

COURT OF APPEALS OF THE STATE OF NEW YORK

People v. Stokes

95 N.Y.2d 633, 744 N.E.2d 1153, 722 N.Y.S.2d 217 (2001) · Decided February 8, 2001

SUMMARY

The New York Court of Appeals held that appointed appellate counsel’s no-merit brief failed to safeguard the defendant’s constitutional right to appellate counsel. The brief omitted several potentially nonfrivolous issues, including trial shackling, refusal to give a circumstantial-evidence charge, and the possible excessiveness of the sentence, and contained factual and legal errors. The court reversed the Appellate Division’s order and remitted the case for a de novo appeal with new assigned counsel.

CASE DETAILS

COURT	Court of Appeals of the State of New York
WRITING FOR THE COURT	Levine, J.; Chief Judge Kaye; Judge Smith; Judge Ciparick; Judge Wesley; Judge Rosenblatt; Judge Graffeo
JURISDICTION	New York
DECIDED	February 8, 2001
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Criminal defendant appealed from an Appellate Division order affirming his conviction after the Appellate Division granted assigned appellate counsel's request to withdraw based on counsel's no-merit brief. The Court of Appeals granted leave to appeal.
STANDARD OF REVIEW	The Court of Appeals reviewed whether assigned appellate counsel's no-merit submission adequately protected the defendant's constitutional right to appellate counsel under the Anders procedure.
PRECEDENTIAL VALUE	Published precedential opinion of the New York Court of Appeals
PARTIES	Roger Stokes v. The People of the State of New York

TOPICS

- appellate procedure
- right to counsel
- fourteenth amendment
- criminal procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether assigned appellate counsel's no-merit brief adequately safeguarded an indigent defendant's constitutional right to appellate counsel.
2. Whether counsel seeking to withdraw under New York's Anders procedure must identify and advocate all nonfrivolous or arguably supportable appellate issues rather than merely advise the court that the appeal lacks merit.
3. Whether the failure to address arguable issues concerning shackling, the circumstantial-evidence charge, and the excessiveness of the sentence required reversal and a de novo appeal with new counsel.

HOLDINGS

1. Assigned appellate counsel did not adequately safeguard Stokes's constitutional right to appellate counsel because the brief failed to identify and advocate several clearly arguable issues, contained material factual errors, and functioned as advice to the court rather than advocacy for the defendant.
2. A no-merit brief seeking withdrawal must recite the underlying facts, raise all points that may arguably support an appeal with record references and applicable authorities, and present the defendant's contentions as an advocate; a conclusory or materially inaccurate brief is insufficient.

KEY QUOTATIONS

"The Anders Court noted that assigned appellate counsel was constitutionally required to act as an "active advocate" on behalf of his or her client, not merely an adviser to the court on the merits of the appeal" (636)

"That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." (636-637)

"assistance given must be that of an advocate rather than amicus curiae" (637)

FACTUAL BACKGROUND

While incarcerated at Southport Correctional Facility, Stokes was convicted of spraying a mixture of excrement and urine on a correction counselor, in violation of Penal Law § 240.32. The victim did not see the perpetrator, a search of Stokes's cell found no spraying container, and another inmate testified that the occupant of a different cell committed the offense. During trial, defense counsel objected to Stokes's shackling and requested a circumstantial-evidence jury instruction, but assigned appellate counsel failed to raise those issues in the no-merit brief and misstated material facts concerning the conviction and sentence.

PROCEDURAL HISTORY

Stokes was convicted after trial of aggravated harassment of an employee by an inmate and was sentenced as a persistent felony offender to 15 years to life. Assigned appellate counsel filed a six-page no-merit brief seeking

to be relieved, and the Appellate Division granted the request and unanimously affirmed. The Court of Appeals reversed and remitted for a de novo appeal with new assigned counsel.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remanded to the Appellate Division for further proceedings, including a de novo appeal with new assigned counsel.

CASES CITED

- Evitts v. Lucey, 469 U.S. 387 (1985)
- Douglas v. California, 372 U.S. 353 (1963)
- People v. Hughes, 15 N.Y.2d 172 (1965)
- Smith v. Robbins, 528 U.S. 259, 278 (2000)
- Anders v. California, 386 U.S. 738, 741-742, 744 (1967)
- Ellis v. United States, 356 U.S. 674, 675 (1958)
- People v. Gonzalez, 47 N.Y.2d 606, 610, 612 n.3 (1979)
- People v. Emmett, 25 N.Y.2d 354, 356 (1969)
- People v. Saunders, 52 A.D.2d 833 (1st Dep't 1976)
- People v. Cruwys, 113 A.D.2d 979, 980 (3d Dep't 1985)
- People v. Crawford, 71 A.D.2d 38, 39 (4th Dep't 1979)
- People v. Brown, 140 A.D.2d 363 (2d Dep't 1988)

OPINION

People v. Stokes 744 N.E.2d 1153

LEVINE, J.

