

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 14-1255
	:	
Plaintiff-Appellee,	:	On Appeal from the Medina
	:	County Court of Appeals
vs.	:	Ninth Appellate District
	:	
PENNY SHAFFER,	:	C.A. Case Nos. 12CA71-M
	:	12CA77-M
Defendant-Appellant.	:	

ENTRY IN LIEU OF AFFIDAVIT OF INDIGENCY

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FILED
JUL 23 2014
CLERK OF COURT
SUPREME COURT OF OHIO

STATE OF OHIO) COURT OF APPEALS
COUNTY OF MEDINA) ss: 13 AUG -7 AM 11: 24

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

STATE OF OHIO

C.A. Nos. 12CA0071-M
12CA0077-M

Appellee

v.

PENNY SHAFFER

Appellant

JOURNAL ENTRY

This matter is before the Court on an appeal from the Summit County Court of Common Pleas. Appellant’s counsel has filed an *Anders* Brief and a motion to withdraw as Appellant’s attorney.

Appellant’s counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), asserting that, after a review of the record, he was unable to find any issues that might support an appeal. *See Anders*, 386 U.S. at 744. Upon the filing of an *Anders* brief, this Court conducts a full examination of the proceedings to decide whether the case is wholly frivolous. *Id.* If our independent review reveals that any issue presented is not wholly frivolous or that there are other arguable issues, we must appoint different appellate counsel to represent the appellant. *State v. Pullen*, 2d Dist. No. 19232, 2002-Ohio-6788, ¶ 2. “*Anders* equates a frivolous appeal with one that presents issues lacking in arguable merit. An issue does not lack arguable merit merely because the prosecution can be expected to present a strong argument in reply or because it is uncertain whether an

appellant will ultimately prevail on that issue on appeal. An issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal.” (Internal quotations and citations omitted.) *State v. Moore*, 2d Dist. Greene No. 07-CA-97, 2009-Ohio-1416, ¶ 4.

Based upon our review of the record and the applicable law, we have determined there is at least one issue that may be raised on appeal. It appears the trial court’s sentence may be contrary to law in sentencing Appellant to five years in prison for a third-degree felony violation of R.C. 2925.041. R.C. 2925.041(C)(1) does provide in part that

[i]f the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense and if at least one of those previous convictions or guilty pleas was to * * * a violation of division (A) of section 2925.04 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

However, R.C. 2929.14(A)(3) only authorizes a five year sentence for certain specific third-degree felonies, and violations of R.C. 2925.041 are not included in that list. Accordingly, there appears to be a conflict in the sentencing laws. *See State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶ 17-35. The foregoing issue is not wholly frivolous, and, therefore, a merit brief is appropriate in this case.

Because our own review of the record reveals an arguable issue for appeal, this Court grants the request of Appellant’s counsel to withdraw and appoints new counsel to brief the identified issue along with any other issues he or she may discern. *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 439, 444 (1988); *see Penson v. Ohio*, 488 U.S. 75, 85 (1988). The assignment of this matter to the panel of judges is terminated. Joseph Salzgeber is hereby appointed to prepare an appellate brief in this case

and to consider the arguable issue identified by this Court and any other issues he believes may have merit. Joseph Salzgeber will have 45 days from the journalization of this entry in which to file an appellate brief. In the event that he concludes that documents are missing from the appellate record, he should file a motion to supplement the record and, if necessary, a motion to enlarge the time within which to file Appellant's brief. Briefing will proceed according to the Ohio Rules of Appellate Procedure after the filing of Appellant's merit brief.

The clerk of courts is directed to note Joseph Salzgeber's appearance on the docket as counsel of record and to serve a copy of this order on Joseph Salzgeber. The clerk of courts is also directed to serve this order upon Appellant.



Judge

Concur:

Moore, P.J.

Whitmore, J.