Abated and Opinion Filed July 24, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00391-CR

FRANK PAUL CELAYA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1252876-U

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Molberg

Frank Paul Celaya appeals the trial court's judgment revoking deferred adjudication community supervision and adjudicating him guilty for possession of one gram of methamphetamine in trial court Cause No. F-1252876-U. Appointed appellate counsel filed a motion to withdraw and an *Anders* brief stating she had carefully examined the record and no arguable grounds for appeal exist. For the reasons stated below, we grant appellate counsel's motion to withdraw, we strike the *Anders* brief she filed in this Court, and we remand the case to the trial court and order the trial court to appoint new appellate counsel to represent appellant.

PROCEDURAL HISTORY

Appellant was charged by indictment with possession of more than one gram but less than four grams of methamphetamine. On May 23, 2012, pursuant to a plea agreement under which he pleaded guilty to a charge of possession of one gram of methamphetamine, appellant was placed on deferred adjudication community supervision for a period of five years. On March 7, 2017, appellant's community supervision was extended by twelve months. On August 30, 2017, the State filed a motion to revoke probation or proceed with an adjudication of guilt on the grounds appellant violated certain conditions of his community supervision. According to the State, appellant committed assault on July 4, 2017, in violation of condition (a); failed to report to the community supervision office in March and April 2017, in violation of condition (d); failed to pay community supervision fees in the amount of $3,180, in violation of condition (j); failed to pay Dallas Area Crime Stoppers, Inc. in the amount of $50, in violation of condition (k); and failed to pay restitution in the amount of $206, in violation of condition (o).

At a December 7, 2017 hearing on the State's motion, appellant pleaded "not true" to the State's allegations. After hearing testimony and counsels' arguments, the trial court revoked community supervision,[1] adjudicated appellant guilty, and sentenced him to ten years' incarceration. The judge ordered appellant to return to

[1] Although the record on appeal does not include a formal written order revoking community supervision, it is clear from the context of the judge's statements, as recorded in the hearing transcript, that community supervision was revoked, a conviction was entered, and a ten-year sentence was imposed.

court on June 6, 2018 for a hearing on whether to suspend the remainder of the ten-year sentence. After appellant filed a notice of appeal and a pauper's oath, the trial court appointed Tara Cunningham as counsel. Notice of appeal was filed in this court on April 6, 2018.

On August 6, 2018, Ms. Cunningham filed a motion requesting this Court to grant a thirty-day extension of time to file appellant's brief on the grounds appellant's motion for "shock probation" had been granted by the trial court on June 7, 2018, but she "[had] not been able to contact Appellant regarding that hearing, which may render this appeal moot."[2] Ms. Cunningham further stated, "Appellant's trial counsel informed [her] that shock probation is what Appellant wanted." We granted Ms. Cunningham's motion. In a September 7, 2018 letter to the Court, Ms. Cunningham expressed her opinion the appeal was moot because the trial court granted appellant's motion for shock probation, but she was not able to reach appellant to confirm he no longer wished to pursue this appeal.[3]

On September 12, 2018, we abated the appeal and ordered the trial court to conduct a hearing to determine whether appellant desired to prosecute or abandon the appeal. When no action was taken by the trial court, we followed our order with a November 21, 2018 letter and a second abatement order on January 9, 2019. On

[2] Nothing in the record on appeal shows when appellant was released from prison.

[3] We disagree with Ms. Cunningham's representation the appeal was moot. Regardless of whether appellant had been released from prison, he now has a felony conviction, which would not be the case if the trial court improperly revoked community supervision and proceeded with an adjudication of guilt.

March 19, 2019, a supplemental reporter's record was filed showing the trial court had conducted a hearing, as ordered by this Court, but appellant did not appear. At the hearing, Ms. Cunningham represented she had sent appellant two letters and called three telephone numbers associated with him in an unsuccessful effort to contact him; she had talked to appellant's trial counsel, who also had not been in recent contact with him; and she had informed appellant's mother by telephone "we're going to have a hearing and this is the last opportunity to contact me if he wants to pursue his appeal[.]" Although Ms. Cunningham filed unopposed proposed findings, the trial court did not file findings of fact. By order dated May 7, 2019, this Court reinstated the appeal, and stated new appellate counsel would be appointed if Ms. Cunningham did not file a brief by June 7, 2019. Ms. Cunningham did not file a brief, and on July 5, 2019, we removed Ms. Cunningham as counsel, abated the appeal, and ordered the trial court to appoint new appellate counsel. The trial court appointed Sharita Blacknall.

