

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANTHONY ANDREWS

Defendant-Appellant

: JUDGES:

:
: Hon. Patricia A. Delaney, P.J.
: Hon. W. Scott Gwin, J.
: Hon. William B. Hoffman, J.

: Case No. 23 CA 0079

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas General Division

JUDGMENT:

Affirmed
Motion to Withdraw Granted

DATE OF JUDGMENT ENTRY:

September 30, 2024

APPEARANCES:

For Plaintiff-Appellee:

Kenneth W. Oswalt
Licking County Prosecutor's Office
20 South Second Street
Newark, Ohio 43055

For Defendant-Appellant:

Brian A. Smith
123 South Miller Road, Suite 250
Fairlawn, Ohio 44333

Delaney, P.J.

{¶1} Defendant-Appellant Anthony M. Andrews has appealed from the October 11, 2023, Judgment Entry of the Licking County Court of Common Pleas in which he was convicted of one count of aggravated trafficking in methamphetamine after he pleaded guilty. His sentence included forfeiture of a vehicle and a cell phone. Plaintiff-Appellee State of Ohio did not appear in this appeal.

{¶2} The lawyer who was appointed to represent Andrews on appeal has submitted a brief as provided by the United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967), asserting he found no issues of arguable merit for appeal. He has moved to withdraw as counsel. In his brief, counsel stated that a copy of the *Anders* brief was sent to Andrews with instructions on filing a *pro se* brief on the merits. Andrews has not filed a brief.

{¶3} We have independently reviewed the record and have concluded that there are no issues of arguable merit. Accordingly, we grant the motion to withdraw and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

{¶4} On March 11, 2023, the Central Ohio Drug Enforcement Task Force planned and carried out a controlled drug purchase in Licking County, Ohio, between a confidential informant and Andrews. The informant told members of the Task Force that he knew Andrews and could purchase drugs from him. He subsequently called Andrews' cell phone and the two arranged to meet in the parking lot of a truck stop.

{¶5} Prior to the scheduled meeting time, officers arrived at the truck stop and began to monitor the situation. To facilitate the sale, the Task Force provided the informant with a specific amount of “buy money,” which had been previously photographed to record the serial numbers on the individual bills. The informant was also furnished with a device to record their conversations. The informant waited at the truck stop for Andrews to arrive. Andrews called from his cell phone to provide the informant with updates of where he was and when he expected to arrive.

{¶6} A detective with the Task Force was parked approximately 50 feet from the informant’s vehicle. He watched Andrews pull into the parking lot and park his maroon Chevy Silverado truck next to the informant. There were two passengers inside. Andrews exited the driver’s side door and got into the passenger side of the informant’s vehicle. They could be heard on tape using language indicative of negotiating a price. Andrews returned to his truck to speak with one of the passengers and to hand him money.

{¶7} Andrews then returned to the informant’s vehicle. Around this time, the detective drove closer to the truck to record the license plate number. He noted what Andrews was wearing and alerted other officers with a description so that Andrews could be later identified. Andrews returned to his truck and drove away from the truck stop. He was stopped by officers from the Licking County Sheriff’s Office and arrested. After searching the occupants of the truck, they found the recorded buy money in the pocket of the passenger who had received it from Andrews. When the confidential informant was searched, he had a bag containing methamphetamine. He also had less recorded buy money than he had prior to the transaction.

{¶8} Andrews was indicted on one count of violating R.C. 2925.03(A)(1)(C)(1)(f), Aggravated Trafficking in Drugs (Methamphetamine), a first degree felony. The weight of the methamphetamine was over 100 times bulk amount. In addition, there were forfeiture specifications for Andrews' truck and cell phone pursuant to R.C. 2981.02(A)(1)(A) and R.C. 2941.1417(A). He was arraigned and entered a plea of not guilty.

{¶9} Andrews filed a motion to suppress any evidence or statements recovered as a result of the arrest and subsequent searches. Specifically, he objected to the recorded buy money being used as evidence. The trial court held a hearing on the motion. Two detectives from the Task Force testified. Both had been part of planning the controlled purchase and were present at the truck stop. The trial court subsequently denied the motion.

{¶10} Andrews pleaded guilty to an amended charge of R.C. 2925.03(A)(1)(C)(1)(e), with Forfeiture Specifications. During the plea colloquy, the trial court reviewed the nature of the charges and the penalties, including the forfeiture specifications. When the trial court asked if he had any questions, Appellant answered that he did not, and responded he wanted to voluntarily enter a plea of guilty to the charges. The trial court sentenced him to prison for 9 to 13 1/2 years, with credit for time served. The court found him indigent and did not impose the mandatory fine. In addition, the trial court ordered that the truck and cell phone were forfeited to the Central Ohio Drug Enforcement Task Force.

