In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00323-CR

TORY LYNN LEATHERWOOD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Hale County, Texas
Trial Court No. B20114-1601; Honorable Kregg Hukill, Presiding

May 14, 2021

MEMORANDUM OPINION

Before PIRTLE, PARKER, and DOSS, JJ.

Appellant, Tory Lynn Leatherwood, pleaded guilty to the offense of burglary of a habitation, a second degree felony.[1] Punishment was originally assessed at five years of confinement, suspended for a period of five years. Appellant was also assessed a fine

[1] TEX. PENAL CODE ANN. § 30.02(c)(2) (West 2020). A person commits burglary when, without the effective consent of the owner, he enters a habitation with intent to commit theft. *Id.* at § 30.02(a)(1). A second degree felony is punishable by imprisonment for any term of not more than twenty years or less than two years and a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.33 (West 2020).

of $2,500, court costs, and restitution. In presenting this appeal, counsel has filed an *Anders*[2] brief in support of a motion to withdraw. As modified, we affirm the judgment and grant counsel's motion to withdraw.

In support of his motion to withdraw, counsel certifies he has conducted a conscientious examination of the record, and in his opinion, it reflects no potentially plausible basis for reversal of Appellant's conviction. *Anders v. California*, 386 U.S. 738, 744-45, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). Counsel candidly discusses why, under the controlling authorities, the record supports that conclusion. *See High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. 1978). Counsel has demonstrated that he has complied with the requirements of *Anders* and *In re Schulman* by (1) providing a copy of the brief to Appellant, (2) notifying him of the right to file a *pro se* response if he desired to do so, and (3) informing him of the right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408.[3] By letter, this court granted Appellant an opportunity to exercise his right to file a response to counsel's brief, should he be so inclined. *Id.* at 409 n.23. Appellant did not file a response.

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

[3] Notwithstanding that Appellant was informed of his right to file a *pro se* petition for discretionary review upon execution of the *Trial Court's Certification of Defendant's Right of Appeal*, counsel must comply with Rule 48.4 of the Texas Rules of Appellate Procedure which provides that counsel shall within five days after this opinion is handed down, send Appellant a copy of the opinion and judgment together with notification of his right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408 n.22, 411 n.35. The duty to send the client a copy of this court's decision is an informational one, not a representational one. It is ministerial in nature, does not involve legal advice, and exists after the court of appeals has granted counsel's motion to withdraw. *Id.* at 411 n.33.

BACKGROUND

In March 2016, Appellant pleaded guilty to burglary of a habitation. He was placed on community supervision, subject to certain terms and conditions. His community supervision was modified by an agreed order at the end of May 2016, wherein Appellant was required to complete the drug treatment program at Ray D. Anderson Community Corrections Facility. He completed that program in March 2017 but continued to use controlled substances. The State filed its first motion to revoke Appellant's community supervision in October 2018. As a result, Appellant's community supervision was again modified, requiring him to attend ten Narcotics Anonymous meetings. He attended only three of those required ten meetings.

The State filed its second motion to revoke in September 2020. The court held a "Zoom hearing" on the motion,[4] during which Appellant pleaded "true" to the State's live allegations.[5] Appellant also testified at the hearing, admitting his drug problem and asking to remain on community supervision and to receive drug treatment. He admitted he was "in the shoes I'm in because of poor choices that I made." Appellant's community supervision officer was the only other witness to testify at the hearing. She confirmed the truth of the State's allegations and told the court that while Appellant was currently

[4] In response to the imminent threat presented by the COVID-19 pandemic, the Texas Supreme Court issued numerous emergency orders authorizing "anyone involved in any hearing . . . to participate remotely, such as by teleconferencing, videoconferencing, or other means . . . ." One such order was effective as of the date of this hearing.

[5] At the outset of the hearing, the State abandoned its first allegation.

requesting placement in SAFPF,[6] he had refused to be placed in that program on five or six previous occasions.

At the conclusion of the hearing, the trial court found, based on Appellant's pleas of "true" and the evidence presented, that Appellant had violated the conditions of his community supervision and sentenced him to the original five years of imprisonment, but reduced the assessed fine from $2,500 to $2,000.

ANALYSIS

By the *Anders* brief, counsel evaluates, among other things, due process requirements, adverse pretrial motions, adverse rulings, sufficiency of the evidence, fundamental error, propriety of the imposed sentence, adverse post-trial rulings, and ineffective assistance of counsel. He determines there were no arguable grounds on which to reverse Appellant's conviction.

We too have independently examined the record to determine whether there are any non-frivolous issues which might support an appeal. *See Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *In re Schulman*, 252 S.W.3d at 409; *Stafford*, 813 S.W.2d at 511. We have found no such issues. *See Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969). We note that proof of one violation of the terms and conditions of community supervision is sufficient to support the revocation. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009); *Moses v. State,* 590 S.W.2d 469 (Tex. Crim. App. 1979). A plea of "true" alone is sufficient to support the trial court's

[6] SAFPF is a Substance Abuse Felony Punishment Facility designed for persons under felony community supervision or confinement that have been identified as having a substance abuse problem.

determination to revoke. *Moses*, 590 S.W.2d at 469. After reviewing the record and counsel's brief, we agree with counsel's assessment that there is no plausible basis for reversal of Appellant's conviction. *See Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

MODIFICATION OF JUDGMENT

Counsel noted in his *Anders* brief that the trial court's judgment contained in the clerk's record reflects a clerical error. The summary portion of the judgment contains the question, "IS ORIGINAL JUDGMENT/SENTENCE REFORMED?" The answer that appears in the written judgment is "NO." The reporter's record, however, reveals that at the conclusion of the hearing, the trial court reduced the fine assessed against Appellant from the original amount of $2,500 to a modified amount of $2,000.[7]

This court has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). 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. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). The power to modify or reform a judgment is "not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the

[7] Fines are punitive in nature and "are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal Code, which is entitled 'Punishments.'" *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011).

trial court." *Id.* at 529-30. Thus, we modify the trial court's judgment to reflect a response of "YES" to the identified question in the summary portion of the judgment.

CONCLUSION

As modified, the trial court's judgment is affirmed and counsel's motion to withdraw is granted.

Patrick A. Pirtle
Justice

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