Opinion filed March 16, 2017

In The

Eleventh Court of Appeals

No. 11-16-00181-CR

ANA LUISA ROMERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 266th District Court
Erath County, Texas
Trial Court Cause No. CR14439

M E M O R A N D U M O P I N I O N

The jury convicted Ana Luisa Romero of the offense of delivery of more than four grams but less than two hundred grams of methamphetamine. The jury assessed her punishment at confinement for ten years and a fine of $5,000, and the trial court sentenced her accordingly. We modify the trial court's judgment to delete certain fees, and we dismiss the appeal.

Appellant's court-appointed counsel has filed a motion to withdraw. The motion is supported by a brief in which counsel professionally and conscientiously examines the record and applicable law and states that he has concluded that the appeal is frivolous. Counsel has provided Appellant with a copy of the brief, a copy of the motion to withdraw, an explanatory letter, a copy of the clerk's record, and a copy of the reporter's record. Counsel also advised Appellant of her right to review the record and file a response to counsel's brief. Despite being granted an extension of time in which to file her response, Appellant has not filed a pro se response to counsel's brief.

Court-appointed counsel has complied with the requirements of *Anders v. California*, 386 U.S. 738 (1967); *Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014); *In re Schulman*, 252 S.W.3d 403 (Tex. Crim. App. 2008); *Stafford v. State*, 813 S.W.2d 503 (Tex. Crim. App. 1991); *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. [Panel Op.] 1978); *Currie v. State*, 516 S.W.2d 684 (Tex. Crim. App. 1974); *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969); and *Eaden v. State*, 161 S.W.3d 173 (Tex. App.—Eastland 2005, no pet.). In addressing an *Anders* brief and pro se response, a court of appeals may only determine (1) that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error or (2) that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues. *Schulman*, 252 S.W.3d at 409; *Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005). Following the procedures outlined in *Anders* and *Schulman*, we have independently reviewed the record, and we agree that the appeal is without merit and should be dismissed. *See Schulman*, 252 S.W.3d at 409. In this regard, we note that no evidentiary matters were preserved for appellate review and that Appellant testified at trial and admitted to the offense.

We note, however, that the judgment contains nonreversible error. In the judgment, the trial court ordered Appellant to pay "Restitution" that included court-appointed attorney's fees in the amount of $2,200 to the district clerk and a lab fee of $180 to the "Texas DPS." Neither of these fees were pronounced in open court. The record reflects that the trial court had found Appellant to be indigent and had appointed counsel to represent her at trial and on appeal. A defendant who has been determined to be indigent is presumed to remain indigent, and court-appointed attorney's fees cannot be assessed against such a defendant unless there is proof and a finding by the trial court that the defendant is no longer indigent. TEX. CODE CRIM. PROC. ANN. arts. 26.04(p), 26.05(g) (West Supp. 2016); *Cates v. State*, 402 S.W.3d 250, 251–52 (Tex. Crim. App. 2013); *Mayer v. State*, 309 S.W.3d 552, 555–56 (Tex. Crim. App. 2010). In this case, the record contains no such proof or finding. Nor does the record contain any evidence related to the $180 lab fee that was assessed as restitution.

Restitution is punishment. *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009). Therefore, to be valid, it must be included in the oral pronouncement of sentence. *Wells v. State*, No. 12-11-00327-CR, 2012 WL 4107321, at *2 (Tex. App.—Tyler Sept. 19, 2012, no pet.) (mem. op., not designated for publication); *Sauceda v. State*, 309 S.W.3d 767, 769 (Tex. App.—Amarillo 2010, pet. ref'd). Because the restitution was not orally pronounced during Appellant's sentencing or awarded to a crime victim or a crime victim's compensation fund and because no evidence supports such restitution, it should be deleted from the judgment. *See Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004) (stating that, when there is a conflict between written judgment and oral pronouncement, the oral pronouncement controls); *Milligan v. State*, No. 02-16-00035-CR, 2016 WL 6123643, at *1–2 & n.2 (Tex. App.—Fort Worth Oct. 20, 2016, no pet.) (mem. op., not designated for publication) (deleting from judgment $180 in lab-related

restitution payable to the Texas Department of Public Safety); *Cain v. State*, No. 12-13-00178-CR, 2014 WL 2978159, at *1 (Tex. App.—Tyler June 30, 2014, no pet.) (mem. op., not designated for publication) (deleting $140 DPS lab fee from judgment for lack of evidence to support fee); *Wells*, 2012 WL 4107321, at *2 (deleting DPS lab fee from judgment because it was not included in oral pronouncement of defendant's sentence).

We hold that the trial court erred when it assessed the lab fee and the court-appointed attorney's fees against Appellant. We modify the trial court's judgment to delete both.

We note that counsel has the responsibility to advise Appellant that she may file a petition for discretionary review with the clerk of the Texas Court of Criminal Appeals seeking review by that court. TEX. R. APP. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a *pro se* petition for discretionary review under Rule 68."). Likewise, this court advises Appellant that she may file a petition for discretionary review pursuant to TEX. R. APP. P. 68.

The judgment of the trial court is modified to delete the lab fee of $180 and the court-appointed attorney's fees of $2,200; the motion to withdraw is granted; and the appeal is dismissed.

PER CURIAM

March 16, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.