We reinstated the appeal on July 26, 2019 and ordered the clerk of the Court to list Ms. Blacknall as appellant's counsel of record. On May 18, 2019, Ms. Blacknall filed an *Anders* brief, in which she stated she had reviewed the entire record and, in her opinion, there was no reversible error reflected in the record upon which an appeal could be predicated. *See Anders v. California*, 386 U.S. 738, 744–45 (1967).

On order of this Court,[4] Ms. Blacknall filed a motion to withdraw as appellate counsel on September 21, 2019. In support of her motion to withdraw, Ms. Blacknall represented she had carefully reviewed the record in this case and she was "of the opinion that there is no reversible error and that the appeal is frivolous, and [she] has filed a brief in conformity" with the requirements of *Anders v. California*, 386 U.S. 738. Ms. Blacknall's motion stated, "In connection with this Motion, counsel has provided Appellant with a copy of the [*Anders*] brief, a copy of the record, and informed Appellant that he has the right to file a *pro se* brief."

The next day, however, Ms. Blacknall informed the Court by letter:

> I have been unable to locate Mr. Celaya in the TDCJ offender location system or Dallas County Jail Look Up system in order to send him copies of Anders Brief, Motion to Withdraw and record.
>
> Please advise on what you would like me to do.
>
> I was also unable to locate him at the time that I prepared the Anders as noted in the Identity of parties.[5]

In response, this Court mailed a letter to Ms. Blacknall on September 25, 2019, providing appellant's last known address. To date, Ms. Blacknall has not filed anything—in response to the Court's September 25 letter—indicating she provided appellant with a copy of her *Anders* brief or motion to withdraw, or notified him he has a right to review the appellate record and file a pro se response.

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[4] Ms. Blacknall did not respond to telephone and letter requests to file a motion to withdraw made on September 9, 2019 by the clerk of the Court, precipitating our September 20, 2019 order.

[5] On page iii of her *Anders* brief, Ms. Blacknall lists appellant's address as "unknown."

On October 18, 2019, the clerk of the Court mailed copies of Ms. Blacknall's *Anders* brief and motion to withdraw, along with a letter, to appellant at his last known address and informed him that his attorney had filed the same and that her brief stated she has determined his appeal is frivolous and without merit. The Court's letter apprised appellant of his right to review the appellate record, file a pro se response, and seek discretionary review with the Texas Court of Criminal Appeals should we declare his appeal frivolous. We advised appellant that failure to file a pro se response by November 8, 2019, would result in the case being submitted on the brief filed by his attorney. To date, appellant has not filed a pro se response or otherwise responded to the Court's letter. The State did not file a response brief.

ANALYSIS

This Court has grown weary of pro forma *Anders* briefs that do not reflect that appellate counsel has conducted a conscientious and thorough review of the law and the facts in full compliance with the requirements of *Anders*. When appellate counsel is appointed to represent an indigent defendant, "his only justification for filing an *Anders* brief is his ethical obligation to avoid burdening the courts with wholly frivolous appeals." *Kelly v. State*, 436 S.W.3d 313, 318 (Tex. Crim. App. 2014). After court-appointed appellate counsel files an *Anders* brief asserting that no arguable grounds for appeal exist, we independently examine the record to determine whether an appeal is "wholly frivolous." *Anders*, 386 U.S. at 744. An appeal is wholly frivolous when it lacks any basis in law or fact; an argument is

frivolous if it cannot conceivably persuade the court. *Crowe v. State*, 595 S.W.3d 317, 319 (Tex. App.—Dallas 2020, no pet.).

