[Cite as *State v. Stekelenburg*, 2010-Ohio-219.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24825
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MICHELLE C. STEKELENBURG	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 05 1718

DECISION AND JOURNAL ENTRY

Dated: January 27, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} The trial court convicted Michelle Stekelenburg of seven counts of deception to obtain a dangerous drug, three counts of possession of a dangerous drug, and one count of possession of heroin. This Court reversed her convictions for possession of a dangerous drug because she had a valid prescription for the drugs. On remand, the trial court dismissed those counts and resentenced Ms. Stekelenburg on the remaining counts. Ms. Stekelenburg has appealed from her resentencing. The lawyer who was appointed to represent her has submitted a brief under *Anders v. California*, 386 U.S. 738 (1967), alleging that no arguable issues exist for appeal. He also has moved to withdraw as Ms. Stekelenburg's lawyer. Having reviewed the entire record and concluded that the resentencing proceedings were proper, this Court grants the motion to withdraw and affirms the judgment of the trial court.

ANDERS BRIEF

{¶2} In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court wrote that, if a court-appointed lawyer conducts "a conscientious examination" of the record and concludes that an appeal would be "wholly frivolous," "he should so advise the court and request permission to withdraw." *Id.* at 744. His request, however, must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." *Id.* A proper *Anders* brief "serves the dual purpose of assisting the court in determining both that counsel has in fact conducted a review of the record and that the case may be decided without an adversary presentation." *State v. Lowe*, 9th Dist. No. 97CA006758, 1998 WL 161274 at *1 (Apr. 8, 1998).

{¶3} After this Court receives an *Anders* brief, "it must then itself conduct 'a full examination of all the proceeding[s] to decide whether the case is wholly frivolous.'" *Penson v. Ohio*, 488 U.S. 75, 80 (1988) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). "Only after this separate inquiry, and only after [this Court] finds no nonfrivolous issue for appeal, may [it] proceed to consider the appeal on the merits without the assistance of counsel." *Id.* If this Court "disagrees with counsel . . . and concludes that there are nonfrivolous issues for appeal, 'it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.'" *Id.* (quoting *Anders*, 386 U.S. at 744).

VISITING JUDGE

{¶4} Although arguing that there are no meritorious claims to raise on appeal, Ms. Stekelenburg's lawyer has advised this Court that Ms. Stekelenburg would like him to present several arguments on her behalf. Her first proposed assignment of error is that her convictions are void because the retired visiting judge who tried her case was not authorized to preside over the trial. Specifically, she has argued that the judge's assignment was improper under the Ohio

Rules of Superintendence, that he did not take an oath of office, that retired visiting judges may not hear criminal cases, that the retired visiting judge system is unconstitutional, and that retired visiting judges are inherently biased because they are paid by the State.

{¶5} This Court cannot review the merits of Ms. Stekelenburg's arguments because they are barred by the doctrine of law of the case. That doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984). It "precludes a litigant from attempting to rely on arguments at a retrial [that] were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 404-05 (1996).

{¶6} The doctrine of law of the case applies to cases in which a defendant's convictions were upheld on appeal, but the matter was remanded for resentencing and the defendant appealed again after being resentenced. In such cases, this Court has held that the defendant cannot attack her convictions again in the second appeal. *State v. Fischer*, 181 Ohio App. 3d 758, 2009-Ohio-1491, at ¶8. If a "court affirms . . . convictions in the first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them become barred. Thus, in the second appeal, only arguments relating to the resentencing are proper." *Id*. (quoting *State v. Ortega*, 9th Dist. No. 08CA009316, 2008-Ohio-6053, at ¶7).

{¶7} In Ms. Stekelenburg's first appeal, this Court affirmed her convictions for deception to obtain a dangerous drug and possession of heroin. Ms. Stekelenburg could have made the arguments she has made about the judge who presided over her trial in that appeal.

Accordingly, she may not make those arguments in this appeal. *State v. Fischer*, 181 Ohio App. 3d 758, 2009-Ohio-1491, at ¶8. Her first proposed assignment of error is wholly frivolous.

JURY TRIAL WAIVER

{¶8} Ms. Stekelenburg's second proposed assignment of error is that she was denied her constitutional right to a jury trial because her purported waiver of that right was not knowing, intelligent, and voluntary. As with her first proposed assignment of error, Ms. Stekelenburg could have raised the validity of her jury trial waiver in her first appeal. She, therefore, is prohibited by the doctrine of law of the case from raising that issue in this appeal. See *State v. Fischer*, 181 Ohio App. 3d 758, 2009-Ohio-1491, at ¶8. Her second proposed assignment of error is wholly frivolous.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶9} Ms. Stekelenburg's third proposed assignment of error is that she was denied the right to effective assistance of counsel at trial and on appeal. She has argued that the lawyer who represented her at both stages failed to argue that the visiting judge's appointment did not comply with the law, did not understand the difference between a controlled and a non-controlled dangerous drug, did not assure that her jury trial waiver was informed and voluntary, did not object to her being convicted on multiple counts for a continuing course of conduct, did not argue selective prosecution, and did not argue that a state psychologist, who was not a medical doctor, was not qualified to testify about prescription drug use.

{¶10} Because Ms. Stekelenburg had the same lawyer for her first appeal that she had at trial, she could not realistically have been expected to raise a claim of ineffective assistance of trial counsel in that appeal. *State v. Hutton*, 100 Ohio St. 3d 176, 2003-Ohio-5607, at ¶39. To the extent that she believes her lawyer was ineffective in her first appeal for not raising the

lawyer's own claimed ineffectiveness at trial, she should have moved to reopen that first appeal under Rule 26(B) of the Ohio Rules of Appellate Procedure. *Morgan v. Eads*, 104 Ohio St. 3d 142, 2004-Ohio-6110, at ¶8 (explaining that Rule 26(B) "was designed to offer defendants a separate collateral opportunity to raise ineffective-appellate-counsel claims beyond the opportunities that exist through traditional motions for reconsideration and discretionary appeals to our court or the Supreme Court of the United States."); *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, at ¶47 ("claims of ineffective assistance of appellate counsel may be raised in an application for reopening under App.R. 26(B) or in a direct appeal to the supreme court."). As this Court explained in *State v. Fischer*, 181 Ohio App. 3d 758, 2009-Ohio-1491, at ¶8, Ms. Stekelenburg may only raise claims related to her resentencing in this appeal. Her third proposed assignment of error is wholly frivolous.

{¶11} This Court has fully reviewed the record and proceedings and has not identified any nonfrivolous issues for appeal. Accordingly, having independently reviewed the entire record and determined that all the proceedings were proper, this Court concludes that the trial court's judgment should be affirmed.

CONCLUSION

{¶12} Ms. Stekelenburg's lawyer's motion to withdraw as counsel is granted. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

RONALD T. GATTS, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.