AFFIRMED as MODIFIED; Opinion Filed July 8, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00783-CR

No. 05-19-00787-CR

WILLIE CLEVELAND, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause Nos. F17-17123-H & F17-76539-H

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Myers

Appellant Willie Cleveland appeals two convictions for aggravated robbery. Appellant waived a jury trial, pleaded guilty to each charge, and, in an open plea to the court, pleaded true to the enhancement paragraph in each indictment. The trial court accepted the pleas of guilty and true, made findings of guilty and true as well as deadly weapon findings in each case, and sentenced appellant to thirty years in prison in each case, with the sentences to run concurrently.

On appeal, appellant's court-appointed attorney has filed a brief in which he concludes the appeals are wholly frivolous and without merit, and he has filed an

accompanying motion to withdraw. 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*). Counsel attests that he served on appellant a copy of his motion to withdraw as court-appointed attorney, the brief in

support of that motion to withdraw, and a copy of the clerk's and reporter's record. We advised appellant by letter of his right to file a pro se response, but he 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.); *see also Burton v. State*, No. 05-18-00608-CR, 2019 WL 3543580, at *3 (Tex. App.—Dallas Aug. 5, 2019) (mem. op., not designated for publication). 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*, 2019 WL 3543580, at *3. Moreover,

when, as in this case, the convictions are for the same category of offense and the costs are the same, court costs should be based on the lowest trial court cause number. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dism'd, improvidently granted*, No. PD-0947-16, 2017 WL 1493488 (Tex. Crim. App. Apr. 26, 2017) (not designated for publication); *Duchesneau v. State*, Nos. 02-18-00321-CR, 02-18-00322-CR, 2019 WL 2455619, at *7 (Tex. App.—Fort Worth June 13, 2019, pet. ref'd) (mem. op., not designated for publication).

The record shows the two indictments, both for aggravated robbery, were tried in a single proceeding, and thus fall within a single criminal action. *See Burton*, 2019 WL 3543580, at *3 (citing *Hurlburt*, 506 S.W.3d at 201–04). Also, the costs of court imposed in the two cases are identical ($224), and court costs should not be assessed in cause F17-76539-H (05-19-00787-CR) because it is the higher trial court cause number of the two cases.

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 v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). This includes modifying a judgment to remove duplicative court costs. *See Burton*, 2019 WL 3543580, at *3; *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, the judgment in cause 05-19-00787-CR will be modified to remove the 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 appeals are frivolous and without merit, and we find nothing in the record that might arguably support the appeals.

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

/Lana Myers/
LANA MYERS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
190783F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIE CLEVELAND, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-00783-CR V.	Trial Court Cause No. F17-17123-H.
	Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

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

Judgment entered this 8th day of July, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIE CLEVELAND, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-00787-CR V.	Trial Court Cause No. F17-76539-H.
	Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek 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 "$224" to "N/A."

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

Judgment entered this 8th day of July, 2020.