Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00389-CR

Paul **PADILLA** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 399th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR2112
Honorable Ray Olivarri, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 28, 2017

AFFIRMED AS MODIFIED

Appellant Paul Padilla Jr. was charged by two-count indictment: (I) possession with intent to deliver a controlled substance, methamphetamine, in an amount of four grams or more but less than 200 grams, and (II) possession of a controlled substance, methamphetamine, in an amount of four grams or more but less than 200 grams. The State alleged that Padilla was previously convicted of a felony on February 26, 1997, and after that conviction was final, Appellant was convicted of a second felony on January 23, 2001. The State proceeded to trial only on count two, and a jury found Appellant guilty. Appellant pled true to the two prior felonies and the trial court

sentenced Appellant to confinement in the Texas Department of Criminal Justice—Institutional Division for a period of fifty years. Appellant timely filed a notice of appeal.

COURT-APPOINTED APPELLATE COUNSEL'S *ANDERS* BRIEF

Padilla's court-appointed appellate attorney filed a brief containing a professional evaluation of the record in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. [Panel Op.] 1978); counsel also filed a motion to withdraw. In appellate counsel's brief, he recites some of the relevant facts with citations to the record, very briefly analyzes the record with respect to jurisdiction and the indictment, and accompanies that analysis with relevant legal authorities. Counsel concludes the appeal is frivolous and without merit. *See Nichols v. State*, 954 S.W.2d 83, 85 (Tex. App.—San Antonio 1997, no pet.).

We conclude the brief meets the *Anders* requirements. *See Anders*, 386 U.S. at 744; *see also High*, 573 S.W.2d at 813; *Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969). Counsel provided Padilla with copies of the brief and counsel's motion to withdraw, and informed Padilla of his right to review the record and file a pro se brief. *See Nichols*, 954 S.W.2d at 85–86; *see also Bruns v. State*, 924 S.W.2d 176, 177 n.1 (Tex. App.—San Antonio 1996, no pet.). Appellant requested a copy of the appellate record, and this court provided it to him. This court also advised Padilla of his right to file a pro se brief and we set a due date for that brief. *See Kelly v. State*, 436 S.W.3d 313, 319–20 (Tex. Crim. App. 2014). Padilla did not file a pro se brief.

ERRORS IN JUDGMENT

In our review of the record, we observed errors in the judgment.

A. Degree of Offense

The record conclusively establishes that Padilla was convicted of possession of a controlled substance, methamphetamine, in an amount of at least four grams but less than 200 grams. *See*

TEX. HEALTH & SAFETY CODE ANN. § 481.115(d) (West 2017) (making it a second-degree felony to possess 4–200 grams of a controlled substance without proper authorization); *Moore v. State*, 371 S.W.3d 221, 223 (Tex. Crim. App. 2012) (recognizing same). The degree of offense is "a felony of the second degree." TEX. HEALTH & SAFETY CODE ANN. § 481.115(d); *accord Penton v. State*, 489 S.W.3d 578, 581 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) ("Possession of methamphetamine weighing more than four grams and less than two [hundred] grams is a second-degree felony."). The judgment indicates the degree of offense was "1ST." The judgment does not accurately indicate the degree of offense.

B. Pleas, Findings on Enhancement Paragraphs

Further, the judgment states under the heading "Plea to 1st Enhancement Paragraph" "TRUE TO HABITUAL" and under the heading "Findings on 1st Enhancement Paragraph" "TRUE TO HABITUAL." The text boxes under the headings "Plea to 2nd Enhancement/Habitual Paragraph" and "Findings on 2nd Enhancement/Habitual Paragraph" are blank.

A single prior felony conviction, as stated in the first enhancement paragraph, cannot meet the statutory requirement for a habitual felony offender. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016); *Jordan v. State*, 256 S.W.3d 286, 290–91 (Tex. Crim. App. 2008). But the indictment included two properly pleaded enhancement paragraphs, and Padilla pled true to both. The trial court found both to be true. The judgment does not accurately indicate the pleas and findings pertaining to the two enhancement paragraphs.

C. Punishment Range

Assuming, without deciding, there was some error in establishing the second enhancement, such as the State failed to prove the second prior felony was final before the offense for which Padilla presently stands accused was committed, there would still be no harm to Padilla. A single prior felony conviction is sufficient to change the punishment range from a second-degree felony

to a first-degree felony. *See* TEX. PENAL CODE ANN. § 12.42(b); *Crawford v. State*, 509 S.W.3d 359, 364 (Tex. Crim. App. 2017) (recognizing that Penal Code section 12.42(b) acts to "enhance punishment for a second degree felony to a first degree felony with one prior felony conviction"). The State's evidence showed Padilla committed a felony in 1997 that was final, Padilla pled true to the enhancement, and the trial court found it to be true. Padilla's fifty-year sentence is within the punishment range for a single first-degree felony, and no second enhancement was required to impose a fifty-year sentence. *See* TEX. PENAL CODE ANN. § 12.42(b) (enhancing the punishment range from second- to first-degree felony for a single prior felony conviction); *id.* § 12.32(a) (specifying an imprisonment term of life or 5–99 years for a first-degree felony punishment); *Berger v. State*, 104 S.W.3d 199, 206 (Tex. App.—Austin 2003, no pet.).

D. Authority to Modify Judgment

This court may correct certain errors in a judgment by modifying the judgment. *See Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("'Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record.'" (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd)); *Penton*, 489 S.W.3d at 581. Here, the record conclusively establishes that Padilla was convicted of a second-degree felony, he pled true to the first and second enhancement paragraphs, and the trial court found the first and second enhancement paragraphs to be true.

Accordingly, we MODIFY the language of the judgment as follows:

- under the heading "Degree of Offense" that reads "1ST," we MODIFY the language to read "2ND DEGREE FELONY";
- under the heading "Plea to 1st Enhancement Paragraph" that reads "TRUE TO HABITUAL," we MODIFY the language to read "TRUE";

- under the heading "Plea to 2nd Enhancement/Habitual Paragraph" that is blank we MODIFY the language to read "TRUE";
- under the heading "Findings on 1st Enhancement Paragraph" that reads "TRUE TO HABITUAL," we MODIFY the language to read "TRUE";
- under the heading "Findings on 2nd Enhancement/Habitual Paragraph" that is blank we MODIFY the language to read "TRUE"; and
- we do not modify any other language in the judgment.

CONCLUSION

Having reviewed the entire record and court-appointed counsel's *Anders* brief, we agree with Padilla's court-appointed appellate counsel that there are no arguable grounds for appeal and the appeal is wholly frivolous and without merit. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005). We affirm the trial court's judgment as modified and grant appellate counsel's motion to withdraw. *See Nichols*, 954 S.W.2d at 85–86; *Bruns*, 924 S.W.2d at 177 n.1.

No substitute counsel will be appointed. Should Padilla wish to seek review of this case by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or he must file a pro se petition for discretionary review. Any petition for discretionary review must be filed within thirty days from the date of either (1) this opinion or (2) the last timely motion for rehearing or motion for en banc reconsideration is overruled by this court. *See* TEX. R. APP. P. 68.2. Any petition for discretionary review must be filed with the clerk of the Texas Court of Criminal Appeals. *Id.* R. 68.3(a). Any petition for discretionary review must comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure. *Id.* R. 68.4.

Patricia O. Alvarez, Justice

DO NOT PUBLISH