{¶11} The court appointed counsel on his behalf for an appeal. His appellate counsel has reviewed the record and has asked this Court to determine if any issues of arguable merit exist to pursue on an appeal.

ASSIGNMENTS OF ERROR

{¶12} In keeping with an *Anders* brief, Andrews' counsel has not raised specific assignments of error, but rather has pointed to two potential assignments of error for this Court to review:

{¶13} Whether the trial court erred in denying Appellant's Motion to Suppress

{¶14} Whether the trial court's sentence was contrary to law for ordering the forfeiture of the Silverado and cell phone, where the State failed to prove, by a preponderance of the evidence, that the vehicle or cell phone was subject to forfeiture pursuant to R.C. 2981.02

ANALYSIS

Anders Brief

{¶15} In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court weighed an indigent defendant's right to counsel against counsel's duty to refrain from filing frivolous pleadings. It concluded that if a court appointed appellate lawyer performed a conscientious examination of the record and concluded that the appeal was "wholly frivolous," then he should advise the court and request permission to withdraw. *Id.* at 744. The request to withdraw must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw and (2) allow his client sufficient time to raise any matters that the client chooses. *Id.*

{¶16} Once counsel satisfies these requirements, the appellate court must fully examine the proceedings to determine if any arguably meritorious issue exists. *Id.* An

appeal is wholly frivolous if the record is devoid of any legal points arguable on the merits. *State v. Middaugh*, 2003-Ohio-91, ¶ 13 (5th Dist.). If the court determines that the appeal is wholly 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.* If the court "concludes that there are nonfrivolous issues for appeal, 'it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.'" *Penson v. Ohio*, 488 U.S. 75, 80 (1988), quoting *Anders*, 386 U.S. at 744.

{¶17} When determining if an issue is frivolous and lacks arguable merit, it is not enough to expect that the prosecution will present a strong argument in reply or to conclude that it is uncertain whether a defendant will prevail on the issue on appeal. *State v. Sanders*, 2024-Ohio-2235, ¶ 12 (5th Dist.). Rather, an issue lacks arguable merit if pursuant to the facts and law "no responsible contention can be made that it offers a basis for reversal." *Id.*, citing *State v. Pullen*, 2002-Ohio-6788 (2d Dist.), ¶ 4.

{¶18} In this case, defendant's counsel has concluded that there are no arguably meritorious claims to raise on appeal. Pursuant to the directive in *Anders*, he has provided potential challenges to the trial court's rulings. The first is the trial court's denial of defendant's Motion to Suppress and the second is the forfeiture of the truck and the cell phone. We have reviewed the record and agree with counsel's conclusion.

I.

Motion to Suppress

{¶19} In appellate counsel's first potential assignment of error, he asks this Court to determine if there is arguable merit in the proposition that the trial court erred in denying the motion to suppress. In his motion to the trial court, Andrews argued that the officers

did not have any reasonable or articulable suspicion to conduct the traffic stop and to search the people in the truck. At the motion hearing, trial counsel clarified that the specific evidence he sought to suppress was the recorded buy money found in the passenger's pocket.

{¶20} An appellate review of a trial court's decision to deny a motion to suppress may involve both questions of law and fact, depending on the arguments set forth by the party seeking to suppress. *State v. Macklin*, 218-Ohio-2975 (5th Dist.). There are three types of arguments a criminal defendant can make to challenge a trial court's ruling. *Id.*, citations omitted. A defendant may challenge the trial court's finding of fact, he may challenge the law applied, or he may challenge whether the trial court correctly decided the issues raised in the motion. *Id.*

{¶21} The standard of review depends on which challenge the defendant raises on appeal. An appellate court must give deference to the trial court's findings of fact. *State v. Myer*, 2017-Ohio-1046, ¶ 15, (5th Dist.) citing *State v. Mills*, 62 Ohio St.3d 357 (1992). The evaluation of evidence and the credibility of the witnesses are issues for the trier of fact on a motion to suppress. *Id.* The appellate court is bound to accept factual determinations of the trial court that are supported by competent and credible evidence. *Id.*

{¶22} The role in reviewing a trial court's ruling is not to reevaluate the evidence or the credibility of the witnesses, but to determine whether the trial court's application of the law to the facts, as the trial court found them to be, is appropriate. *Myer* at ¶ 16, citing *Mills*, 62 Ohio St.3d at 366. Accordingly, once the appellate court has accepted the facts as true, it must independently determine as a matter of law whether the trial court met the

applicable legal standard by reviewing the law and its application. This is subject to a *de novo* standard of review. *State v. Hill*, 2024-Ohio-522 (5th Dist.). In this case, we have reviewed the motion to suppress and the record to determine if there are issues of arguable merit surrounding the arrest and the resulting recovery of the recorded buy money.

