

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

08-1818

Plaintiff-Appellee,

On Appeal From The Cuyahoga County
Court Of Appeals, Sixth Appellate
District

v.

MAURICE DEE MORRIS,

Court of Appeals Case No. L-06-1377

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

JAMES R. WILLIS, ESQ.

Reg. No. 0032463

343 Lakeside Avenue, Suite 430

Cleveland, Ohio 44115

(216) 523-1100

(216) 861-4161 (Fax)

Attorney for Defendant-Appellant

IAN ENGLISH, ESQ.

Lucas County Prosecutor

Lucas County Courthouse

700 Adams Street

Toledo, Ohio 43624

Attorney for Plaintiff-Appellee

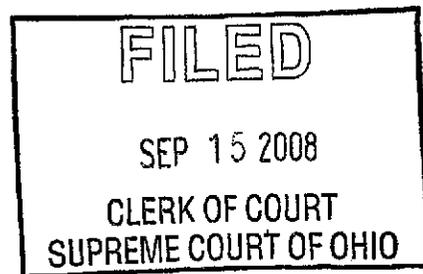


TABLE OF CONTENTS

	PAGE
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	2
<u>Proposition of Law I: Absent a Sufficient Evidentiary Showing of “Good Cause” a Trial Court Cannot Allow a Convicted Defendant’s Appellate Counsel to Withdraw as Counsel.</u>	2
CONCLUSION	4
CERTIFICATE OF SERVICE	5
APPENDIX:	

APPENDIX “A” -- Journalized 6th District Court of Appeals Opinion dated July 31, 2008

TABLE OF AUTHORITIES

PAGE

1. **Anders v. United States, 386 U.S. 738 (1967)** 1

2. **Penson v. Ohio, 488 U.S. 75 (1988)** 3

3. **McCoy v. Court of Appeals of Wisconsin, 486 U.S. 75 (1988)** 4

OTHER RELEVANT CASES, CODES, AUTHORITIES:

1. **Revised Code of Ohio, §2903.13** 1

**EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Appellant sought the to appeal using private counsel, the fact that this fact was regarded as being dispositive as to whether his counsel could summarily be removed from the case as counsel, simply because he asked, makes for a question of great public interest. This follows because if he were a free lawyer he would have be required to justify his request for leave to withdraw.

It is also a substantial constitutional question as to whether this removal can be validated in a case when the Court only had before it the naked request that he be removed.

STATEMENT OF THE CASE AND FACTS

The facts here are really beyond dispute. The Appellant was convicted of the crime of Assault (**Revised Code of Ohio, §2903.13**) and sentenced. All this occurred in the Lucas County, Ohio, Court of Common Pleas. An appeal from this conviction was lodged by retained counsel, who later sought, and was granted, leave of Court to withdraw as counsel. It is likewise clear that in seeking to withdraw as counsel, clearly did not advise the Court as to the basis for his Motion, as arguably was required. Indeed, stated another way, counsel failed to file anything with the Court that could be likened to what was to be referred to as an **Anders** Brief, a concept developed in the wake of the case of **Anders v. California, 386 U.S. 738 (1967)**. More simply put, as the Court was indeed informed in our submissions, the Court's ruling, relieving prior counsel from the appeal, included the categorical statement that showed it found "good cause [was] shown." It is this determination that Appellant seeks to have this Court review.

Indeed, in application of the facts asserted above, the Court below was explicitly reminded that there was nothing in this Record that showed, as **Anders** seems to require (in comparable

situations), that before prior counsel was dismissed the Court below had satisfied itself that prior “counsel ha[d] provided the client with a diligent and thorough search of the Record for an arguable claim that might support his client’s appeal.” (*Ibid.*) Even this is not all, given there is nothing in the Record, created for the Court of Appeals or in its written resolution of Appellant’s quest for the opportunity to appeal, which shows the Court had “correctly concluded the appeal would be frivolous.” (*Ibid.*) Significant here, the Court below went way out on a tangent when it concluded, as it did, that the fact that counsel, who was allowed to withdraw, was not appointed by the Court. This notion, is irrelevant in our judgment, and is punctuated by the further assertion that not only was it a fact that the Appellant “did not retain new counsel,” he did not “ask that counsel be appointed for him.” And, that because of these failures and his failure to file his Brief, justified the dismissal of his Appeal.

