IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ANGEL J. SANTOS,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0020-CRM
SUPERIOR COURT NO. 10-0132E

ORDER

Cite as: 2013 MP 10

Decided August 9, 2013

Mark B. Hanson, Saipan, MP, for Defendant-Appellant Angel J. Santos
James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; and PERRY B. INOS, Associate Justice.

PER CURIAM:

¶ 1 Court-appointed counsel for Appellant-Defendant Angel J. Santos ("Santos") filed an *Anders* brief, which contained two parts: Santos' opening brief and counsel's motion to withdraw. For the following reasons, we DENY the motion to withdraw and direct Santos, through his counsel, to provide additional briefing consistent with this Order.

I. Factual and Procedural Background

¶ 2 Santos was arrested and later charged with kidnapping, 6 CMC § 1421(a)(1); conspiracy to commit kidnapping, 6 CMC § 303(a), § 1421(a)(1); sexual assault in the first degree, 6 CMC §§ 1301(a)(1), (a)(2); conspiracy to commit sexual assault in the first degree, 6 CMC § 303(a), § 1301(a); aggravated assault and battery, 6 CMC § 1203(a); and disturbing the peace, 6 CMC § 3101(a).

¶ 3 Shortly thereafter, Santos entered a plea agreement in which he agreed to cooperate against his co-conspirators and plead guilty to conspiracy to commit sexual assault in the first degree in exchange for a dismissal of the other five charges and a sentence of between ten and twenty years of incarceration. The court accepted Santos' guilty plea and scheduled the sentencing for a subsequent date.

¶ 4 Several months later, but before sentencing, Santos submitted a motion to withdraw his guilty plea in response to the Commonwealth dismissing the charges against his co-conspirators. The trial court denied the motion and, in a subsequent proceeding, sentenced Santos in accordance with the terms of his plea bargain.

¶ 5 Santos appealed.

II. Jurisdiction

¶ 6 We have jurisdiction over Superior Court final judgments and orders, NMI CONST. art. IV, § 3; 1 CMC § 3102(a), as well as all criminal actions in the Commonwealth. NMI CONST. art. IV, § 2; 1 CMC § 3202.

III. Discussion

¶ 7 Counsel's motion requires us to determine whether a court-appointed counsel may withdraw from a representation if counsel believes the appeal is wholly frivolous; and, if so, what procedure counsel must follow in order to withdraw. We must then decide whether Santos' counsel has properly satisfied that procedure. We address each below.

A. Anders Brief

¶ 8 Counsel's *Anders* brief represents the collision of two competing concerns: an indigent defendant's right to an advocate and his counsel's duty as a judicial officer to refrain from making

frivolous arguments. We have not addressed what counsel must do in such cases, but the U.S. Supreme Court has.

¶ 9 In *Anders v. California*, 386 U.S. 738 (1967), the U.S. Supreme Court reviewed a petition for writ of habeas corpus seeking to reopen a conviction because the defendant, Anders, had, in effect, not received counsel on appeal. Anders had been convicted for felony possession of marijuana. *Id.* at 739. On appeal, his court-appointed counsel sent a letter to the court claiming the appeal had no merit. *Id.* Anders then filed a pro se brief, though the court ultimately affirmed his conviction. *Id.* at 740.

¶ 10 On review, the Supreme Court reversed and remanded. It noted that the Due Process Clause required indigent defendants to receive an active advocate, rather than simply an *amicus curiae*. *Id.* at 744. The letter did not meet that standard because while it claimed the appeal had no merit, it did not suggest the case was wholly frivolous. *Id.* Because non-frivolous arguments were available,[1] and the appellate court seemingly accepted the validity of the letter at face value, both the no-merit letter and the ensuing procedure were inadequate. *Id.*

