Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36590
O/kmb

_____AD3d_____ Submitted - November 7, 2012

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-03955 DECISION & ORDER ON MOTION
2011-02390
2012-09052

The People, etc., respondent,
v Douglas Duart, appellant.

(S.C.I. No. 553/09, Ind. No. 2799/10)

Robert C. Mitchell, Riverhead, N.Y. (Alfred J. Cicale of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Michael Miller of counsel), for respondent.

Appeals by the defendant from (1) a judgment of the County Court, Suffolk County (Kahn, J.), rendered April 1, 2009, convicting him of attempted use of a child in a sexual performance under Superior Court Information No. 553/09, upon his plea of guilty, and imposing sentence, (2) a judgment of the same court rendered January 25, 2011, convicting him of attempted use of a child in a sexual performance under Indictment No. 2799/10, upon his plea of guilty, and imposing sentence, and (3) an amended judgment of the same court, also rendered January 25, 2011, revoking a sentence of probation previously imposed by the same court upon a finding that he violated a condition thereof, upon his admission, and imposing a sentence of imprisonment upon his previous conviction of attempted use of a child in a sexual performance under Superior Court Information No. 553/09. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738), in which he moves for leave to withdraw as counsel for the appellant.

ORDERED that the motion of Robert C. Mitchell for leave to withdraw as counsel is granted, and he is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

ORDERED that Steven A. Feldman, Esq., 626 RXR Plaza, West Tower, 6th Floor,

Uniondale, N.Y., 11556, is assigned as counsel to perfect the appeals; and it is further,

ORDERED that the People are directed to furnish a copy of the certified transcript of the proceedings to the new assigned counsel; and it is further,

ORDERED that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order and the People shall serve and file their brief within 30 days after the brief on behalf of the appellant is served and filed. By prior decisions and orders on motions of this Court, the defendant was granted leave to prosecute the appeals as a poor person, with the appeals to be heard on the original papers, including a certified transcript of the proceedings, and on the briefs of the parties, who were directed to file nine copies of their respective briefs and to serve one copy on each other.

If "after a conscientious examination of the record" assigned counsel finds a case to be "wholly frivolous," counsel should "so advise the court and request permission to withdraw" (*People v Saunders*, 52 AD2d 833, 833; *see Anders v California*, 386 US 738, 744; *People v Stokes*, 95 NY2d 633, 637). "Such request should be accompanied by a brief reciting the underlying facts and highlighting anything in the record that might arguably support the appeal" (*People v Saunders*, 52 AD2d at 833; *see Anders v California*, 386 US at 744; *People v Stokes*, 95 NY2d at 637; *Matter of Giovanni S.* [*Jasmin A.*], 89 AD3d 252, 256). Here, the *Anders* brief filed by assigned counsel contained no reference whatsoever to the plea and sentencing proceedings with respect to the judgment rendered April 1, 2009, convicting the defendant of attempted use of a child in a sexual performance under Superior Court Information No. 553/09, and merely referred to the defendant's plea of guilty to attempted use of a child in a sexual performance under Indictment No. 2799/10 and to his admission of violating the terms or conditions of his probation. Moreover, counsel failed to address the arguments made by the parties regarding the defendant's motion to withdraw his plea of guilty prior to the imposition of the sentences on January 25, 2011.

In addition, based upon an independent review of the record, we conclude that there are nonfrivolous issues to be raised concerning, inter alia, whether the County Court providently exercised its discretion in denying the defendant's motion to withdraw his plea of guilty (*see People v Graves*, 92 AD3d 799, 800; *People v Peoples*, 24 AD3d 689; *People v Sloane*, 13 AD3d 400). Consequently, the assignment of new counsel is warranted (*see Anders v California*, 386 US 738; *People v Stokes*, 95 NY2d 633).

MASTRO, J.P., SKELOS, CHAMBERS and SGROI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court