Preliminary Opinion and Opinion Filed July 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00466-CR

JUAN MANUEL AREVALOS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1900219-M

OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

Appellant Juan Manuel Arevalos was convicted of aggravated sexual assault of a child under fourteen years of age[1] and sentenced to fifteen years' imprisonment.

After appellant filed a notice of appeal and a pauper's oath, the trial court appointed appellate counsel. Appointed appellate counsel filed a brief in which he concluded this appeal is wholly frivolous, without merit, and that there are no

[1] Appellant was originally indicted for aggravated sexual assault of a child under six years of age. In finding appellant guilty, the trial court stated: "I do find you guilty of aggravated sexual assault of a child under 14. Now, based on the evidence, I cannot say beyond a reasonable doubt that I had proof of under 6, so I'm finding you guilty of aggravated sexual assault of a child under 14."

arguable grounds to advance. *See Anders v. California*, 386 U.S. 738 (1967); *Gainous v. State*, 436 S.W. 2d 137, 138 (Tex. Crim. App. 1969). Appellant's appointed counsel also filed a separate motion to withdraw stating he (1) informed appellant of the motion to withdraw and the filing of the *Anders* brief, (2) provided appellant with the "requisite copies required by *Kelly*[2] while notifying him of his various pro se rights," and (3) supplied him with a form motion for pro se access to the appellate record as well as the mailing address for this Court.[3]

In *Anders,* the United States Supreme Court outlined a procedure for ensuring that an indigent defendant's right to counsel on appeal is honored when his appointed attorney concludes that the appeal is without merit. 386 U.S. at 744. If the appointed attorney finds, after a conscientious examination of the record, that the case is "wholly frivolous," he should so advise the appellate court, request permission to

[2] *See Kelly v. State*, 436 S.W.3d 313, 319–20 (Tex. Crim. App. 2014), which holds that an appointed attorney who files an *Anders* brief must fulfill a number of additional functions: (1) notify his client of the motion to withdraw and the accompanying *Anders* brief, providing him a copy of each; (2) inform him of his right to file a pro se response and of his right to review the record preparatory to filing that response; (3) inform him of his pro se right to seek discretionary review should the court of appeals declare his appeal frivolous; and (4) take concrete measures to initiate and facilitate the process of actuating his client's right to review the appellate record, if that is what his client wishes.

[3] By letter dated November 19, 2019, we advised appellant of his right to file a pro se response by December 19, 2019, and that failure to file a pro se response by that date would result in the case being submitted on the brief filed by appointed appellate counsel. After appellant informed this Court that he wished to file a pro se response to the *Anders* brief filed by appellate counsel, we ordered appointed appellate counsel to provide appellant with copies of the clerk's and reporter's records. Appointed appellate counsel thereafter notified this Court by letter dated January 2, 2020, that a copy of the clerk's and reporter's record was sent to appellant on December 10, 2019. Appellant's pro se response was due by February 7, 2020. To date, this Court has not received a pro se response from appellant.

withdraw, and file a brief referring to anything in the record that might arguably support the appeal. *Id.*; *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008); *see also McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 437–39 (1988).

The purpose of the brief filed in support of counsel's motion to withdraw, the "*Anders* brief," is to satisfy the appellate court that the appointed attorney's motion to withdraw is based upon a conscientious and thorough review of the law and facts. *Kelly v. State*, 436 S.W.3d 313, 318 (Tex. Crim. App. 2014) (citing *In re Schulman,* 252 S.W.3d at 408). The *Anders* brief should reflect that the appointed attorney has adequately researched the case and used due diligence investigating potential error before requesting to withdraw from further representation. *In re Schulman*, 252 S.W.3d at 407. Texas courts further require an *Anders* brief to refer to anything in the record that might arguably support the appeal, with citations to the record and legal authority. *High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. [Panel Op.] 1978); *see also Stafford v. State*, 813 S.W.2d 503, 510 n. 3 (Tex. Crim. App. 1991). The Court of Criminal Appeals has specifically held that an *Anders* brief has certain requirements:

> [I]n contested cases where "frivolous appeal" briefs are filed by court-appointed counsel . . . [courts] . . . should not . . . accept such briefs unless they discuss the evidence adduced at the trial, point out where pertinent testimony may be found in the record, *refer to pages in the record where objections were made, the nature of the objection, the trial court's ruling, and discuss either why the trial court's ruling was correct or why the appellant was not harmed by the ruling of the court*.

High, 573 S.W.2d at 813 (emphasis added). If done correctly, an *Anders* brief can be more difficult and time-consuming to prepare than an ordinary appellate brief. *Banks v. State*, 341 S.W.3d 428, 431 (Tex. App.—Houston [1st Dist.] 2009, order); *Wilson v. State*, 40 S.W.3d 192, 196 (Tex. App.—Texarkana 2001, order.); *see also United States v. Wagner*, 158 F.3d 901, 902 (5th Cir. 1998).

