

[Cite as *State v. Drake*, 2017-Ohio-4190.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105176

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HOWARD L. DRAKE

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-606259-A

BEFORE: Laster Mays, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: June 8, 2017

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FOR APPELLANT

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ANITA LASTER MAYS, J.:

{¶1} This is an appeal from defendant-appellant Howard L. Drake's ("Drake") conviction in the Cuyahoga County Common Pleas Court where he entered a plea of guilty to one count of felonious assault, in violation of R.C. 2903.11(A)(1). The trial court sentenced Drake to seven years imprisonment.

{¶2} Drake was appointed counsel who has filed a motion to withdraw and a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that, after a thorough review of the record, proceeding with the appeal would be frivolous. An *Anders* brief must meet the protocol designed to honor and protect an indigent defendant's constitutional right to counsel, requiring that counsel seeking to withdraw from representation demonstrate good faith and diligence in investigating potential grounds for appeal. "This procedure will assure penniless defendants the same rights and opportunities on appeal — as nearly as is practicable — as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Anders* at 745.

{¶3} On May 26, 2016, Drake was indicted on one count of felonious assault, a second-degree felony, in violation of R.C. 2903.11(A)(1); one count of felonious assault, a second-degree felony, in violation of R.C. 2903.11(A)(2); and attempted murder, a first-degree felony, in violation of R.C. 2923.02. On September 15, 2016, Drake entered a plea of guilty to Count 1 and the remaining counts were dismissed. The trial court

sentenced Drake to seven years in prison at the sentencing hearing.

{¶4} Drake's appointed appellate counsel filed a notice of appeal, and subsequently filed a motion to withdraw and a brief pursuant to *Anders*. Appellate counsel has asserted that, after a thorough review of the record, proceeding with the appeal would be frivolous. Appellant's counsel served Drake with a copy of the motion to withdraw and the *Anders* brief. This court notified Drake that he could file his own appellate brief, but he has not done so even after given an extension to file an answer.

{¶5} In *Anders*, the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then counsel should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the client's appeal. *Id.* Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. *Id.*

{¶6} The appellate court must then fully examine the proceedings below to determine if any arguably meritorious issues exist. The court may grant counsel's request to withdraw from the case and dismiss the appeal without violating constitutional requirements if the court determines that the appeal is wholly frivolous, or may proceed to a decision on the merits where required by state law. *Id.*

{¶7} Counsel bears the burden of demonstrating the efficacy of the motion; thus, the *Anders* brief must reference "anything in the record that might arguably support the

appeal[.]” *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988) (quoting *Anders* at 744).

{¶8} Appellant’s counsel has complied with the *Anders* requirements. Appellant’s counsel determined that Drake’s guilty plea was made knowingly, intelligently, and voluntarily. He also determined that the trial court fully complied with Crim.R. 11. Additionally, the trial court did not err in sentencing Drake to seven years imprisonment. After conducting an independent assessment of the record, we find no meritorious issues for appellate review. We, therefore, grant counsel’s motion to withdraw, and the appeal is dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR