FILED
United States Court of Appeals
Tenth Circuit

January 10, 2019

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

DAGOBERTO ONTIVEROS,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden, Wyoming State Prison; ATTORNEY GENERAL OF WYOMING,

Respondents - Appellees.

No. 18-8057
(D.C. No. 2:17-CV-00164-NDF)
(D. Wyo.)

**ORDER DENYING A CERTIFICATE OF APPEALABILITY**

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

Applicant Dagoberto Ontiveros, an inmate in the custody of the Wyoming Department of Corrections, requests a certificate of appealability (COA) to challenge the denial by the United States District Court for the District of Wyoming of his application for relief under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA for a prisoner in state custody to appeal from the denial of relief under § 2254). He complains that the "*Anders* Brief" submitted by his appellate counsel in state court was constitutionally defective and that the Wyoming Supreme Court deprived him of his right of direct appeal by accepting his counsel's brief and permitting him to withdraw. Because Applicant has failed to make a substantial showing of the denial of a

constitutional right, as required by 28 U.S.C. § 2253(c)(2), we deny a COA and dismiss the appeal.

## I. BACKGROUND

Applicant was originally charged with first-degree murder but reached an agreement with the State to plead no contest to the charge of murder in the second degree. The penalty for second-degree murder in Wyoming is a sentence of 20 years to life in prison. The state district court sentenced Applicant to 20 to 24 years' imprisonment.

Applicant filed a notice of appeal with the Wyoming Supreme Court. Because he had pleaded no contest, which in Wyoming is equivalent in the criminal context to a plea of guilty, *see Martin v. State*, 780 P.2d 1354, 1356 (Wyo, 1989), he had waived all nonjurisdictional defenses, *see Smith v. State*, 871 P.2d 186, 188-89 (Wyo. 1994), leaving available only claims "that address the jurisdiction of the court or the voluntariness of the plea," *Kitzke v. State*, 55 P. 3d 696, 699 (Wyo. 2002). After speaking to Applicant, reviewing the entire case file, and examining other materials, his attorney—the senior assistant appellate counsel for the state public defender—filed a brief purportedly in accordance with *Anders v. California*, 386 U.S. 738 (1967), and moved for leave to withdraw.

Although given the opportunity to submit a pro se brief, including two extensions of time, Applicant did not file anything on the merits. The Wyoming Supreme Court granted counsel's motion to withdraw and affirmed the district court's judgment and sentence, citing *Anders* and saying that "following a careful review of the record and the

*Anders* brief submitted by appellate counsel, this Court finds appellate counsel's motion to withdraw should be granted and the district court's 'Judgment and Sentence' should be affirmed." R. at 62.

Applicant's § 2254 application asserted that his no-contest plea was involuntary because of ineffective assistance of trial counsel and that he was denied his right to appeal by ineffective appellate counsel and by the Wyoming Supreme Court because of their failure to comply with *Anders*. The district court granted the State summary judgment, dismissed the case with prejudice, and denied a COA.

## II. STANDARD OF REVIEW

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 provides that an application for relief under § 2254 may not be granted unless the prisoner has exhausted the remedies available in state court. *See* 28 U.S.C. § 2254(b)(1)(A). Each issue must have been "properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d

1531, 1534 (10th. Cir. 1994). Applicant has not presented his § 2254 claims in state court. But this court may deny relief on the merits despite a failure to exhaust. *See Wood v. McCollum*, 833 F.3d 1272, 1273 (10th Cir. 2016) (a court confronted with a petition containing an unexhausted claim may "deny the entire petition on the merits" (internal quotation marks omitted)).

## III. DISCUSSION

Under *Anders* if an attorney examines a case and determines that an appeal desired by his client would be "wholly frivolous," counsel may "so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744. Counsel must submit a brief to both the appellate court and the client, pointing to anything in the record that could potentially present an appealable issue. *See id.* The client may then choose to offer argument to the court. *See id.* If, upon close examination of the record, the court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal. *See id.*

In this court Applicant does not pursue his claim of ineffective assistance of trial counsel but complains only about how his state appeal was handled. He contends (1) that his state appellate counsel was ineffective because he failed to file a proper brief after determining only that his appeal was "not meritorious," rather than that it was "frivolous"; and (2) that the Wyoming Supreme Court improperly permitted appellate counsel to withdraw rather than requiring the filing of a proper brief because it, too, did not make the finding of frivolity required by *Anders*.

