(a). The remaining charges were "off docketed." The trial court explained "[a] plea of no contest, though not admission of guilt, you are allowing this Court to accept as true all the information contained in the complaint and in all likelihood you would be found guilty." The court informed Czech of the potential penalties and inquired as to the voluntary nature of his plea. The court determined that the plea was made knowingly, voluntarily, and intelligently. Before entering a finding of guilt, the court indicated on the record that it

had "review[ed] the complaint." It was then that the public defender's office brought to the court's attention that this was not Czech's first driving while intoxicated conviction and requested a presentence investigative report. A brief discussion was held off the record. On the record, the court indicated it would review Czech's Bureau of Motor Vehicle ("BMV") records and recall the case later that day.

{¶ 5} When the case was recalled, the trial court stated, "All right, looks like second in six. That does change the penalties a little bit."[1] The trial court reviewed the potential penalties and asked Czech, again, whether he wished to enter a plea of no contest. Czech indicated in the affirmative. The trial court stated, "Okay. Note that defendant has a conviction in 1980, 2007, 2011, two in 2006, one in 2008 and then now yet another one in 2012.[2] Defendant was supposed to have been here for his first appearance on November 8th, didn't bother to show up." Czech was sentenced to 180 days in jail. The sentence was ordered to be served consecutive "to any other sentence the defendant is serving." The court ordered a fine of $525 and a class IV license suspension. The court further ordered an ignition interlock and restricted license plates on any vehicle driven by appellant.

[1] Contrary to the trial judge's in-court statement, the judge indicated on the journal that this was appellant's first OVI in six years.

[2] Czech's BMV records were not made part of the record.

{¶ 6} On May 8, 2013, appellant wrote a letter to the trial judge asking for a stay on the sentence until October 15, 2013, so that he could "have time to retain an attorney to file an appeal."

{¶ 7} On June 5, 2013, the trial court conveyed Czech to the trial court for a "sentencing review." The trial court acknowledged that it failed to review his appellate rights with him at the March 27, 2013 plea hearing. The court informed Czech of his "automatic right to appeal" and stated

> I sentenced you to a consecutive sentence because of your terrible driving history, your multiple D.U.I. offenses, you continue to drive even when you don't have a license. You are not even entitled – not only are you driving intoxicated, you don't even have a valid license for driving to begin with. For those reasons, the Court did sentence you consecutively to the other sentence you received from Judge Christiansen. So your request for modification of your sentence and/or for stay of your sentence is denied.

{¶ 8} Czech informed the court that he "need[ed] a public defender." Attorney Tim Dugan was appointed appellate counsel. For good cause shown, we granted appellant's motion for delayed appeal.

{¶ 9} Based upon the belief that no prejudicial error occurred below, appointed counsel has filed a brief and motion to withdraw pursuant to *Anders v. California*, 386 U.S. 783, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Anders* and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by

counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if, after a conscientious examination of the case, counsel determines the appeal to be wholly frivolous he should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.*

{¶ 10} Appointed counsel must also furnish the client with a copy 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 it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 11} In this case, appointed counsel has fully satisfied the requirements set forth in *Anders*. Although arguing that there were no meritorious claims to raise on Czech's behalf, appointed counsel found three potential assignments of error for our consideration: (1) the trial court improperly found appellant guilty after a no contest plea without having an explanation of the circumstances of the elements of the offense, (2) the trial court violated Ohio Traffic Rule 10, and (3) the trial court's sentence was contrary to law.

{¶ 12} Appellee, the city of Toledo, did not file a responsive brief nor did it oppose the motion to withdraw.

{¶ 13} Having now demonstrated a "conscientious examination of the record," and having complied with the initial requirement of *Anders*, counsel asserts that he can find no meritorious issues for appeal and urges this court to proceed to the next step of the *Anders* analysis and to conduct "a full examination of all the proceedings to decide whether the case is wholly frivolous." *Id.* "If we find any legal issue that is arguable on the merits, and therefore not wholly frivolous, new counsel must be appointed to argue the appeal." *State v. Hopkins*, 6th Dist. Lucas No. L-10-1127, 2011-Ohio-4144, ¶ 6.

{¶ 14} We find no merit in appointed counsel's second and third potential assignments of error. However, appointed counsel's first potential assignment of error is arguable on the merits.

{¶ 15} In his first potential assignment of error appointed counsel asserts the trial court improperly found appellant guilty after a no contest plea without an explanation of the circumstances of the elements of the offense as required by R.C. 2937.07. Appointed counsel states:

> The complaint in this case is the ticket written by the police officer. * * * The complaint lists that Appellant had a blood alcohol level of 0.104%. * * * Since .08% is legal limit, .104% therefore is a clear violation of R.C. 4511.19.

Appointed counsel concludes that "[b]ecause the complaint clearly lists facts that the Trial Court could find Appellant guilty by, and since the Trial Court stated on the record that it reviewed that complaint before finding Appellant guilty, this assignment of error has no merit." Appointed counsel does not address the requirement set forth in R.C. 2937.07 that a trial court "call for an explanation of circumstances" upon receiving a plea of not guilty, nor did he distinguish this case from precedent. Therefore, we cannot agree with appointed counsel's conclusion that the first potential assignment of error has no merit.

{¶ 16} We find the issue of whether the trial court complied with the substantive requirements set forth in R.C. 2937.07 is not wholly frivolous, but rather is arguable on the merits. "Because an *Anders* brief is not a substitute for an appellate brief on the merits, 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." *Hopkins*, 6th Dist. Lucas No. L-10-1127, 2011-Ohio-4144, at ¶ 11, quoting *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 444, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), *but see State v. Hayes*, 6th Dist. Lucas No. L-13-1204, 2014-Ohio-2968, ¶ 9 (upon independent review of *Anders* brief we immediately remanded the case to the trial court upon holding that trial court "clearly failed" to comply with a sentencing statute).

{¶ 17} Accordingly, appointed counsel's motion to withdraw is found well-taken and is, hereby, granted. We appoint Laura Kendall, 1709 Spielbusch Avenue, Suite 110, Toledo, Ohio 43604, as appellate counsel in this matter, and direct her to prepare an

appellate brief discussing the arguable issues identified in this decision, and any further arguable issues that may be found in the record within 30 days of the date of this decision and judgment. The remaining briefing schedule shall proceed in accordance with App.R. 18. The clerk is ordered to serve, by regular mail, all parties, including David Czech, with notice of this decision.

Motion granted.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE