AFFIRMED as MODIFIED; Opinion Filed June 8, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00740-CR

No. 05-19-00742-CR

DAVID ANDREW BROWN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 296-83533-2018 & 96-83534-2018

MEMORANDUM OPINION

Before Justices Myers, Whitehill, and Pedersen, III
Opinion by Justice Myers

Appellant David Andrew Brown appeals his convictions for unlawful possession of a firearm by a felon and possession of a controlled substance in an amount of one gram or more but less than four grams. The indictment in the possession of a controlled substance case included an enhancement paragraph alleging a prior felony conviction involving the manufacture/deliver of a controlled substance. The trial court assessed punishment of eight years in the institutional division, TDCJ, in the possession of a firearm case; and, after finding the enhancement paragraph true, ten years in the possession of a controlled substance

case. The court also imposed a $500 fine and assessed $374 in court costs in the possession of a controlled substance case. In the possession of a firearm case there was no fine, but the court separately imposed $314 in court costs. The prison sentence in the possession of a controlled substance case was suspended and the trial court placed appellant on community supervision for ten years.

On appeal, appellant's attorney has filed a brief in which he concludes the appeal is frivolous and without merit, along with a motion to withdraw as counsel. When an appellate court receives an *Anders* brief asserting no arguable grounds for appeal exist, we must determine that issue independently by conducting our own review of the record. *See Anders v. California*, 386 U.S. 738, 744 (1967) (emphasizing that the reviewing court, and not appointed counsel, determines, after full examination of proceedings, whether the case is "wholly frivolous"); *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991) (quoting *Anders*). An appeal is "wholly frivolous" or "without merit" when it "lacks any basis in law or fact." *McCoy v. Court of Appeals*, 486 U.S. 429, 438 n.10 (1988). Arguments are frivolous when they "cannot conceivably persuade the court." *Id*. at 436. An appeal is not wholly frivolous if it is based on "arguable" grounds. *See Anders*, 386 U.S. at 744.

If we conclude, after conducting an independent review, that "appellate counsel has exercised professional diligence in assaying the record for error" and agree the appeal is frivolous, we should grant counsel's motion to withdraw, *Meza v. State*, 206 S.W.3d 684, 689 (Tex. Crim. App. 2006), and affirm the trial court's

judgment. *In re Schulman*, 252 S.W.3d 403, 409 (Tex. Crim. App. 2008).

The brief meets the requirements of *Anders*. It presents a professional evaluation of the record showing why there are no arguable grounds to advance. *See High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. [Panel Op.] 1978) (determining whether brief meets requirements of *Anders*). In his *Anders* brief, counsel certifies that on October 8, 2019, he mailed to appellant via the United States Postal Service a copy of the brief along with copies of the appellate record, a copy of the motion to withdraw, and a letter advising appellant of his right to file a brief. On October 16, 2019, we sent a letter to appellant notifying him that his attorney had filed a brief in which he determined the appeal was frivolous and without merit, along with a motion to withdraw as counsel. Copies of these documents were included with the letter. Our letter noted that appellant's attorney had informed us that he had sent a copy of the record to appellant, and that we were separately ordering that the record be made available to him. We informed appellant of his right to file a pro se response; that he must do so by November 25, 2019; and that if did not do so by that date the case would be submitted on the brief filed by counsel. Appellant has not filed a pro se response. *See Kelly v. State*, 436 S.W.3d 313, 319–21 (Tex. Crim. App. 2014) (appellant has right to file pro se response to Anders brief filed by counsel).

Although not an arguable issue, we note that one of the two judgments must be modified because it imposes duplicative court costs.

"In a single criminal action in which the defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. ANN. art. 102.073(a). For purposes of this rule, a person convicted of more than one offense in the same trial is convicted of those offenses in a "single criminal action." *Hurlburt v. State*, 506 S.W.3d 199, 201–04 (Tex. App.—Waco 2016, no pet.). When two or more convictions arise from a single criminal action, "each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest category of offense that is possible based on the defendant's convictions." TEX. CODE CRIM. PROC. ANN. art. 102.073(b). A claim challenging the bases of assessed court costs can be raised for the first time on appeal. *Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Burton v. State*, No. 05-18-00608-CR, 2019 WL 3543580, at *2 (Tex. App.—Dallas Aug. 5, 2019) (mem. op., not designated for publication).

The record shows that 05-19-00740-CR, the unlawful possession of a firearm by a felon case, and 05-19-00742-CR, the possession of a controlled substance case, were tried together in a single criminal action. In the possession of a firearm case, appellant was charged a total of $314 for costs on the third-degree felony offense. *See* TEX. PENAL CODE ANN. § 46.04(a). In the possession of a controlled substance case, appellant was charged $374 in court costs in addition to a $500 fine, on the third-degree felony—enhanced to a second-degree felony. *See* TEX. HEALTH &

SAFETY CODE ANN. § 481.115(c). The costs of court in both cases are identical apart from the $60 "Drug Court Program HB 530" fee assessed in the possession of a controlled substance case.

This Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry*, 813 S.W.2d at 529–30. This includes modifying a judgment to eliminate duplicative court costs. *See Burton*, 2019 WL 3543580, at *2; *Rubio v. State*, No. 05–17–00621–CR, 2018 WL 3424362, at *3 (Tex. App.—Dallas July 16, 2018, pet. ref'd) (mem. op, not designated for publication). Therefore, we modify the judgment in 05-19-00740-CR and delete the $314 in duplicative court costs.

CONCLUSION

We have reviewed the record and counsel's brief. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005) (explaining appellate court's duty in Anders cases). We agree the appeal is frivolous and without merit, and we find nothing in the record that might arguably support the appeal. We grant counsel's motion to withdraw.

As modified, we affirm the trial court's judgments.

/Lana Myers/
LANA MYERS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID ANDREW BROWN, Appellant No. 05-19-00740-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 296th Judicial District Court, Collin County, Texas Trial Court Cause No. 296-83533-2018. Opinion delivered by Justice Myers. Justices Whitehill and Pedersen, III participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

***** The part of the judgment that reads "Court Costs" should be changed from "$314" to "N/A."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 8th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID ANDREW BROWN, Appellant No. 05-19-00742-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 296th Judicial District Court, Collin County, Texas Trial Court Cause No. 296-83534-2018. Opinion delivered by Justice Myers. Justices Whitehill and Pedersen, III participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 8th day of June, 2020.