Applicant reads too much into *Anders*. That decision set forth a constitutionally acceptable procedure but the Supreme Court did not say that it was the only possible acceptable procedure. As the Court later explained, "[T]he *Anders* procedure is not an independent constitutional command, but rather is just a prophylactic framework that [the Court] established to vindicate the constitutional right to appellate counsel." *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (internal quotation marks omitted). Consequently, "States may . . . craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*." *Id.* at 276.

In particular, *Smith* approved a state procedure that did not require "counsel to explicitly describe the case as frivolous." *Id.* at 282. The Court recognized that requiring counsel to characterize the client's case as frivolous created tension between the counsel's duty not to present frivolous arguments to the court and the duty to further the client's interests. *See id.* at 281–82. The essential point is that appellate counsel submit a proper brief if there are any arguable (that is, not frivolous) issues. *See id.* at 277–78; *see also id.* at 280 (equating "frivolous" and "lacking in arguable issues").

In light of *Smith*, no reasonable jurist could debate that Applicant's state appellate counsel was ineffective. To begin with, counsel's brief attested that after he "conscientiously reviewed the entire file, as well as other materials, [and spoke] with his client," he could find "no appealable issues." R. at 47. Counsel stated that Applicant had raised three complaints about his prosecution, plea, and sentence: (1) his sentence was excessively harsh, (2) he did not commit second-degree murder, and (3) he was improperly induced to plead no contest because he thought he would receive probation.

*See* R. at 47. The next eight pages of the brief then carefully explained why there was no legal basis or factual support in the record for Applicant's complaints (the brief had earlier devoted three pages to the factual and procedural background and one page to the standard of review). Although counsel's appellate brief never used the term *frivolous*, there can be no doubt that counsel had concluded that Applicant had no arguable issues to present on appeal. Indeed, the first sentence of the brief's three-sentence conclusion stated that counsel had concluded "that there are no meritorious, *arguable issues* for appeal." R. at 57 (emphasis added). Thus, counsel satisfied his obligations under *Anders* and *Smith*, and was not constitutionally ineffective

In addition, no reasonable jurist could debate that the Wyoming Supreme Court denied Applicant's right to appeal by improperly permitting appellate counsel to withdraw without submitting further briefing. We recognize that the state supreme court did not explicitly state that on review it had concluded that the appeal was frivolous. But this is a matter of form rather than substance, and the court clearly complied with *Smith*. After citing *Anders* earlier in its order, the court wrote: "Now, following a careful review of the record and the '*Anders* brief' submitted by appellate counsel, this Court finds that appellate counsel's motion to withdraw should be granted and the district court's 'Judgment and Sentence' should be affirmed." Order Affirming the District Court's Judgment and Sentence, R. at 62. A recitation of the requirements of *Anders* was unnecessary. We presume "that state courts know and follow the law," and we give state-court decisions "the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). In light of the state court's explicit recognition of the applicability of *Anders* and

the persuasive brief submitted by Applicant's state appellate counsel, we see no possible rebuttal of the presumption that the court's "careful review" included a determination that the appeal was frivolous.

We **DENY** a COA and **DISMISS** the appeal.

Entered for the Court

Harris L Hartz
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

February 14, 2019

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DAGOBERTO ONTIVEROS,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden, Wyoming State Prison, et al.,

Respondents - Appellees.

No. 18-8057

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**ORDER**

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Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

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DAGOBERTO ONTIVEROS — PETITIONER

vs.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, and
THE WYOMING ATTORNEY GENERAL— RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

TENTH CIRCUIT COURT OF APPEALS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

DAGOBERTO ONTIVEROS,

Petitioner,

vs.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, and the ATTORNEY GENERAL OF THE STATE OF WYOMING,

Respondents.

Case No: 17-CV-164-F

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the State's Motion for Summary Judgment (Doc. 15). The Court has considered the motion and response and is fully informed in the premises. For the following reasons, the State's Motion for Summary Judgment is GRANTED, and Ontiveros' Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody is DISMISSED WITH PREJUDICE.

**BACKGROUND**

On July 17, 2015, Petitioner Ontiveros pleaded no contest to the charge of second degree murder. (Doc. 15-4 at 14). The state court sentenced Ontiveros to twenty to twenty-four years imprisonment. (Doc. 15-7 at 35–36).

