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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-575

Filed 07 February 2023

Henderson County, No. 17 CRS 731

STATE OF NORTH CAROLINA

v.

RAY DEAN LIVELY

Appeal by Defendant from a judgment entered 9 July 2021 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 29 November 2022.

No brief for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon B. Mayes, for Defendant-Appellant.

WOOD, Judge.

Defendant appeals the judgment of the trial court but does not allege any error with the trial court's decision. After a careful review of the proceedings, we find no error with the trial court's judgment.

I. Background

Trooper Bowman of the North Carolina Highway Patrol, in search of a reported

reckless driver, happened upon a car settled in a ditch. From skid marks on the adjacent road, Trooper Bowman supposed the vehicle crashed into the ditch after crossing the opposite lane.

Ray Dean Lively (“Defendant”) sat in the driver’s seat of the vehicle. Defendant’s young daughter sat beside him. Trooper Bowman asked Defendant to step out of the vehicle and follow him across the road, but Defendant struggled to maintain his balance once he got out of the vehicle.

Defendant’s pupils were abnormally small, and Trooper Bowman believed that Defendant was impaired by some stimulant. When Trooper Bowman inquired, he recalled Defendant saying, “I overdosed on meth last night. They just let me out of the hospital. I went and picked up my daughter and was trying to get home. Almost made it.”

Upon Trooper Bowman’s request, Defendant submitted to a blood test. An EMS worker at the scene of the accident drew samples of Defendant’s blood in the presence of Trooper Bowman. The blood sample would later test positive for methamphetamine and amphetamine.

Trooper Bowman cited Defendant for reckless driving and driving while impaired. Defendant was convicted of driving while impaired on 3 December 2018. Defendant appealed the matter to superior court for a jury trial. The jury, on 9 July 2021, likewise found Defendant guilty of driving while impaired and reckless driving to endanger. The trial court imposed a level one punishment on the driving while

impaired charge due to the grossly aggravating factor of driving “while a child under the age of 18 years was in the vehicle.” The trial court sentenced Defendant to six months imprisonment suspended for eighteen months of supervised probation, with a special condition of ten days active time, for the driving while impaired charge and a ten-day active sentence suspended for eighteen months of supervised probation for the reckless driving charge.

Defendant timely appealed to this Court as of right from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b).

II. Discussion

Under the U.S. Supreme Court case of *Anders v. California*, a defendant is afforded procedural safeguards when his appellate counsel believes an appeal is frivolous. 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967).

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. 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. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.

Id. Our Supreme Court observed this instruction in *State v. Kinch* and there informed our task to “review the legal points appearing in the record, transcript, and

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briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.” 314 N.C. 99, 102-03, 331 S.E.2d 665, 667 (1985).

Appellate counsel for Defendant filed a no-merit brief on Defendant’s behalf, in which he states he has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks this Court to conduct its own review of the record for possible prejudicial error. Counsel shows to the satisfaction of this Court he complied with the requirements of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the necessary documents to do so. Counsel also provided us with his letter to Defendant in which counsel indicated that he was unable to find legal error in this case, informed Defendant of his right and the means to file his own brief, and offered Defendant additional assistance.

Defendant has not filed any written arguments with this Court, and a reasonable time for him to do so has passed.

“Under our review pursuant to *Anders* and *Kinch*, we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.” *State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (citation and quotation marks omitted). As required by *Anders* and *Kinch*, we fully examined the record for any issue with arguable merit. We have been unable to find any error, and we conclude that this appeal presents no issue that might entitle Defendant to relief.

III. Conclusion

Upon a full review of the record pursuant to our duty under *Anders* and *Kinch*, we are unable to find prejudicial error with the trial court's judgment and hold that this appeal is wholly frivolous.

NO ERROR.

Judges ZACHARY and GORE concur.

Report per Rule 30(e).