Preliminary Opinion and Opinion Filed July 27, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00371-CR

CLIFTON DEMONE OWENS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F-1854331-I

MEMORANDUM OPINION
Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Osborne

Appellant, Clifton Demone Owens, was convicted by a jury of aggravated robbery and subsequently sentenced by the trial court to twenty-five years' imprisonment.

After appellant filed a notice of appeal and a pauper's oath, the trial court appointed appellate counsel. Appointed counsel filed a brief in which he concluded this appeal is wholly frivolous, without merit, and that there are no 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). Appointed appellate counsel also filed a separate motion to withdraw stating that he sent appellant a copy of the motion and brief and has "complied with the requirements" of *Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014).[1]

Appellant filed a pro se brief alleging error regarding what he termed (1) a lack of evidence, (2) possible tampering with evidence, and (3) deficiencies in the original police report. He also claims that he received ineffective assistance of appellate counsel because appointed counsel filed an *Anders* brief instead of a brief on the merits. In addition, appellant filed a motion asking this Court to replace his appointed counsel with a new attorney.

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 withdraw, and file a brief referring to anything in the record that might arguably

[1] The *Kelly* case clarifies 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. *Kelly v. State*, 436 S.W.3d 313, 319 (Tex. Crim. App. 2014).

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 *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. The *Anders* brief must 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). Specifically, an *Anders* brief must do the following:

> [D]iscuss 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); *see also Arevalos v. State*, No. 05-19-00466-CR, 2020 WL 4199062, at *2 (Tex. App.—Dallas July 22, 2020, no pet. h.) (not yet published) (citing *High,* 573 S.W.2d at 813); *Crowe v. State*, 595 S.W.3d 317, 320 (Tex. App.—Dallas 2020, no pet.) (same).

When we receive an *Anders* brief, we must independently review the entire record to determine whether arguable grounds for an appeal exist. *Anders*, 386 U.S. at 744; *Stafford,* 813 S.W.2d at 511. If, after that independent review, we conclude

"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*, 595 S.W.3d at 320. 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. 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*. *Arevalos*, 2020 WL 4199062, at *2.

In his brief in support of the motion to withdraw, appointed counsel discusses why, in his professional opinion, an appeal from the judgment and sentence is without merit and frivolous because the record reflects no reversible error and there are no grounds upon which an appeal can be predicated. Counsel specifically states that he found no issues presented for review with respect to the following: (1) the indictment, (2) pretrial motions, (3) jury selection, (4) the sufficiency of the evidence, (5) the jury charge, and (6) the arguments of counsel. In addition, appointed counsel provided a thorough and detailed discussion of two sets of objections raised at trial, which he referred to as the "only two significant issues,"

i.e., objections to (1) the denial of a continuance to secure an expert to examine the gun found in appellant's vehicle to determine if it was functional and (2) the qualifications of the sponsoring witness of the penitentiary packet offered into evidence at the punishment phase of the trial. As part of that discussion, appointed counsel provides this Court with detailed reasoning as to why he did not raise actual issues on appeal regarding the trial court's rulings with respect to these two sets of objections.

However, our review of the record shows that, in addition to the "two significant issues" discussed by appointed counsel in the *Anders* brief, trial counsel made multiple additional objections, both at the guilt/innocence and punishment phases of the trial. Appointed counsel does not identify or describe any of those additional objections, nor does he discuss why the trial court's rulings on those objections were either correct or not harmful to appellant. As a result, the filed *Anders* brief in support of the motion to withdraw is deficient as to form. *Arevalos*, 2020 WL 4199062, at *3, n.4 (and cases cited therein). Because 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. *Id*.

Conclusion

Accordingly, and by separate order, we strike the brief filed in this case. We deny appointed counsel's motion to withdraw. We order appointed counsel, within thirty days of the date of this opinion and order, to either (1) file a brief that addresses arguable issues found within the record, or (2) if, 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. Appointed counsel should also address the issues raised in appellant's pro se response.[2] We deny appellant's pro se motion for new counsel.

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

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
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[2] We express no opinion as to whether there is, or is not, a potentially meritorious issue in this record. Our determination of whether the form of an *Anders* brief is sufficient is an inquiry legally distinct from our determination of whether appointed counsel has correctly concluded the appeal is wholly frivolous. *See Interest of N.F.M.*, 582 S.W.3d 539, 546 (Tex. App.—San Antonio 2018, order).