Ontiveros timely filed a notice of appeal with the Wyoming Supreme Court. His appellate counsel filed a motion to withdraw as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). (Doc. 9-1). In the *Anders* brief, appellate counsel

summarized the record, stated he "conscientiously reviewed the entire file, as well as other materials, had spoken with his client, and found no appealable issues." (*Id.* at 2–5). Counsel noted due to Ontiveros' no contest plea, he could only appeal issues regarding jurisdiction or the voluntariness of the plea. (*Id.* at 9–10). Counsel analyzed the voluntariness of his plea citing the legal standard and the record and found an appeal of that issue would be frivolous. (Doc. 9-1). Counsel also identified the issues Ontiveros believed the Wyoming Supreme Court should examine and determined there were no appealable issues. (*Id.* at 8). Specifically, Counsel discussed the voluntariness of his plea and the harshness of his sentence.

After receiving the motion to withdraw and *Anders* brief, the Wyoming Supreme Court granted an extension permitting Ontiveros to file a *pro se* brief, so he could specify the issues he wanted the Wyoming Supreme Court to consider. (Doc. 9-2). The Wyoming Supreme Court granted a second extension for Ontiveros to file a *pro se* brief, but he did not file a brief. (Doc. 15-8; Doc. 9-3 at 1).

On September 26, 2016, the Wyoming Supreme Court entered an order affirming the district court's judgment and sentence. (Doc. 9-3). The Wyoming Supreme Court stated, "following a careful review of the record and the '*Anders* brief' submitted by appellate counsel , this Court finds that appellate counsel's motion to withdraw should be granted and the district court's Judgment and Sentence should be affirmed." (*Id.* at 2); *see Anders*, 386 U.S. at 744.

On September 25, 2017, Ontiveros filed his petition under 28 U.S.C. § 2254. (Doc. 1). Overall, Ontiveros alleges appellate counsel ("Counsel") and the Wyoming Supreme

Court violated the requirements set forth in *Anders*. Specifically, Ontiveros alleges he received ineffective assistance from his appellate counsel when he filed the *Anders* brief and sought to withdraw. (Doc. 1 at 5). Additionally, Ontiveros alleges the Wyoming Supreme Court denied his right of appeal when it permitted Counsel to withdraw and permitted Ontiveros to file a *pro se* brief.

## LEGAL STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is only appropriate if the pleadings and admissible evidence produced during discovery, together with any affidavits, show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Western Diversified Services, Inc. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1272 (10th Cir. 2005). An issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Id.* The non-moving party is entitled to all reasonable inferences from the factual record, which is viewed in the light most favorable to the party opposing summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, to defeat summary judgment, a plaintiff must support the claim with more than conjecture and speculation. *Self v. Crum*, 439 F.3d 1227, 1236 (10th Cir. 2006). The burden of persuasion rests squarely on the moving party. *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 980 (10th Cir. 2002).

## DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) provides habeas relief to a prisoner in state custody if he demonstrates "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The authority to issue a writ is preserved "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This authority is granted to federal courts to "guard against extreme malfunctions in the state criminal justice systems," and is not to serve as a "substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). To obtain relief "from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

For claims adjudicated on the merits in state court, relief will only be granted where the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

*Id.* § 2254(d)(1)–(2). When reviewing a state court adjudication, the AEDPA "imposes a 'highly deferential standard . . . .'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)).

***Ineffective Assistance of Counsel***

Ontiveros appears to claim his appellate counsel was ineffective when he filed a motion to withdraw and an *Anders* brief with the Wyoming Supreme Court. The State argues Ontiveros cannot establish that his counsel's performance was deficient.

After a court enters a judgment of conviction, a defendant "retains his Sixth Amendment right to representation by competent counsel, but [the defendant] must assume the burden of convincing an appellate tribunal that reversible error occurred at [the lower court]." *McCoy v. Crt of Apps. Of Wisc., Dist. 1*, 486 U.S. 429, 436 (1988). To establish an ineffective assistance of counsel claim, Ontiveros must show his counsel's performance was deficient and his counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. *Id.* To establish prejudice, Ontiveros must show "there is a reasonable probability that, but for counsel's [deficient performance], the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Ontiveros' appellate counsel filed a motion to withdraw and an *Anders* brief stating that Ontiveros did not have a meritorious claim on appeal. An *Anders* brief serves

two functions. First, it assists the court in determining counsel conducted the required detailed review of the case. *Penson v. Ohio*, 488 U.S. 75, 81 (1988). Second, the *Anders* brief assists the court in determining whether the appeal is so frivolous that it may be decided without an adversary presentation. *Id.* at 82. The Supreme Court has found counsel must act in the role of an active advocate for his client and the advocate role requires counsel to "support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. 738, 744 (1967).

