

No. 28928-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAVIER CHAVEZ, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

REPLY BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ARGUMENT

MR. CHAVEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FILED AN *ANDERS* BRIEF REGARDING HIS MOTION TO WITHDRAW HIS GUILTY PLEA

Shortly after pleading guilty and before he was formally sentenced, Mr. Chavez moved to withdraw his guilty pleas. RP 132. Mr. Chavez's attorney did not help him draft the motion to withdraw. See RP 132-34. Instead appointed counsel filed a pleading captioned "Motion to Withdraw Guilty Plea" but with a footer stating "Defendant's Anders Brief." CP 36-37. The brief stated

Counsel for the defendant submits this motion for consideration of possible errors made by his attorney pursuant to Anders v. California, 386 U.S. 738, 13 L.Ed.2d 493, 87 S.Ct. 1896 (1976)[sic]; State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and State v. Atterberry, 87 Wn.2d 556, 554 P.2d 1053 (1976)."

CP 37. Mr. Chavez has argued the because a an Anders brief is (1) by definition a motion to withdraw, (2) a statement to the court that there are no nonfrivolous issues and (3) a procedure reserved for appeal, his attorney denied him his Sixth Amendment right to counsel by filing such a pleading in the trial court.

Ignoring the footer of the pleading, as well as its contents, the State responds with the fantastic claim that appointed counsel “never submitted and Anders brief.” Brief of Respondent at 27. Next, the State adds “there [is] nothing in the record” to support Mr. Chavez’s characterization of this pleading as a motion to withdraw. The State’s response evinces the same fundamental misunderstanding of Anders as trial counsel and the trial court.

Anders, and the other cases cited in the trial counsel’s motion, do not merely identify a procedure whereby an attorney can ask the court to conduct its own review of the record to determine the merits of a defendant’s claim. Instead, these cases spell out a procedure, whereby appointed appellate counsel may seek to withdraw as counsel where he or she is unable to identify any nonfrivolous issues. Addressing the Sixth Amendment requirement of appellate counsel, Anders provides

His role as advocate requires that he support his client’s appeal to the best of his ability. Of course, 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. 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. On 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.

386 U.S. at 744.

The first failing here, is that Anders spells out an appellate procedure not one for use in trial court. As stated in Mr. Chavez's initial brief, a search of published cases from all fifty states and the federal circuit reveals no case in which an Anders brief was filed at trial. This is not surprising; the text of the Anders opinion specifically refers to appellate practice. 386 U.S. at 744 (An attorney's "role as advocate requires that he support his client's *appeal* to the best of his ability.") (emphasis added).

Second, an Anders brief is by definition a motion to withdraw. 386 U.S. at 744 ("[I]f counsel finds his case to be wholly frivolous . . . he should so advise the court and request permission to withdraw.") Thus, regardless of its application to trial practice, an Anders brief formally signals the end of an attorney's involvement in a case, unless the court rejects the motion. The State's contention, then, that defense counsel did not move to withdraw

demonstrates both a lack of understanding of what Anders entails as well as the complete denial of counsel at a critical stage.

Anders creates two outcomes: (1) the court may deny the motion and appoint new counsel to represent the defendant or (2) grant the motion, allow counsel to withdraw and affirm the conviction.

But here, assuming an Anders may be filed in trial court, even after filing the Anders brief counsel continued to represent Mr. Chavez at sentencing. Because the court did not reject the motion it accepted counsel's view of the frivolity of the issues, yet it allowed counsel to continue representation after denying the motion to withdraw the plea. That outcome is not consistent with Anders. That outcome is not fundamentally different from an attorney standing before a jury to say "I believe my client's case is frivolous but I ask you to consider the State's case against him for possible errors." The Sixth Amendment does not tolerate such a plain abandonment of trial counsel's obligation to his client.

But Mr. Chavez's attorney, Mr. Mendoza, did more than withdraw his services: he advocated against Mr. Chavez. In court, Mr. Mendoza explained how a case Mr. Chavez cited in his motion did not support his position. See RP 132-34. To further prove his

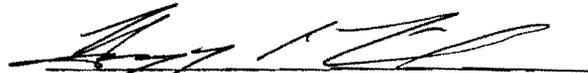
point, Mr. Mendoza supplied the court with a copy of the case. RP 132-33.

Thus, Mr. Chavez was procedurally and practically denied an attorney at a critical stage of the proceeding. That denial of counsel during a critical stage of the proceedings is presumptively prejudicial. United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Mr. Chavez is entitled to a new motion to withdraw his guilty pleas with actual legal representation.

B. CONCLUSION

For the reasons above, and those in Mr. Chavez's initial brief, this Court must reverse his convictions.

Respectfully submitted this 8th day of November 2010.



GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant