

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001143-MR

KENNER DYER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA ISAAC, JUDGE  
ACTION NO. 03-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Kenner Dyer appeals from a jury verdict finding him guilty of assault in the fourth degree and violation of a domestic violence order. He was sentenced to twelve months and a \$500 fine on each count. Dyer's appointed counsel on appeal filed an Anders brief<sup>1</sup> in support of his motion to withdraw. In the brief, appellate counsel stated that no matter was raised or otherwise preserved by motion from which to base

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<sup>1</sup> Pursuant to procedure outlined in Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S. Ct. 1396 (1967), an appellate counsel who believes an appeal to be wholly frivolous after conscientious examination may so advise the court and request permission to withdraw, supplemented by a brief which contains reference to anything which may support the appeal.

an appeal. This Court granted the motion to withdraw as counsel for appellant. Dyer did not file a pro se supplemental brief. The Commonwealth filed a brief in agreement with appellate counsel's assessment that pursuit of an appeal in this case would be frivolous.

Anders requires that this court conduct a full examination of the proceedings before deciding the merits of the request to withdraw. We now realize that in this case we improvidently granted the request to withdraw before our review of the record. According to Penson v. Ohio, 488 U.S. 75, 82-83, 109 S. Ct. 346, 351, 102 L. Ed. 2d 300 (1988), this court should not have acted on the motion to withdraw before examining the record to determine whether counsel's evaluation of the case was sound. Nevertheless, we are convinced that in this case it is unnecessary to appoint additional counsel. Unlike the Ohio Court in Penson, we find no arguable issues on appeal from our review of the record, detailed below.

Our review of the record in this case discloses no basis for a non-frivolous appeal. Dyer conceded below that there was sufficient evidence to convict him of assault in the fourth degree, and only argued against conviction on the higher offense of assault in the second degree. The Commonwealth provided reasonable notice of intention to introduce other crimes evidence, and Dyer did not object at trial to the

admission of such evidence. Dyer requested a bench trial on the morning of trial, but proceeded with a jury trial when the court did not grant its approval. RCr 9.26(1). Finally, the court and counsel resolved the issue of whether Dyer's attorney could represent him after having represented the victim, Linda Hayes, in a previous, unrelated criminal matter. Under SCR 3.130, Rules of Prof. Conduct, Rule 1.9, the trial court adjudged that this was not a substantially related matter, and Hayes additionally consented on the record to the representation.

Accordingly, we find no genuine issue on which Dyer might have based an appeal. We affirm Dyer's conviction for assault in the fourth degree and violation of a domestic violence order.

ALL CONCUR.

ANDERS BRIEF ON BEHALF OF  
APPELLANT:

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BRIEF FOR APPELLEE:

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