In *Anders*, the Supreme Court outlined the procedures appellate counsel must follow when counsel finds no nonfrivolous issue to appeal. "If 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." *Id.* The client should receive a copy of the brief and may raise any points he chooses, and then the court, after full examination of all the proceedings, must decide whether the case is wholly frivolous. *Id.* If the court finds the case if frivolous, it may grant counsel's request to withdraw and either dismiss the appeal if the federal requirements are not met or proceed to a decision on the merits if state law requires. *Id.* However, if the court finds "any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to the decision, afford the indigent the assistance of counsel to argue the appeal." *Id.* "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's

evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." *Id.* at 741–42 (citation and quotation marks omitted).

The *Anders* procedures balance appellate counsel's role as an active advocate for the client with counsel's professional obligations. On appeal, to serve the client's interest, appellate counsel must assert specific grounds for reversal; however, "counsel may not ignore his or her professional obligations." *McCoy*, 486 U.S. at 436. Specifically, counsel may not deliberately mislead the court regarding the law or the facts and counsel may not "consume the time and energies of the court or the opposing party by advancing frivolous arguments." *Id.* Thus, appellate counsel has "an ethical obligation to refuse to prosecute a frivolous appeal." *Id.* A frivolous argument is an "argument[ ] that cannot conceivably persuade the court, so if [counsel] believes in good faith that there are no other arguments that he can make on his client's behalf he is honor-bound to so advise the court and seek leave to withdraw as counsel." *Id.* (citation and quotation marks omitted).

Thus, to satisfy *Anders*:

> The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability. Only after such evaluation has led counsel to the conclusion that the appeal is 'wholly frivolous' is counsel justified in making a motion to withdraw.

*Id.* at 438–39.

Here, Ontiveros' appellate counsel sought to withdraw from the case and submitted an *Anders* brief. In the *Anders* brief, Counsel explained Ontiveros entered an

unconditional no contest plea, which is equivalent to a guilty plea. (Doc. 9-1 at 9). Therefore, the only claims he did not waive through his plea were claims addressing the court's jurisdiction or the voluntariness of the plea. (*Id.*). Counsel then analyzed the voluntariness of Ontiveros' no contest plea, including whether Ontiveros was properly advised before he entered his plea. (*Id.* at 10). Counsel stated he was "unable to find support for the position that Mr. Ontiveros was not properly advised by the district court during the entering of his plea." (*Id.* at 11). Counsel cited Wyo. R. Cr. P. 11, which instructs the trial court about what it must inquire and explain before accepting a guilty or no contest plea. (*Id.* at 11–12). Citing the record, Counsel listed everything the court discussed with Ontiveros prior to the acceptance of his plea, including, confirming Ontiveros was not under the influence of any substances, discussing his right to trial, the loss of rights upon acceptance of the plea, the charges against him, and the consequences of his plea. (*Id.* at 13–14). Counsel stated the court went over the plea agreement with Ontiveros and Ontiveros stated no other promise was made to induce him to plead no contest beyond the plea agreement. (*Id.* at 13). Finally, Ontiveros stated his plea was voluntary, he knowingly entered into it, and he was not forced or threatened to enter the plea. (*Id.* at 13–14). Thus, after a thorough review of the record, Counsel determined Ontiveros could not present a meritorious argument on appeal regarding the voluntariness of his plea. (*See id.* at 18).

Additionally, Counsel identified Ontiveros' concerns with his sentence, which he believed was unfairly harsh. (*Id.* at 14). Counsel explained that Ontiveros' sentence was within the statutorily permitted boundaries for the crime and both the State and trial court

went along with the plea agreement. Additionally, the trial court conducted the sentencing according to Wyoming law. (*Id.*). Finally, Counsel stated the standard of review for sentencing decisions, which is abuse of discretion. (*Id.*). Counsel explained Ontiveros's sentence was almost the minimum permitted by law. (*Id.* at 15). Counsel explained Ontiveros believed his sentence was harsh because his trial counsel indicated he had a "good chance" at probation and in-patient treatment; however, Counsel stated nothing in the record supports this claim, he was denied by in-patient facilities, and the court found probation was not appropriate. (*Id.* at 15–16). Finally, Counsel stated Ontiveros's plea agreement was beneficial because he was originally charged with first degree murder and faced life imprisonment, but plead to second degree murder and will serve less than twenty years in prison. (*Id.* at 16–17). Thus, Counsel concluded Ontiveros did not have a meritorious argument regarding the length of his sentence. (*See id.* at 18).

