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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

GEORGE A. WOLOSONOWICH,

Defendant-Appellant.

No. 57997
Motion to Withdraw

(Guilty Plea)

TO: Judges
FROM: Phil Stevens
DATE: July 2, 1982; for submission July 13, 1983

COMMISSIONER'S REPORT

FACTS:

The defendant-appellant's court-appointed counsel, Dennis H. Snyder, seeks leave of the Court to withdraw as counsel pursuant to Anders v California, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967). The Court should grant the motion to withdraw.

The defendant was charged in a single count information with carrying a weapon in an automobile in violation of MCL 750.227; MSA 28.424. From the preliminary examination, the defendant's wife had been granted a divorce on August 11, 1980. On August 13, the defendant's birthday, he appeared in front of his ex-wife's home, having been drinking and in a belligerent mood. He fired several shots from a .38 pistol, reloaded, fired two more shots, and thereafter returned to his vehicle. The police were summoned to the scene. His ex-wife and children had entered the van in which defendant was sitting, apparently to calm him down. The police seized the pistol in plain view and arrested the defendant.

The defendant appeared before Judge Harry B. McAra in the Genesee County Circuit Court on January 8, 1981, the date set for trial. After some preliminary discussion, the defendant indicated that he wished to plead guilty. Judge McAra advised the defendant of his right to counsel and of his absolute right to a trial either before the court alone, or with a jury. The defendant again indicated that he wanted to plead guilty rather than go to trial.

Judge McAra ascertained that the defendant was 42 years of age and had a sixth grade education. The defendant said that he could read and write English and that he understood the judge as the judge spoke to him.

Judge McAra told the defendant that he was pleading guilty to carrying a pistol in an automobile and that the offense carried a maximum penalty of five years in jail, a fine and that the offense was a "Proposal B" charge. The defendant inquired into the effect of Proposal B and Judge McAra told him that Proposal B crimes were those crimes in which a defendant could receive no special or early parole. The court went on to explain that if the defendant had previously been convicted of a felony, he could be charged as an habitual offender, however, explaining that because the prosecutor had not yet charged the defendant, defendant could not now be charged as an habitual offender. Judge McAra said that the minimum prison sentence would be probation. Moreover, the court indicated that if the defendant was on probation or parole, he could be sentenced for violating either probation or parole.

Judge McAra told the defendant that by pleading guilty he waived his right to be tried by the court or by the jury. Further, the court explained the defendant's right to be presumed innocent until the prosecuting attorney had proved him guilty beyond a reasonable doubt. Judge McAra said that the defendant had a right to have the witnesses against him appear at trial, explaining at length the rule about endorsed or res gestae witnesses. The judge explained that the defendant had the right to cross-examination and the right to have the court order any witnesses that the defense wanted to appear at trial. He explained to the defendant his right to remain silent at trial and not to have his silence used against him in any way or, if he preferred, to testify at trial in his own behalf.

The court ascertained that there had been no plea-bargain agreement between the prosecutor and defense counsel. The court

went on to state that it had made no agreement and would not be bound by any sentencing bargain not on the record. Judge McAra asked the defendant if anyone had promised him anything and the defendant replied that no one had made any promises to him. The defendant indicated that no one had threatened him or coerced him in an effort to make him plead guilty. The defendant said that he pled guilty freely and voluntarily.

Judge McAra read the information to the defendant and then asked him if the contents of the information were true. The defendant indicated that the statement contained in the information was, in fact, true. The defendant said that it was a mistake to have shot his gun under the circumstances and that he had been celebrating his birthday and drinking on the night of August 13, 1980. He said that he knew that what he did was wrong and that he did in fact have an unlicensed and unregistered pistol in the van with him.

The court ascertained from the prosecutor and defense counsel that it had complied with GCR 1963, 785.7(1) - (3). The court again indicated that no agreement had been made with regard to sentence. Judge McAra then accepted the plea as freely and voluntarily entered.