¶ 11 But while the no-merit letter and subsequent procedure did not pass constitutional muster, the U.S. Supreme Court then provided a procedure for court-appointed counsel faced with a wholly frivolous appeal. If, after a conscientious examination of the record, an attorney could only unearth frivolous claims, he "should so advise the court and request permission to withdraw." *Id.* When making that request, however, counsel must also submit to both his client and the court a "brief referring to anything in the record that might arguably support the appeal." *Id.* The indigent defendant must then receive time "to raise any points that he chooses." *Id.* Following that time "the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the court finds the appeal is wholly frivolous, "it may grant counsel's request to withdraw and [either] dismiss the appeal . . . or proceed to a decision on the merits," depending on what the law requires. *Id.* If, on the other hand, it finds any colorable arguments, "it must, prior to its decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

¶ 12 The U.S. Supreme Court revisited the *Anders* procedure in *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). In that case, a trial court found McCoy, an indigent defendant, guilty of abduction and sexual assault. *Id.* at 431. On appeal, McCoy's court-appointed counsel reviewed the file, found no merit to it, and gave the client three options: dismissal, moving forward without representation, or counsel filing a brief that presented McCoy's strongest arguments and informed the court that counsel found the appeal

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[1] One error, for example, was that both the judge and prosecutor commented to the jury about Anders' failure to testify. Following trial, but before Anders' habeas petition, the Supreme Court found that the Fifth Amendment of the United States Constitution (incorporated through the Fourteenth Amendment) prohibited those types of comments, which had previously been permitted pursuant to Art. 1, § 13 of the California Constitution. *Anders*, 386 U.S. at 743.

frivolous. McCoy chose the third option. *Id.* at 431-32. Counsel then submitted a brief that argued (as an advocate) for McCoy's conviction to be set aside before requesting (as an officer of the court) to withdraw because further appellate proceedings "would be frivolous and without any arguable merit . . . ." *Id.* at 432 (internal quotation omitted). The brief was rejected, however, because McCoy's counsel failed to discuss why the claims were frivolous as required by local rules. *Id.*

¶ 13 On appeal, the Supreme Court upheld the rule. *Id.* at 444. It started by noting that "[a]t the trial level, defense counsel's view of the merits of his or her client's case never gives rise to a duty to withdraw." *Id.* at 435. That is because "trial counsel may remain silent and force the prosecutor to prove every element of the offense . . . ." *Id.* at 436. But that changes following a conviction: "If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel, but he must assume the burden of convincing an appellate tribunal that reversible error occurred at trial." *Id.* Because appellant counsel "cannot serve the client's interest without asserting specific grounds for reversal," and may not, in so doing, "deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments," counsel is "under an ethical obligation to refuse to prosecute a frivolous appeal." *Id.*

¶ 14 That ethical obligation poses little problem for retained counsel. If retained counsel concludes an appeal would be frivolous, counsel "has a duty to advise the client that it would be a waste of money to prosecute the appeal and that it would be unethical for the lawyer to go forward with it." *Id.* at 437. But the obligation creates a dilemma for appointed counsel. Although burdened with the duty to withdraw, appointed counsel may not do so without leave of court. *Id.* Advising the court, in turn, that the reason for seeking withdrawal is the frivolity of the appeal "would appear to conflict with the advocate's duty to the client." *Id.* Nonetheless, though the confession might hurt the client's appeal, "this dilemma must be resolved by informing the court of counsel's conclusion." *Id.*

¶ 15 The Court then re-affirmed *Anders*, *id.* at 438, and defined the expectations of appointed counsel prior to following an *Anders* brief:

> The principle of substantial equality . . . require[s] that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer before concluding that an appeal is frivolous. Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. 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 an 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.

¶ 16 Since its announcement in *Anders*, the procedure has become widespread.[2] We likewise adopt its basic contours, but limit its use to plea-based convictions. We set this limit because of the differences between a guilty plea and a guilty verdict. Independently reviewing a plea colloquy and the events leading up to it for reversible error is relatively straightforward. Independently reviewing a trial, in contrast, expends significant judicial resources. It would also be unnecessary since, in all but the rarest of instances, a creative advocate reviewing an entire prosecution, including all filings and a trial transcript, should find at least one non-frivolous argument.