Considering the lengthy discussion identifying Ontiveros' concerns and possible claims on appeal and citations to the law and the record, Counsel's brief met the requirements set out by the Supreme Court in *Anders*. As such, Counsel's performance was not deficient. Ontiveros' claim for ineffective assistance of appellate counsel is DISMISSED WITH PREJUDICE.

***Denial of Right to Appeal***

Ontiveros also argues the Wyoming Supreme Court improperly denied him his right to direct appeal when it accepted the *Anders* brief and permitted Ontiveros to submit a *pro se* brief. He argues the Wyoming Supreme Court denied him his right to appeal because it knew or should have known he was "ill equipped to prepare an appeal

regarding his concerns." (Doc. 1 at 5). The State argues the Wyoming Supreme Court properly reviewed the record and *Anders* brief and determined the appeal was frivolous.

First, as discussed above, Ontiveros' appellate counsel complied with the *Anders* requirements when filing the motion to withdraw and accompanying brief. After Counsel filed the motion and brief, the Wyoming Supreme Court provided Ontiveros with several extensions to file a *pro se* brief. Ontiveros did not file a separate brief.

*Anders* also requires the appellate court to fully examine all of the proceedings to decide whether the appeal is wholly frivolous. *Anders*, 386 U.S. at 744. In its Order Affirming Judgment and Sentence, the Wyoming Supreme Court, stated it conducted a careful review of the record and the *Anders* brief. (Doc. 9-3 at 2).

Ontiveros argues the Wyoming Supreme Court erred in its review because it did not make a finding of frivolity and his appellate counsel acted only as amicus curiae for the State. In support of his argument, Ontiveros cites *Anders*.

In *Anders*, the Court considered the actions of the defendant's appellate counsel. On appeal, defendant's counsel filed a "no-merit letter" with the court of appeals which consisted of a conclusory statement that the appeal had no merit. *Anders*, 386 U.S. at 743. The court of appeals examined the record and affirmed the judgment. *Id.* On a writ of habeas corpus six years later, the court of appeals simply found the appeal had no merit and it failed "to say whether [the appeal] was frivolous or not . . . ." *Id.* The defendant appealed the decision to the California Supreme Court and the court dismissed the habeas application without giving any reason at all. *Id.* The United States Supreme Court found there was not a "finding of frivolity by either of the California courts or that counsel

acted in any greater capacity than merely as amicus curiae." *Id.* The Court held appellate counsel must be an active advocate for the client, rather than an amicus curiae, and the no-merit letter did not provide substantial equality and fair process for the client. *Id.* at 744. In *Anders*, the appellate counsel only filed a no-merit letter and the appellate courts did not make any findings; therefore, neither counsel nor the courts discussed the frivolity of the defendant's possible claims. Therefore, the *Anders* court provided a procedure that counsel and the court must follow when counsel seeks to withdraw from an unmeritorious appeal.

Here, contrastingly, Ontiveros' counsel provided a lengthy discussion highlighting the possible claims and analyzing the frivolity of the claims. As discussed above, Counsel followed the procedures outlined in *Anders*, which prevents appellate courts from dismissing appeals based only on a conclusory statement that the appeal is meritless. Counsel presented the issues Ontiveros sought to appeal, diligently analyzed the issues, and found an appeal would be frivolous. The Court stated it independently reviewed the record and the *Anders* brief and then affirmed the Judgment and Sentence.

Additionally, Ontiveros claims the Wyoming Supreme Court denied him his right to appeal when it permitted him to file a *pro se* brief, rather than another brief with the assistance of counsel. After counsel seeks to withdraw and files an *Anders* brief, "if the appellate court 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." *Penson v. Ohio*, 488 U.S. 75, 83 (1988) (quoting *Anders*, 386 U.S. at 744). *Anders* is a limited exception to the requirement that "indigent defendants [must] receive

representation on their first appeal as of right." *Id.* Here, The Wyoming Supreme Court provided Ontiveros the opportunity to file his own brief after the *Anders* brief, but Ontiveros only had the right to assistance of counsel after the *Anders* brief if the Wyoming Supreme Court determined there was a non-frivolous claim.