Sentencing was held on March 11, 1981. Both the assistant prosecutor and defense counsel were present. The court offered allocution to both the defense and prosecutor. He inquired of both defense counsel and the defendant concerning their knowledge of the contents of the presentence report. Neither the defendant nor defense counsel had any additions or corrections. The court then allowed both defense counsel and the defendant time for allocution. Judge McAra then sentenced the defendant to from 40 to 60 months imprisonment with two days credit. He went on to advise the defendant of his constitutional right to appellate review of his conviction, indicating that if the defendant was unable to provide a lawyer to perfect the appeal, the court would appoint a lawyer for him, furnishing counsel with portions of the transcript and a record so that the lawyer could prepare post-conviction motions and perfect an appeal. Judge McAra

indicated to the defendant that if he was to appeal, his request for counsel must come within 60 days after sentencing. The record indicates that appropriate appellate forms were given to defendant at the time of hearing.

ISSUE:

> SHOULD THE MOTION TO WITHDRAW BE GRANTED BECAUSE THE COURT FINDS AFTER A FULL EXAMINATION OF ALL THE PROCEEDINGS THAT THE APPEAL IS WHOLLY FRIVOLOUS, AND SHOULD DEFENDANT'S CONVICTION BE AFFIRMED?

DISCUSSION:

The Court should note that the defendant has addressed two letters to the Clerk of the Court of Appeals concerning this appeal. The letters themselves are undated, but the Court date stamp reveals that the first letter was received on January 11, 1982 and the second on February 16.

Regarding the letter of January 11, the defendant asserts that his trial counsel erred by bringing defendant's childrens' names in as witnesses against him. The defendant indicates that the reason that he pled guilty was that he didn't want to bring his children into the case. I have read the information filed in this case. The children are not endorsed as res gestae witnesses. Apparently, the children were considered too young to testify.

Defendant also alleges that the police should have read him his rights when he was arrested. The police are under no obligation to read the defendant any rights upon arrest. However, if they do not do so, statements made by the defendant may not be used in evidence at trial. Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). As no attempt was made to introduce any statements of the defendant, other than his judicial confession, no legitimate issue could be raised on appeal.

Defendant also asserts that the police lacked a search warrant for his person or the van at the time that the pistol was seized. A review of the preliminary examination transcript shows that police officers were summoned to the defendant's ex-wife's home by a hysterical woman after gunshots had been heard. When police responded to the scene, they found the defendant in a vehicle

described by the woman to be a red van. They noted expended shell casings in the street -- fairly indicative that a weapon had been fired in the vicinity. As the defendant was in the van, the police quite properly invited him out, discovering a pistol and holster in plain view. No search warrant was required, the police having probable cause to believe that the defendant had unlawfully discharged a firearm within the City of Flint and that he possessed a weapon in his van.

The second letter, received by the Court on February 16, 1982, alleges that defendant's trial counsel forced him to plead guilty by involving defendant's children in the case. From the record, it is apparent that defendant did not understand the reason for a motion on November 24, 1980. There was apparently some question about endorsing the defendant's two children, those allegedly present in the van at the time of the defendant's arrest. Defense counsel apparently concurred in the prosecutor's decision not to endorse the children. That decision is a trial strategy, essentially not reviewable upon appeal.

I have reviewed the plea and sentencing transcript for compliance with GCR 1963, 785.7(1) - (3) and GCR 1963, 785.8 - 785.11. I conclude that there is no non-frivolous issue present in this appeal. Accordingly, appointed appellate counsel should be allowed to withdraw. If the panel agrees, a proposed order is attached.

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AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN. Held at the Court of Appeals in the City of , on the day of in the year of our Lord one thousand nine hundred and eighty

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

GEORGE A. WOLOSONOWICH,

Defendant-Appellant.

Present the Honorable

Presiding Judge

Judges

Docket No. 57997
L.C. No. 80-29806-FY

In this cause counsel for defendant-appellant has filed a motion to withdraw pursuant to Anders v California, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and defendant-appellant having filed a response thereto, and due consideration thereof having been by the Court,

IT IS ORDERED that the motion to withdraw be, and the same is hereby GRANTED, it being the finding of the Court, after a full examination of all the proceedings, that the appeal is wholly frivolous.

IT IS FURTHER ORDERED that defendant-appellant's conviction be, and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED that final judgment of affirmance is hereby STAYED for a period of thirty days after the Clerk's certification of this order, within which period defendant may, if he so desires, file a written communication with this Court, raising any issue or question which he wishes this Court to consider. Any such communication shall be treated by this Court as an application for rehearing.

STATE OF MICHIGAN— —ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this day of in the year of our Lord one thousand nine hundred and eighty

Clerk

CA3C180