After conducting an independent examination of the record, if we agree with appellate counsel that no reversible error exists and the appeal is frivolous, we will grant counsel's motion to withdraw and affirm the trial court's judgment. *Id.* If we conclude that appellate counsel has not adequately discharged the constitutional duty to review the record for arguable error, or that the appeal is not wholly frivolous, we will abate the appeal and remand the cause to the trial court for the appointment of new appellate counsel. *Id.*

Without addressing the merits of this appeal, we conclude that at least two arguable issues exist. In its motion to revoke probation or proceed with an adjudication of guilt, the State alleged that appellant violated condition (a) of his community supervision terms by committing a family assault on July 4, 2017, against Sughey Garcia, who appellant refers to as his "wife." However, witness testimony at the hearing reflects no charges were pressed, there was no conviction, and there were no witnesses to the alleged assault. Ms. Garcia testified she and appellant were arguing; she did not believe appellant intentionally struck her on the head with a cell phone; she was not hurt; although she had accused him of pulling her hair at the time of the incident, he "didn't really pull [her] hair"; and she exaggerated her statements to the police and on a 911 call because she was jealous about a text message exchange with another woman that she saw on appellant's

phone. Appellant testified he did not pull Ms. Garcia's hair and he did not intentionally hit her with a cell phone. The State also alleged appellant violated condition (d) of his community supervision terms by not reporting to the community supervision office, as directed, in March and April of 2017. However, the only witness who testified to appellant's alleged non-reporting admitted he had no personal knowledge that appellant did not report and that he did not know whether the records indicating appellant did not report were accurate.

Ms. Blacknall's failure to discuss these issues in her brief shows that she failed to make a thorough and professional evaluation of the record. If Ms. Blacknall failed to address these issues, we cannot assume she did not miss other arguable grounds for appeal, as well.

Appellate counsel additionally has the obligation to (1) notify the appellant of the motion to withdraw and the accompanying *Anders* brief, with copies of each, (2) inform the appellant of his right to file a pro se response and his right to review the appellate record, (3) inform the appellant of his pro se right to discretionary review should the appellate court conclude his appeal is frivolous, and (4) take concrete measures to facilitate the appellant's right to review the appellate record if he wishes to do so. *Kelly*, 436 S.W.3d at 319. Ms. Blacknall has failed to confirm with this Court that she has fulfilled these obligations. In her September 21, 2019 motion to withdraw, Ms. Blacknall misrepresented to this Court that she had provided appellant with a copy of her *Anders* brief—which she had filed on May 18,

2019—and a copy of the record, and that she had informed Appellant of his right to file a pro se brief. The next day, she notified the Court that she did not have appellant's contact information. Even after the clerk of the Court provided Ms. Blacknall with appellant's last known address, she took no action to inform this Court she had fulfilled her obligations under *Kelly v. State*, as she must. 436 S.W.3d at 319 ("Appointed counsel's duties of representation [do] not cease simply because he has submitted a motion to withdraw, along with supporting *Anders* brief. . . . Until such time as the court of appeals relieves him of this professional obligation, appellate counsel must continue to 'act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.'") (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 6).

Instead, this Court provided copies of the *Anders* brief and motion to withdraw to appellant at his last known address and informed him of his right to file a pro se response, review the record, and seek discretionary review if we conclude the appeal is frivolous.

There are two possible outcomes when an *Anders* brief is filed in a criminal case in Texas. "Éither the appellate court confirms that there are no non-frivolous grounds for appeal, thus extinguishing the appellant's constitutional right to appellate counsel, and grants the motion to withdraw, or the appellate court finds that there are plausible grounds for appeal, in which case the appellate court *still*

grants the motion to withdraw, but remands the cause to the trial court for appointment of new appellate counsel." *Kelly*, 436 S.W.3d at 318 n.16.

We grant Ms. Blacknall's motion to withdraw and we strike the *Anders* brief she filed in this Court. We remand the cause to the trial court and order the trial court to appoint new appellate counsel to represent appellant. New appellate counsel must investigate the record and file a brief on the merits that addresses all plausible grounds for appeal. We further order the trial court to notify this Court in writing of the identity of and contact information for new appellate counsel, and the date counsel is appointed. We remove this appeal from the submission docket and abate the appeal for the trial court to comply with the dictates of this opinion.

/Ken Molberg//

KEN MOLBERG
JUSTICE

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