As such, the Wyoming Supreme Court followed the procedures outlined in *Anders* before it affirmed the trial court's Judgment and Sentence. Ontiveros' claim that the Wyoming Supreme Court denied his appeal of right is DISMISSED WITH PREJUDICE.

**Conclusion**

For the above stated reasons, Ontiveros failed to establish a claim for ineffective assistance of counsel and failed to establish the Wyoming Supreme Court denied his appeal of right.

A certificate of appealability (COA) may issue under 28 U.S.C. §2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court finds that Ontiveros failed to state a valid claim of a denial of a constitutional right, therefore a COA should not issue in this case.

IT IS ORDERED the State's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED this case is DISMISSED WITH PREJUDICE.

Dated this 17 day of July, 2018.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

# United States District Court
## For The District of Wyoming

DAGOBERTO ONTIVEROS,

Petitioner,

vs. Civil No. 17-CV-164-F

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, and the ATTORNEY GENERAL OF THE STATE OF WYOMING,

Respondents.

**JUDGMENT IN A CIVIL ACTION**

This action having come before the Court on Respondents' Motion for Summary Judgment. The issues have been considered and a decision has been rendered.

The Court having granted Respondents' Motion for Summary Judgment on July 17, 2018. The Court having dismissed the Petition of Dagoberto Ontiveros with prejudice and therefore Judgment is hereby entered in this matter in favor of the Respondents, Michael Pacheco, Warden, Wyoming State Penitentiary, and the Attorney General of the State of Wyoming.

A certificate of Appealability should not issue.

Dated this 18th day of July, 2018.

*Clerk of Court or Deputy Clerk*

IN THE

SUPREME COURT OF THE UNITED STATES

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DAGOBERTO ONTIVEROS — PETITIONER

vs.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, and
THE WYOMING ATTORNEY GENERAL— RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

TENTH CIRCUIT COURT OF APPEALS

APPENDIX D

**DAGOBERTO ONTIVEROS, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).**
**SUPREME COURT OF WYOMING**
**2016 WY 94; 380 P.3d 91; 2016 Wyo. LEXIS 102**
**S-16-0127**
**September 28, 2016, Decided**

**Notice:**

**THIS OPINION IS SUBJECT TO CORRECTION OR REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTER.**
**Judges:** E. JAMES BURKE, Chief Justice.

**Opinion**

**Opinion by:** E. JAMES BURKE

**Opinion**

**{380 P.3d 91} Order Affirming the District Court's Judgment and Sentence**

P1 **This matter** came before the Court upon its own motion following notification that Appellant has not filed a *pro se* brief within the time allotted by this Court. Pursuant to a plea agreement, Appellant entered an unconditional "no contest" plea to second degree murder. Wyo. Stat. Ann. § 6-2-104. The district court imposed a sentence of 20 to 24 years. Appellant filed this appeal to challenge the district court's March 11, 2016, "Judgment and Sentence."

P2 On June 27, 2016, Appellant's court-appointed appellate counsel e-filed a "Motion to Withdraw as Counsel," pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967). The next day, this Court entered an "Order Granting Motion for Extension of Time to File *Pro Se* Brief." This Court ordered that, on or before August 11, 2016, Appellant "may file with this Court a *pro se* brief specifying the issues he would like this Court to consider in this appeal." This Court also provided notice that, after the time for filing a *pro se* brief expired, this Court would "make its ruling on counsel's motion to withdraw and, if appropriate, make a final decision on this appeal." This Court later extended the time to file a *pro se* brief until September 12, 2016. The Court notes that Appellant did not timely file a *pro se* brief.

P3 Now, following a careful review of the record and the "*Anders* brief" submitted by appellate counsel, this Court finds that appellate counsel's motion to withdraw should be granted and the district court's "Judgment and Sentence" should be affirmed. It is, therefore,

P4 **ORDERED** that the Wyoming Public Defender's Office, court-appointed counsel for Appellant, **Dagoberto** Ontiveros, is hereby permitted to withdraw as counsel of record for Appellant; and it is further

P5 **ORDERED** that the district court's March 11, 2016, "Judgment and Sentence" be, and the same hereby is, affirmed.

P6 **DATED** this 28th day of September, 2016.

**BY THE COURT**:

/s/ **E. JAMES BURKE**

**Chief Justice**