When an appellate court receives an *Anders* brief from an appellant's court-appointed attorney asserting that no arguable grounds for appeal exist, we must determine that issue independently by conducting our own review of the entire record. *Anders*, 386 U.S. at 744; *Stafford*, 813 S.W.2d at 511. If we conclude, after conducting an independent review, that "appellate counsel has exercised professional diligence in assaying the record for error" and agree that 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 at 409; *Crowe v. State*, 595 S.W.3d 317, 320 (Tex. App.—Dallas 2020, no pet.). However, if we conclude either that appellate counsel has not adequately discharged the constitutional duty to review the record for any arguable error, or that the appeal is not wholly frivolous, we abate the appeal and return the cause to the trial court for the appointment of new appellate counsel. *Meza*, 206 S.W.3d at 689; *Crowe*, 595 S.W.3d at 320.

Of course, in order to evaluate which option to exercise, this Court must have the benefit of a brief that fully complies with the requirements of *Anders*.

In this *Anders* brief, appointed appellate counsel has discussed why this appeal is without merit and frivolous because the record reflects no reversible error and, in his opinion, there are no grounds upon which an appeal can be predicated. Counsel specifically discussed and briefed the following: (1) the indictment was sufficient as it alleged all elements necessary to sustain a conviction, (2) the evidence supporting the conviction for aggravated sexual assault of a child under the age of fourteen was sufficient, (3) the trial court's action in overruling appellant's motion for new trial was not error, and (4) the punishment assessed was within the applicable range of punishment for a first-degree felony.

However, our review of the record shows that, although defense counsel at trial made four objections, appointed appellate counsel did not discuss these objections at all. We view such a failure as evidence that counsel failed to make a thorough and professional evaluation of the record. *See Crowe*, 595 S.W.3d at 320. As a result, the filed *Anders* brief in support of the motion to withdraw does not meet the requirements of an *Anders* brief as set forth in *High* and is deficient as to form.[4]

[4] An *Anders* brief can exhibit two types of deficiencies: a deficiency of form or a deficiency of substance. Deficiencies of form include technical violations of the *Anders* requirements, such as failing to cite the record or legal authority, as well as the failure to discuss issues appearing prominently in the record, such as rulings on objections at trial. *Wilson v. State*, 40 S.W.3d 192, 198–200 (Tex. App.—Texarkana 2001, order) (finding deficiencies of form in an *Anders* brief where appointed counsel failed to discuss the admission of evidence over objection); *see also In re N.F.M.*, 582 S.W.3d 539, 545–46 (Tex. App.—San Antonio 2018, no pet.) (ordering an attorney to re-brief where the *Anders* brief failed to address "the numerous, overruled evidentiary objections at trial"). On the other hand, deficiencies of substance call into question appointed counsel's conclusion that the appeal is without merit. *See Wilson*, 40 S.W.3d at 199. Our determination as to whether the form of an *Anders* brief is sufficient is an inquiry legally distinct from our determination as to whether appointed counsel has correctly concluded the appeal is wholly frivolous. *See In re N.F.M.*, 582 S.W.3d at 546.

See In re N.F.M., 582 S.W.3d 539, 545 (Tex. App.—San Antonio 2018, no pet.) (en banc); *Wilson*, 40 S.W.3d at 198–99 (citing *High*, 573 S.W.2d at 812).

Because we have determined that the filed *Anders* brief does not fully comply with the *Anders* requirements, we cannot yet address whether counsel has made a thorough and complete professional evaluation of the record. Consequently, we strike the filed *Anders* brief and order appointed appellate counsel to file a new brief. *Choice v. State*, No. 05-19-00178-CR, 2020 WL 3166743, at *2 (Tex. App.—Dallas June 15, 2020, no pet. h.) (mem. op., not designated for publication); *Jimenez v. State*, No. 05-18-00848-CR, 2020 WL 3166740, at *2 (Tex. App.—Dallas June 15, 2020, no pet. h.) (mem. op., not designated for publication).[5]

Conclusion

Accordingly, by separate order, we strike the brief filed in this case. We order appellant's counsel, within thirty days of the date of this opinion, to either (1) file a brief that addresses arguable issues found within the record, or (2) if, after a thorough and professional review of the record, counsel identifies no such arguable issues, file an *Anders* brief that complies with the requirements of *High*, 573 S.W.2d at 813.

[5] A number of our sister courts have also afforded appointed counsel the opportunity to re-brief to address the deficiencies in a filed *Anders* brief. *See, e.g., In re N.F.M.,* 582 S.W.3d at 545; *Hung Le v. State*, 510 S.W.3d 96, 100 (Tex. App.—Houston [1st Dist.] 2016, order.); *Randle v. State*, No. 12-15-00240-CR, 2016 WL 3950949, at *2 (Tex. App.—Tyler July 20, 2016, order) (per curiam) (not designated for publication).

Any motion for an extension of time to comply with our order will be looked upon with disfavor.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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