95 N.Y.2d 633 (2001) 744 N.E.2d 1153 722 N.Y.S.2d 217 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROGER STOKES, Appellant. Court of Appeals of the State of New York. Argued January 3, 2001. Decided February 8, 2001.

*634 New York State Defenders Association, Albany (Alfred O'Connor of counsel), for appellant. John R. Trice, District Attorney of Chemung County, Elmira (Charles Metcalf and Adam M. Gee of counsel), for respondent. Chief Judge KAYE and Judges SMITH, CIPARICK, WESLEY, ROSENBLATT and GRAFFEO concur.

*635 OPINION OF THE COURT

LEVINE, J. While an inmate at the Southport Correctional Facility, defendant was accused and convicted after trial of aggravated harassment of an employee by an inmate in violation of Penal Law § 240.32, a class E felony, for allegedly spraying a mixture of excrement and urine on a

correction counselor. The court sentenced defendant to 15 years to life as a persistent felony offender pursuant to Penal Law § 70.10. Defendant thereafter filed a notice of appeal and, as an indigent, requested assignment of appellate counsel. The attorney assigned by the Appellate Division filed a six-page, double spaced no-merit brief, requesting that she be relieved of the assignment because, in her estimation, there were no non-frivolous issues upon which to base defendant's appeal. Upon receiving a copy of that brief, defendant submitted two handwritten pro se supplemental briefs in which he argued, among other things, that he should not have been shackled during the course of the trial and that his sentence of 15 years to life for this class E felony was unduly harsh and excessive. In addition, defendant highlighted numerous defects and factual errors within the brief submitted by his assigned appellate counsel. Based upon counsel's representation that there were no non-frivolous issues, the People opted not to submit a responding brief. The Appellate Division, concluding that there were no non-frivolous issues to be addressed on appeal, granted appellate counsel's request to be relieved of the assignment and unanimously affirmed the judgment of conviction (267 AD2d 718). A Judge of this Court granted leave to appeal. Because the papers submitted by assigned counsel on appeal to the Appellate Division did not adequately safeguard defendant's right to appellate counsel, we now reverse and remit to the Appellate Division for a de novo appeal with new assigned counsel. Where a State creates an appellate procedure in criminal matters, the Fourteenth Amendment mandates that an indigent criminal defendant be afforded equal rights to appeal *636 through the representation and advocacy of assigned counsel (see, *Evitts v Lucey*, 469 US 387; *Douglas v California*, 372 US 353; *People v Hughes*, 15 NY2d 172). The one limitation on this constitutional right is that it "does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal" (*Smith v Robbins*, 528 US 259, 278; see, *Anders v California*, 386 US 738, 741-742). In the event that assigned counsel determines, after a conscientious review of the record and the applicable law, that an appeal is wholly frivolous, counsel may request permission to be relieved of the assignment (see, *Anders*, supra, at 741-742, citing *Ellis v United States*, 356 US 674, 675). In *Anders*, the Supreme Court described a procedure by which courts could ensure protection of indigent defendants' constitutional rights in the context of purportedly frivolous appeals (see, *Anders v California*, supra, at 744; *Smith v Robbins*, supra, 528 US, at 278 [explaining that the "goal of *Anders* was to prevent this limitation on the right to appellate counsel from swallowing the right itself"]). The *Anders* Court noted that assigned appellate counsel was constitutionally required to act as an "active advocate" on behalf of his or her client, not merely an adviser to the court on the merits of the appeal (*id.*, at 744). Recognizing the propriety of requesting permission to withdraw from representation in the event that counsel considered an appeal to be wholly frivolous, the Court stated: "[t]hat request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court not counsel then proceeds, after a full examination of all