{¶23} The Fourth and Fourteenth Amendments to the United States Constitution, and Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979); *State v. Gullett*, 78 Ohio App.3d 138 (4th Dist. 1992). Searches and seizures conducted outside the judicial process, without prior approval by either a judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Sneed*, 63 Ohio St.3d 3, 6–7 (1992); Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. See *Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999); *Xenia v. Wallace*, 37 Ohio St.3d 216, paragraph two of the syllabus (1988).

{¶24} An exception to the warrant rule is a search and seizure founded upon probable cause of criminal activity. See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968). To perform a seizure that is the functional equivalent of an arrest, the police officer must have probable cause. *State v. Barker*, 53 Ohio St.2d 135 (1978). A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or

constructive seizure or detention; and (4) it is so understood by the person arrested. *Id.* at syllabus.

{¶25} In this case, the trial court made findings concerning the stop based on testimony, video from a body camera, and the audio tape of the transaction. In denying the motion, the trial court outlined the experience of the officers who testified, their familiarity with using confidential informants, the circumstances surrounding the meeting at the truck stop, their detailed observations of the interactions between the informant and Andrews, and their immediate follow-up with the informant. Andrews was identified by both the truck and the clothing he was wearing. The trial court determined that there was probable cause to believe that a felony had been committed as they observed a deal that they had prearranged by phone call to Andrews.

{¶26} This Court has reviewed the record and determined that the trial court's application of the law to the facts was appropriate and does not give rise to an issue of arguable merit. We accept the facts that the trial court set forth. We cannot say that the trial court applied incorrect law or failed to correctly determine the ultimate issue. Accordingly, we find no issue of arguable merit on the issue of the motion to suppress.

II.

Sentence

{¶27} In appellate counsel's second potential assignment of error, he asked this Court to determine if there is arguable merit in the proposition that the sentence was contrary to law because the State failed to prove by a preponderance of the evidence that

the vehicle or cell phone was subject to forfeiture pursuant to R.C. 2981.02. After reviewing the record, we agree that there is no issue of arguable merit.

{¶28} R.C. Chapter 2981 governs forfeiture of property. R.C. 2981.02 defines what property is subject to forfeiture under the criminal process. It includes contraband, proceeds, or an instrumentality that is used in commission of a felony. R.C. 2981.02(A)(1)(a)-(c)(i).

{¶29} Criminal forfeiture is initiated by including a specification in the indictment. R.C.2941.1417; *State v. Recinos*, 2014–Ohio–3021 (5th Dist.). In this case, the indictment stated that the truck and the phone were subject to forfeiture because they were each an “instrumentality involved in the commission of” the sale.¹

{¶30} Counsel asks this Court to determine if there is an issue whether the State met its burden to prove that the vehicle and cell phone were subject to forfeiture. When determining if the instrumentality was used to commit the felony, the trier of fact must consider the following factors that it deems relevant:

- (a) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;
- (b) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;
- (c) The extent to which the instrumentality furthered the commission of, or attempt to commit the offense.

R.C.2981.02(A)(2). The state has the burden of proving by clear and convincing evidence that the property is subject to forfeiture as an instrumentality. R.C.2981.04.

¹ The indictment used the word “instrumentality,” but it cited R.C. 2981.02(A)(1)(A). An instrumentality used in commission of a felony is 2981.02(A)(1)(c)(i). This was not raised at the trial court, and it does not create an issue of arguable merit in this case.

{¶31} On appeal of the sentence, the court is required by R.C. 2953.08(F) to review the record, including any oral or written statements and presentence investigation reports. R.C. 2953.08(F)(1)-(4). After reviewing the record, the court does not weigh the evidence or judge the credibility of the witnesses. *In re Hill*, 2009–Ohio–174, ¶ 40 (5th Dist.). Rather, it focuses on determining “whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment.” *Id.*

{¶32} The transcripts from the Motion to Suppress and the Entry of Guilty Plea reveal that, except for the final cost of the methamphetamine, Andrews agreed with the State’s recitation of facts. Those facts are he drove the maroon Chevy Silverado, VIN number 1GCEK19T1XE248662, to the truck stop and used it to transport a large amount of methamphetamine. He took the recorded buy money from the informant and gave it to a passenger in the truck to count. The money was later found in the passenger’s pocket during the traffic stop. An officer who was present in the parking lot drove behind the truck to observe the license plate number. A description of the truck and the license plate number were given to others, including the arresting officers. The truck was clearly visible in the video of the arrest.