¶ 17 As a result, if, on appeal from a plea and after diligently examining the record and thoroughly researching the law, counsel fails to find any non-frivolous arguments, counsel may submit a motion to withdraw accompanied by a brief: (1) discussing the plea colloquy, all adverse rulings and any irregularities as well as the factual basis for each and every element of the crime; (2) advancing the indigent defendant's best arguments; and (3) explaining the reasons for why those arguments are nonetheless frivolous. After receiving such a brief, the briefing schedule will be automatically stayed and the indigent defendant given thirty days to respond. After the defendant has had an opportunity to respond, we will then conduct an independent examination of the record. If that examination turns up a colorable claim,[3] we will deny the motion to withdraw and order supplementary briefing. If not, we will summarily affirm the conviction.

B. Motion to Withdraw a Guilty Plea

¶ 18 Turning to this case, we reviewed the record and found at least one issue meriting further development. Before sentencing, Santos submitted a motion to withdraw his guilty plea, which the trial court ultimately denied. In opposition to that denial, Santos' argument boils down to asking for something we would all like on occasion: a do-over based on the benefit of hindsight. In other words, he argues that his plea should be set aside because he would not have pled guilty had he known the Commonwealth would eventually dismiss the cases against his three co-defendants.

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[2] For federal circuits, *see e.g.*, *United States v. Griffy*, 895 F.2d 561, 562 (9th Cir. 1990); *Evans v. Clarke*, 868 F.2d 267, 268 (8th Cir. 1989); *Freels v. Hills*, 843 F.2d 958, 962 (6th Cir. 1988); *Nell v. James*, 811 F.2d 100, 104 (2d Cir. 1987); *United States v. Edwards*, 777 F.2d 364, 365-66 (7th Cir. 1985); *United States v. Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985); *United States v. Johnson*, 527 F.2d 1328, 1329 (5th Cir. 1976). For state courts, *see e.g.*, ARK. SUP. CT. R. 4-3(k)(1); DEL. SUP. CT. R. 26(c); IOWA R. APP. P. 6.1005(2); MICH. CT. R 7.211(C)(5); OKLA. R. CRIM. APP. 3.6(B); WISC. R. APP. P. 809.32; *State v. Benjamin*, 573 So. 2d 528, 529 (La. Ct. App. 1990), *approved in State v. Robinson*, 590 So. 2d 1185 (La. 1992) (per curiam); *State v. Williams*, 406 S.E.2d 357, 357-58 (S.C. 1991) (order setting forth procedure for processing *Anders* briefs under the South Carolina appellate court rules).

[3] A colorable claim is a claim that is reasonably supported by either law or policy, which, if accepted, may result in reversal.

¶ 19 Rule 32(d) of the NMI Rules of Criminal Procedure governs plea withdrawals. Under Rule 32(d), a defendant may submit a motion to withdraw a plea before a sentence is imposed or after sentencing, if the sentence has been suspended or to correct manifest injustice:

> A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea.

NMI R. CRIM. P. 32(d).

¶ 20 Both Rule 32(d) and our jurisprudence, however, are silent as to the standard the court must apply in making that decision. In contrast, under federal rules, a defendant must show a "fair and just reason" for the withdrawal. FED. R. CRIM. P. 11(d)(2)(B). "[F]air and just reasons" include, among others, "'inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea.'" *United States v. Briggs*, 623 F.3d 724, 728 (9th Cir. 2010).

¶ 21 Silence as to the proper standard, as well as potentially relevant interpretations of this federal rule, raise colorable claims. For example, should the Commonwealth: (1) follow the old federal rule, which Rule 32(d) of the NMI Rules of Criminal Procedure is closely patterned after; (2) adopt the current federal standard, which resolved a circuit split in the old standard; or (3) create a new test? If we retain the old federal rule, which circuit should we follow? If we apply the current federal rule, did the trial court abuse its discretion by failing to find that the Commonwealth's decision to dismiss the charges against Santos' co-defendants prior to Santos' sentencing constituted an intervening circumstance? If we craft a new standard, what should it be and how should it apply in this case?

IV. Conclusion

¶ 22 Because the record raises at least one colorable issue, we DENY the motion to withdraw and direct Santos, through appointed counsel, to provide additional briefing consistent with this Order.

SO ORDERED this 9th day of August, 2013.