Postured by these facts, the Court of Appeals somehow has arguably convinced itself that the Appellant can be credited with knowing the onus was on him, if he lacked the funds to have an attorney, to have told the Court. And, he is being credited with being aware that the Court’s reasons for allowing his counsel to withdraw, *i.e.*, for finding “good cause” existed, therefore cannot possibly be divined from counsel’s submissions to the Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The various argument made below is submitted as being sufficient to justify this Court considering this case on its merits.

Proposition of Law No. I: Absent a Sufficient Evidentiary Showing of “Good Cause” a Trial Court Cannot Allow a Convicted Defendant’s Appellate Counsel to Withdraw as Counsel.

Of significance here, the issue as framed for the Court of Appeals showed, which contentions

are repeated here, that his prior counsel had “unbeknownst” to him had filed a Motion to Withdraw as his Appellate counsel. Indeed, there was nothing in the facts before the Court, when it rejected his application, that showed the Appellant was not confounded by the fact that the appeal was in fact dismissed. This fact is amplified, not only by the position taken in its disposition that Appellant did not have appointed counsel, as if it was by choice, the fact that there was no basis for any finding that good cause existed. The obvious point here being counsel’s desire to remove himself, hardly satisfies the requests of due process. Indeed, we repeat here what was said in the Court below, the points made in **Penson v. Ohio, 488 U.S. 75 (1988)**, really says it all. There, the Court wrote, in dealing with a flawed effort of an attorney to withdraw as counsel at the appellate level. Specifically, the Court wrote:

The Ohio Court of Appeals erred in two respects in granting counsel’s motion for leave to withdraw. First, the motion should have been denied because counsel’s “Certification of the Meritless Appeal” failed to draw attention to “anything in the record that might arguably support the appeal.” [fn3] The so-called “*Anders* brief” serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case [fn4] and that the appeal is so frivolous that it may be decided without an adversary in *Anders* itself, 386 U.S., at 745, and was again emphasized last Term. In our decision of *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988), we clearly stated that the *Anders* brief is designed both “to provide the appellate court with a basis for determining whether appointed counsel have fully performed their duty to support their clients’ appeal to the best of their ability,” and also to help the court make “the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.” *Id.*, at 439. Counsel’s failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguably error and also deprived the court of the assistance of an advocate in its review of the cold record on appeal. [fn5]

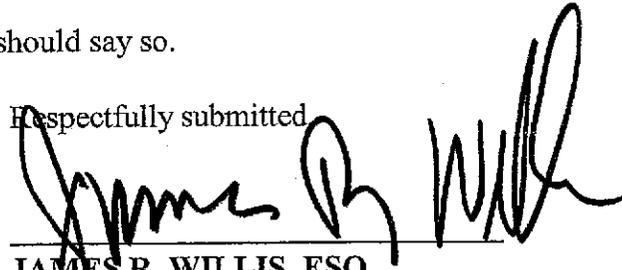
Penson v. Ohio, 488 U.S. 75, at 82-83 (1988).

Given the very narrow position taken by the Court below, surely counsel will, in his defense of that Court's position, factor into his ratiocinations, a discussion of **McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1968)**. In so doing, he can explain how the Court could reach the conclusion that "good cause" existed without the benefit of a finding, by it, that there were no non-frivolous arguments that could possibly be made. In **McCoy**, cited above, the Court endorsed the idea that counsel was required to include in his request that he be allowed to withdraw a discussion as to why the appeal lacks any merit. It is only when that is done that this Court would have a basis for concluding the Appellant's right to counsel had been satisfied. Absent this finding, how can it be said that good cause was shown? Perhaps counsel-opposite can show us where is opposite counsel really missed the point that is critical here. Any failure to do so, of course, should serve as a basis for a reversal here.

CONCLUSION

The issue here is clear cut. The State is satisfied, as is the Court of Appeals, that it makes a difference that the Appellant did not have assigned counsel. This is a distinction without a difference. If we are wrong then this Court should say so.

Respectfully submitted



JAMES R. WILLIS, ESQ.