{¶33} Andrews would not have been able to travel the distance to the truck stop without the truck. It enabled him to bring a passenger who helped count the money. It also enabled him to transport the methamphetamine.

{¶34} Similarly, there is strong connection to the use of the phone in commission of the felony. The transaction was initiated using Andrews’ cell phone. As he drove to the truck stop, Andrews used his phone to call the confidential informant to tell him about his progress. In the body camera video, Andrews was shown asking for his phone. Based on the evidence, there was competent, credible evidence for the trial court to conclude that the stated items were subject to forfeiture as instrumentalities.

{¶35} Once the trier of fact determines that the instrumentality was used in committing a felony, it then determines whether the property shall be forfeited. R.C.2981.04. The process to effectuate forfeiture of seized property, including instrumentalities used in criminal activity is set forth in R.C.2981, *et seq.* Although a forfeiture action is instituted as a criminal penalty, it is a civil proceeding. *State v. Clark*, 2007–Ohio–6235, ¶ 8 (3d Dist.).

{¶36} Considering that this is an *Anders* appeal, this Court will also address whether there is any arguable merit to the proposition that the trial court failed to follow the statutory provisions governing criminal forfeiture by not conducting a valuation of the property and a proportionality review. R.C. 2981.04 provides that if the state proves by clear and convincing evidence that the property is subject to forfeiture, the trier of fact will conduct a proportionality review when relevant. The proportionality review is required to determine if the value of the instrumentality is disproportionate to the severity of the offense. R.C.2981.09.

{¶37} A defendant may plead guilty to an offense while contesting a forfeiture specification. *McCall*, citing *State v. Compton*, 8th Dist. Cuyahoga No. 109427, 2021-Ohio-3106, ¶ 18 further citations omitted. The guilty plea does not affect the procedures that must be followed to forfeit the property. In this case, however, Andrews not only pled guilty, but he did so based on a plea agreement with the Appellee.

{¶38} This Court has recognized that “when [a] defendant enters a plea agreement calling for the forfeiture of seized property, adherence to the statutory procedures [is] unnecessary.” *State v. McCall*, 2022-Ohio-843, ¶ 35 (5th Dist.) quoting *State v. Compton* 2021-Ohio- 3106, ¶ 19 (8th Dist.), further citations omitted. This is because the forfeiture is “not effectuated by operation of the statutory provisions governing forfeiture of contraband, but rather by the parties’ agreement.” *Id.*, citations omitted. By entering a plea agreement calling for the forfeiture of property, a defendant waives application of the

statutory provisions governing forfeiture procedure and his due process rights are not violated. *Compton*, ¶ 19.

{¶39} In this case, Andrews did not contest the forfeiture of either the truck or the phone. He changed his plea of not guilty to the underlying offense, including the forfeiture specifications, based on a plea agreement. In exchange for his plea of guilty, the charge against him was amended to reduce its severity by lessening the amount of methamphetamine, the major drug offender codification was dismissed, and the parties agreed to a joint recommendation of a 9-year aggregate sentence. The plea changes the nature of the forfeiture proceedings from statutory to contractual.

{¶40} By his plea, Andrews admitted to the truth of the facts stated in the indictment. There is no indication in the plea agreement or at the plea hearing that Andrews objected to the proceedings or contested the value or property listed in the forfeiture specifications. The sole factual concern he had was about the drug sale itself, specifically the amount of the negotiated purchase price. At the plea hearing, he stated that he understood his obligations under the plea agreement, and that his plea was not unknowingly, unintelligently, or involuntarily made. Under these circumstances, we find that Appellant's agreement to forfeit the truck and phone were contractual in nature.

{¶41} Because the forfeiture of the truck and the phone were effectuated by Appellant's negotiated plea agreement with Appellee and not R.C. Chapter 2981, the trial court was not required to follow the statutory forfeiture proceedings at the time of sentencing. After an independent review of the record, we find that Appellant's due process protections were not violated and that there are no issues of arguable merit regarding the sentencing.

{¶42} Appellate counsel has followed the *Anders* procedures. This Court has reviewed the record and the merits of the potential assignments of error and has not identified

any that have arguable merit. We therefore concur with appellate counsel that Andrews' appeal is without merit and wholly frivolous as set forth in *Anders*. Having independently reviewed the record and determined that the proceedings were proper, this Court concludes that the counsel's motion to withdraw should be granted and the trial court's judgment should be affirmed.

CONCLUSION

{¶43} Counsel's Motion to Withdraw as counsel is granted. The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.