the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal * * * [o]n the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal" (id.). This Court has consistently recognized and enforced the right of indigent defendants to effective assistance of counsel on appeal and the need to ensure that the Anders exception is carefully scrutinized and applied (see, *People v Gonzalez*, 47 NY2d *637 606, 610 ["assistance given must be that of an advocate rather than amicus curiae"]; *People v Emmett*, 25 NY2d 354, 356 ["There is no substitute for the single-minded advocacy of appellate counsel"]). In *Gonzalez*, we invited the various Departments of the Appellate Division to develop rules and procedures to address the issue of purportedly frivolous appeals (*People v Gonzalez*, supra, 47 NY2d, at 612, n 3). Following the lead of the First Department in *People v Saunders* (52 AD2d 833 [holding that a request to withdraw as counsel, after a "conscientious examination of the record(,) * * * should be accompanied by a brief reciting the underlying facts and highlighting anything in the record that might arguably support the appeal"]), and in response to this Court's invitation in *Gonzalez*, the Departments of the Appellate Division have formulated such procedures to be utilized by courts of this State in assessing frivolous appeals (see, *People v Cruwys*, 113 AD2d 979, 980 [3d Dept] ["counsel should promptly take steps to obtain the * * * transcripts and to consult with his (or her) client and with trial counsel. If counsel determines, after making a diligent and conscientious examination of the record, that the appeal is frivolous" he or she may apply for relief from the assignment and "(s)uch application must be accompanied by a brief reciting the underlying facts and raising all points which may arguably provide a basis for appeal, with references to the record and citation of applicable legal authorities"]; *People v Crawford*, 71 AD2d 38, 39 [4th Dept] [appellate counsel "is not appointed amicus curiae to advise the court whether or not defendant's appeal has merit" but must "assist the court * * * by advancing defendant's contentions to the fullest extent that the record permits"]; see also, *People v Brown*, 140 AD2d 363 [2d Dept] [following First Department in *People v Saunders*]). Notably, the procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*. The Supreme Court of the United States recently clarified, in *Smith v Robbins* (supra), that the procedure described in *Anders* is but one example of an adequate method by which States can safeguard indigent defendants' constitutional rights. Because New York has repeatedly adhered to the protocol outlined in *Anders*, however, we see no compelling reason at this time to revisit, alter or refine New York State's "Anders" rule. The question then becomes, did the no-merit brief filed on behalf of defendant in this matter satisfy this State's articulated requirements? We conclude that it did not.

*638 The evidence adduced at trial was as follows. The victim testified that on February 18, 1997, while on her morning rounds at the facility and speaking with an inmate in cell C-2-11, she was sprayed with the liquid substance apparently coming from cell number C-2-10. She did not see the

person who committed the offense as her view of the interior of cell C-2-10 was obstructed.

A search of defendant's cell immediately after the incident revealed no evidence of any container or other such item that could have been used to spray the victim with the offensive mixture. A correction officer opined, however, that defendant could have committed the crime and successfully concealed any evidence of his guilt by, for example, using a small shampoo bottle to squirt the liquid and then immediately flushing the container down the toilet. For the defense, another inmate testified that he had witnessed the event and that it was the inmate who occupied cell C-2-12 not defendant who was responsible for the incident. Throughout the trial, defense counsel made numerous objections and applications that resulted in adverse rulings from the trial court. Specifically, defense counsel objected to the shackling of defendant during the trial, arguing that the purported justifications for the shackles defendant's prior record, repeated allegations of misconduct in prison and the nature of the instant offense charged were not sufficient to overcome the inordinate prejudice suffered by defendant due to his appearance in court in shackles. In addition, defense counsel requested that the trial court instruct the jury with respect to circumstantial evidence. Without expressing any opinion as to their merits, we note that there are at least three and possibly more clearly arguable issues upon which to base defendant's appeal, including (1) the shackling of defendant throughout trial, (2) the court's refusal to give a circumstantial evidence charge and (3) the possible excessiveness of the sentence imposed upon defendant as a persistent felony offender.[*] Defendant's assigned counsel did not raise these or any other arguable trial errors as bases for defendant's appeal. Instead, the "Anders" brief submitted on defendant's behalf identified only two issues: whether (1) the verdict was *639 supported by the weight of the evidence and (2) the sentence imposed was harsh or excessive. Counsel labeled both issues "frivolous." In connection with the first "point" of her brief, counsel mistakenly coupled an assertion that the verdict was not against the weight of the evidence with a discussion limited solely to the legal sufficiency of the evidence. On the second issue discussed in the brief, counsel erroneously stated defendant had been adjudicated a persistent violent felony offender and, thus, was sentenced within mandatory statutory parameters. In reality, defendant was adjudicated a discretionary persistent felony offender pursuant to Penal Law § 70.10 upon his conviction in this case of a class E non-violent felony. Notably, the brief submitted on defendant's behalf contained no reference whatsoever to the evidence at trial offered by either the prosecution or the defense or to defense counsel's objections at trial. Rather than performing the role of advocate, identifying issues and vigorously arguing the client's position on them, assigned counsel here appears to have found it sufficient to review the record in order to conclude and advise the court on the ultimate merit of defendant's appeal. Moreover, the Anders brief submitted by counsel contained numerous factual errors, including inconsistent and, in places, mistaken assertions as to the crime charged and the specific facility in which defendant was incarcerated at the time of the incident. Accordingly, the order of the Appellate Division should be reversed and the case remitted to the Appellate Division for further proceedings in accordance with this opinion. Order reversed,

etc.

NOTES

[*] The People commendably concede that this last issue concerning defendant's sentencing is not frivolous and, thus, compels reversal in this case and remittal for a de novo appeal.

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