In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00090-CR

TREY ANDERSON A/K/A ATTRAYELLE ANDERSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from County Court at Law No. One
Lubbock County, Texas
Trial Court No. 2016-486,238; Honorable Mark Hocker, Presiding

September 15, 2017

ABATEMENT AND REMAND

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant, Trey Anderson a/k/a Attrayelle Anderson, was given permission by the trial court to appeal his conviction for misdemeanor assault to which he plead guilty.[1] In presenting this appeal, court-appointed counsel has filed an *Anders*[2] brief in support of a motion to withdraw. We grant the motion to withdraw, abate the appeal, and remand

[1] TEX. PENAL CODE ANN. § 22.01(a)(1), (b) (West Supp. 2016).

[2] *Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

the cause to the trial court for appointment of new counsel to represent Appellant in this appeal.

BACKGROUND

By two counts contained in one information, Appellant was charged with the offense of assault. Appellant entered a plea of "guilty" as to the assault charge alleged in count one and the assault charge alleged in count two was dismissed. While the clerk's record does contain a document entitled *Written Admonishments on Plea of Guilty or Nolo Contendere,* it does not contain a written waiver of a reporter's record. Notwithstanding the absence of such a waiver, no reporter's record of the plea hearing was made. In lieu of filing a reporter's record of the proceeding, the official court reporter has filed with this court a letter confirming that the guilty-plea hearing was not recorded.

After Appellant's conviction, the trial court originally signed a *Trial Court's Certification of Defendant's Right to Appeal* which reflected that the case was "a plea-bargain case and the Defendant ha[d] NO right of appeal." Appellant timely filed a *Motion for New Trial and Motion in Arrest of Judgment.* He subsequently filed his *Notice of Appeal* and a *Motion for Leave to Appeal* in which he claimed his guilty plea was a "misunderstanding of how the charge in this court would affect another charge that was pending against him in New Mexico." Several weeks later, the trial court granted that motion. The order recites that "after hearing arguments from counsel, the Court grants [Appellant's] request for leave to appeal . . . ." A reporter's record of that hearing was not filed as part of the appellate record.

APPLICABLE LAW

The purpose of an *Anders* brief is to explain and support a motion to withdraw when counsel's professional evaluation of the record shows no nonfrivolous issues to present on appeal. *In re Schulman*, 252 S.W.3d 403, 404 (Tex. Crim. App. 2008). When faced with an *Anders* brief, an appellate court has a duty to conduct a full examination of the underlying proceedings, and if its independent inquiry reveals nonfrivolous or arguable issues for appeal, it must abate the proceeding and remand the cause to the trial court for appointment of new counsel to brief those issues. *See Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

ANALYSIS

By the *Anders* brief, counsel represents that without a reporter's record "it is almost impossible to find any reversible error." Acknowledging the limited situations in which a guilty plea may be overturned, she concludes the appeal is frivolous. Counsel asserts that Appellant waived the right to have a court reporter present to record his plea hearing; however, there is no documentation in the record to support that assertion and appellate counsel did not serve as trial counsel.

Rule 13.1 of the Texas Rules of Appellate Procedure mandates that a court reporter make a full record of all proceedings unless excused by agreement of the parties. *See* TEX. R. APP. P. 13.1(a). Nothing filed in this court indicates an agreement to excuse the presence of a court reporter. While we acknowledge that failure to object to the absence of a court reporter and the making of a record may be waived for complaints on appeal requiring a record, we are unable to draw that conclusion on the

record before us.[3] *See Davis v. State*, 345 S.W.3d 71, 77 (Tex. Crim. App. 2011); *Henderson v. State*, Nos. 02-09-161-CR, 02-09-162-CR, 02-09-163-CR, 2010 Tex. App. LEXIS 1592, at *5-6 (Tex. App.—Fort Worth March 4, 2010, no pet.).

A defendant's right to appeal is governed by Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure and article 44.02 of the Texas Code of Criminal Procedure. That right to appeal is, however, limited when the defendant enters into a plea bargain and the punishment does not exceed the punishment recommended by the State and agreed to by the defendant. In that situation, a defendant may appeal only matters that were raised by written motion and filed and ruled on before trial or after getting permission to appeal from the trial court. TEX. R. APP. P. 25.2(a)(2)(A), (B).

In this case, Appellant requested permission from the trial court on the ground that there was a misunderstanding with respect to the terms of his plea bargain. The trial court, for reasons unknown to us because of the lack of a record from the hearing on Appellant's *Motion for Leave to Appeal*, granted Appellant permission to appeal.

Voluntariness of a plea from a plea-bargained conviction may not be raised on direct appeal. *Cooper v. State*, 45 S.W.3d 77, 83 (Tex. Crim. App. 2001). However, when, as here, the trial court grants permission to appeal, Appellant's limited right to appeal extends to a claim that his plea may have been involuntary. *See Lenox v. State*, 56 S.W.3d 660, 664-65 (Tex. App.—Texarkana 2001, pet. ref'd). Although paragraph 7 of the written admonishments contained in the clerk's record includes a provision that the plea was made "freely and voluntarily," we note that paragraph 4 provides that the

[3] Our conclusion is based, in part, on the fact that the trial court necessarily found a sufficient basis upon which to certify that Appellant had a right of appeal.

"trial court must give its permission to the Defendant before the Defendant may prosecute an appeal *on any matter in the case . . . .*" (Emphasis added).

CONCLUSION

Based on the trial court's decision to grant permission to appeal from a plea-bargain case contrary to its certification of defendant's right to appeal and having found that arguable issues exist, we grant counsel's motion to withdraw, abate this appeal, and remand the cause to the trial court for appointment of new counsel. *See Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). Upon remand, the trial court is directed to appoint new counsel to represent Appellant in this appeal and to brief whether the making of a reporter's record of the plea hearing was waived, whether Appellant's plea was voluntary, and any other potential errors that could result in a favorable outcome for Appellant. The trial court shall cause its order appointing counsel to be included in a supplemental clerk's record which shall be filed with the clerk of this court on or before October 16, 2017. Appellant's brief will be due thirty days following the appointment of new counsel. The State may file a brief in response within thirty days after the filing of Appellant's brief.

It is so ordered.

Per Curiam

Do not publish.