

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

People v. Areizaga

2021 NY Slip Op 05864 (App. Div. 2021) · No. 2019-10279 · Decided October 27, 2021

SUMMARY

The Appellate Division, Second Department, granted assigned appellate counsel's motion to withdraw under *Anders v. California* after finding the submitted brief deficient. The court assigned new counsel, directed the transfer of case papers and certified transcript, and established deadlines for filing appellate briefs.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Robert J. Miller, J.; Francesca E. Connolly, J.; Angela G. Iannacci, J.; Deborah A. Dowling, J.
JURISDICTION	New York
DECIDED	October 27, 2021
DOCKET	2019-10279
DISPOSITION	other
PROCEDURAL POSTURE	Defendant appealed from a judgment convicting him, upon his guilty plea, of burglary in the third degree and imposing sentence. Appointed appellate counsel filed an <i>Anders</i> brief and moved to withdraw.
STANDARD OF REVIEW	The court reviewed whether appointed counsel had complied with the obligations governing an <i>Anders</i> motion to withdraw by conducting a diligent and thorough examination of the record and identifying potentially arguable appellate issues.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Samuel Areizaga v. The People of the State of New York

TOPICS

- appellate procedure
- criminal procedure
- right to counsel

PRACTICE AREAS

criminal appellate practice

indigent appellate representation

Anders motions

QUESTIONS PRESENTED

1. Whether appointed appellate counsel's Anders brief demonstrated a diligent and thorough search of the record for any nonfrivolous issue that might support the appeal.
2. Whether counsel's failure to provide an adequate factual statement and to analyze potential appellate issues required appointment of new counsel.

HOLDINGS

1. An Anders brief is deficient when it fails to provide an adequate statement of facts, fails to analyze potential appellate issues or identify supporting facts and law, and does not demonstrate review of significant portions of the record relevant to the appeal.
2. When an Anders brief fails to demonstrate that assigned counsel fulfilled the required obligations, the appellate court must appoint new counsel rather than permit counsel to withdraw without substitution.

KEY QUOTATIONS

*"In reviewing an attorney's motion to be relieved pursuant to Anders v California (386 US 738), this Court must first "satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal"" ([*1])*

*"counsel must, at a minimum, draw the Court's attention to the relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority" ([*1]-[*2])*

FACTUAL BACKGROUND

Areizaga pleaded guilty to burglary in the third degree and was sentenced by the Westchester County Court. The plea and sentence proceedings included an alleged admission that he violated the conditions of the plea agreement. His appointed appellate counsel submitted an Anders brief that discussed the plea and sentence but did not demonstrate review of the presentence report or the transcript of the proceeding concerning the alleged violation.

PROCEDURAL HISTORY

The Westchester County Court rendered judgment on June 26, 2019. On appeal, appointed counsel submitted an Anders brief and sought leave to withdraw. The Appellate Division found the brief deficient, granted counsel's motion to withdraw, assigned new counsel, and directed the parties to provide the necessary transcript and appellate briefs.

DISPOSITION

other

REMAND INSTRUCTIONS

The withdrawing attorney was directed to turn over all papers to new counsel. Thomas R. Villecco was assigned to perfect the appeal; the respondent was directed to furnish the certified transcript; and new counsel was directed to serve and file an appellant's brief within 90 days, followed by the respondent's brief within 30 days.

CASES CITED

- Anders v California, 386 US 738
- Matter of Giovanni S. [Jasmin A.], 89 AD3d 252, 255, 256, 258
- Penson v Ohio, 488 US 75, 83
- People v Murray, 169 AD3d 227, 231-232
- People v Sanders, 91 AD3d 798, 799
- People v Ferretti, 148 AD3d 720, 720-721
- People v McNair, 110 AD3d 742, 743
- People v Singleton, 101 AD3d 909, 910
- People v Hill, 155 AD3d 891, 892
- People v Rojas, 188 AD3d 726, 727
- People v Todarello, 185 AD3d 970, 970

OPINION

PER CURIAM.

People v Areizaga (2021 NY Slip Op 05864) People v Areizaga 2021 NY Slip Op 05864 Decided on October 27, 2021 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on October 27, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

ROBERT J. MILLER FRANCESCA E. CONNOLLY ANGELA G. IANNACCI DEBORAH A. DOWLING, JJ. 2019-10279 ON MOTION (Ind. No. 18-00858) [*1]The People of the State of New York, respondent, vSamuel Areizaga, appellant. Jason M. Bernheimer, Valhalla, NY, for appellant. Miriam E. Rocah, District Attorney, White Plains, NY (Raffaelina Gianfrancesco of counsel), for respondent (no brief filed).

DECISION & ORDER Appeal by the defendant from a judgment of the County Court, Westchester County (Susan M. Capeci, J.), rendered June 26, 2019, convicting him of burglary in the third degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with Anders v California (386 US 738), in which he moves for leave to withdraw as counsel for the appellant.

ORDERED that the motion of Jason M. Bernheimer for leave to withdraw as counsel for the appellant is granted, and he is directed to turn over all papers in his possession to new counsel assigned herein; and it is further, ORDERED that Thomas R. Villecco, 366 No. Broadway, Suite 410, Jericho, NY 11753, is assigned as counsel to perfect the appeal; and it is further, ORDERED that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the new assigned counsel; and it is further, ORDERED that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order on motion, and the respondent shall serve and file its brief within 30 days after the brief on behalf of the appellant is served and filed.

By prior decision and order on motion of this Court dated March 13, 2020, the appellant was granted leave to prosecute the appeal as a poor person, with the appeal to be heard on the original papers (including a certified transcript of the proceedings) and on the briefs of the parties.

The parties are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service of one hard copy on each other (see 22 NYCRR 670.9[a]). In reviewing an attorney's motion to be relieved pursuant to *Anders v California* (386 US 738), this Court must first "satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal" (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252, 255, quoting *Penson v Ohio*, 488 US 75, 83).

As this Court has explained, "counsel must, at a minimum, draw the Court's attention to the relevant [*2]evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority" (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258; see *People v Murray*, 169 AD3d 227, 231-232; *People v Sanders*, 91 AD3d 798, 799).

Here, the brief submitted by the appellant's counsel pursuant to *Anders v California* (386 US 738) is deficient because it failed to contain an adequate statement of facts and failed to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal (see *People v Ferretti*, 148 AD3d 720, 720-721; *People v McNair*, 110 AD3d 742, 743; *People v Singleton*, 101 AD3d 909, 910; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 256).

Although it recites the facts related to the defendant's plea and sentence, the brief does not demonstrate that appellant's counsel reviewed the defendant's presentence report (see CPL 390.20[1]), or the transcript of the January 23, 2019 proceeding where the defendant purportedly admitted violating the conditions of the plea agreement (see *People v Hill*, 155 AD3d 891, 892).

The brief improperly relies upon "a conclusory statement that the defendant's waiver of his right to appeal was valid" (*People v Rojas*, 188 AD3d 726, 727), and it does not adequately analyze

potential issues that would survive even a valid waiver of the right to appeal (see e.g. *People v Todarello*, 185 AD3d 970, 970). Since the brief does not demonstrate that assigned counsel fulfilled his obligations under *Anders v California*, we must assign new counsel to represent the appellant (see *People v McNair*, 110 AD3d at 743; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258).

DILLON, J.P., MILLER, CONNOLLY, IANNACCI and DOWLING, JJ., concur. ENTER: Maria T. Fasulo Acting Clerk of the Court