Reg. No. 0032463

The 113 St. Clair Building

113 St. Clair Avenue, N.E., Suite 440

Cleveland, OH 44114

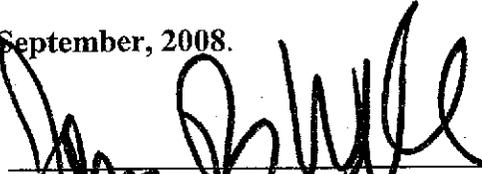
(216) 523-1100

(216) 737-7412 (Fax)

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Support of Jurisdiction*, was mailed to the office of Ian English, Lucas County Prosecutor, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43624, this 15th day of September, 2008.



JAMES R. WILLIS, ESQ.
Attorney for Defendant-Appellant

APPENDIX

FILED
COURT OF APPEALS
2008 JUL 31 A 10:16

COMMON PLEAS COURT
BERNE GUILTER
CLERK OF COURTS

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

State of Ohio

Court of Appeals No. L-06-1377

Appellee

Trial Court No. CR-2006-1681

v.

Maurice Dee Morris

DECISION AND JUDGMENT

Appellant

Decided: JUL 31 2008

* * * * *

This matter is before the court on appellant's "ALTERNATIVE MOTION TO REINSTATE APPEAL OR MOTION FOR DELAYED APPEAL." Appellee has filed a memorandum in opposition.

In support of his motion, he states that appellant's counsel withdrew without good cause, failed to file a brief, pursuant to *Anders v. California* (1967), 386 U.S. 738, which resulted in the court dismissing appellant's appeal on March 6, 2007, for failure of appellant to file a brief. Further, the court made no inquiry of appellant about whether he could afford new counsel or would require court appointed counsel. Therefore, he

E-JOURNALIZED

FAXED

1.

JUL 31 2008

argues that the appeal was improvidently dismissed, and asks that it be reinstated or that appellant be granted leave to appeal.

Upon a review of the record, the court finds that appellant's counsel, who was not appointed by the trial court or this court, was granted leave to withdraw as counsel for appellant on March 6, 2007, and appellant was granted a 30-day extension of time to retain new counsel. The court's appearance docket indicates that the decision was served on all counsel and appellant. Appellant did not retain new counsel or ask that counsel be appointed for him. On April 25, 2008, the court dismissed appellant's appeal, sua sponte, for failure to file his brief in accordance with App.R. 18(A).

Nowhere in appellant's motion does he cite to any appellate rule governing his request to have his appeal reinstated. If appellant is asking that the court reconsider its sua sponte dismissal of April 25, 2008, pursuant to App.R. 26(A), appellant's motion is late. App. 26(A) requires that a motion for reconsideration must be filed within ten days of the date of the judgment. If appellant is asking that the court reopen his appeal pursuant to App.R. 26(B), he has not complied with the requirements set forth in the rule to demonstrate ineffective assistance of appellate counsel.

Appellant, in the alternative, requests leave to file a delayed appeal. Motions for delayed appeal are governed by App.R. 5(A). However, App.R. 5(A) only applies if appellant has failed to file a timely notice of appeal. This is not the case; appellant's counsel filed a timely appeal.

FAXED

As to appellant's argument that the court had a duty to ask appellant if he was indigent, it seems clear that appellant's original counsel was retained. The court permitted appellant to obtain new counsel. If appellant could not afford counsel, it was his responsibility to file an affidavit of indigency and motion, asking the court to appoint him counsel. 6th Dist.Loc.App.R. 7(B) and 14(A).

Upon due consideration, appellant's motion is found not well-taken and denied.

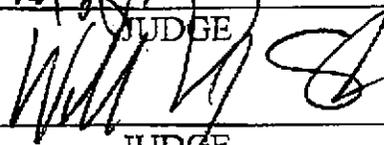
Mark L. Pietrykowski, P.J.

William J. Skow, J.

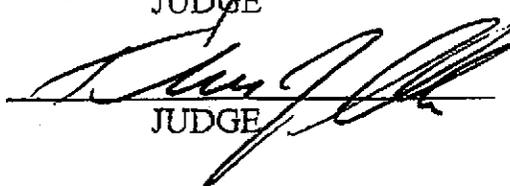
Thomas J. Osowik, J.
CONCUR.



JUDGE



JUDGE



JUDGE

FAXED