COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

KEVIN MARK BASFORD,	§	No. 08-20-00110-CR
Appellant,	§	Appeal from the
v.	§	132nd District Court
THE STATE OF TEXAS,	§	of Scurry County, Texas
Appellee.	§	(TC# 10678)
	§	

DISSENTING OPINION

I would hold that the moment the court-appointed attorney for Appellant became of the opinion that an appeal in this case would be frivolous, he was in conflict with his client, who had previously instructed the attorney to pursue an appeal. Based upon Sixth Amendment principles outlined by the Supreme Court of the United States, counsel for Appellant was required to advise this Court of his belief and request permission to withdraw. *See Anders v. State of California*, 386 U.S. 738, 744 (1967). That request to withdraw was required to "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id*. Such a brief is commonly known as an *Anders* brief. *See In re Shulman*, 252 S.W.3d 403, 407 (Tex.Crim.App. 2008).

Ignoring that constitutional obligation, counsel—who was also Appellant's trial counsel—unilaterally decided to advise Appellant that it was his belief that an appeal would be frivolous and asked the client to voluntarily waive his right to appeal. Naturally, the Appellant agreed to do so. Counsel filed a Motion to Dismiss under Texas Rule of Appellate Procedure 42.2(a), attaching a document titled "Appellant's Instruction to Attorney," signed by the Appellant, purporting to instruct counsel that he wished to waive his right to appeal. The signed Instruction stated the following:

> My name is Kevin Mark Basford. My appellate attorney, Trey Keith, believes that the Trial Record does not contain any reversible errors; he indicated to me that he will probably be required to file a 'Frivolous Appeal Brief', by which he will tell the Court of Appeals there was no apparent error in my trial. For this reason, my attorney has asked me whether I wish to continue with an appeal.

Concerned with the juxtaposition of the Appellant's Sixth Amendment right to effective assistance of counsel on the one hand and his right to exercise a free choice to dismiss his own appeal on the other hand, this Court ordered the case back to the trial court to determine whether the Motion to Dismiss was done so knowingly, intelligently, and voluntarily. Joining in that ruling, I had hoped that the resulting record of that hearing would establish either that Appellant had clearly and unequivocally waived his right to appeal, without relying on counsel's conflicted assertion that an appeal would be frivolous, or that the trial court would ensure that a newly appointed attorney would simply proceed with the well-settled *Anders* protocol. On March 12, 2021, a hearing was held in the 132nd District Court of Scurry County, after which the trial court found that the Appellant knowingly waived his right to appeal. Unfortunately, after reading the transcript of the hearing, my concerns are not abated; in fact, more have arisen.

Pursuant to this Court's order, the Appellant was represented by another attorney, other than Mr. Keith, at the hearing. I will refer to her as Appellant's hearing-attorney, although

Mr. Keith was also in attendance. Appellant was placed under oath and his hearing-attorney asked whether he understood the *Anders* briefing process, to which the Appellant answered that he recalled the terminology but was not sure what the definition was. His hearing-attorney then asked if he understood "that there was a process [the Appellant] could go through where Mr. Keith would submit a report or a brief to the Court of Appeals stating that [Mr. Keith] thought the appeal was frivolous and then [the Appellant] could appeal on [his] own . . ." to which the Appellant answered in the affirmative. Shortly thereafter, Appellant's hearing-attorney passed the witness. The State had no questions, nor did Mr. Keith.

The trial court then questioned the Appellant to confirm that he was voluntarily waiving his right to appeal. In response, the Appellant made the following lengthy statement:

> I had -- my own thoughts on it was I had the plea deal from [the prosecutor] was a five year, $1,500.00 . . . fine, and then I felt as though I was really innocent and I wanted to plead my case to you in person and in court thinking that you were going to grant me even more leniency, or have some sort of understanding on my behalf and give me a better -- I thought you were going to give me a better sentence. And then after the trial, after going through the trial and everything, I got eight years and an $8,000.00 fine, and so I was really frustrated and upset about that. So that's when I decided to make the decision not to appeal the case and go any further because the sentencing was just getting worse the more that I was trying to work and get everybody's understanding about it. So that was my thought process on why I did want to waive the appeal.

The Court then endeavored to explain the *Anders* process to the Appellant again:

> Do you understand that even if Mr. Keith filed what's called - - what [Appellant's hearing-attorney] called an *Anders* brief, which says there is no real basis for winning this appeal and therefore an appeal asking that the case be reversed is frivolous, that's basically what an *Anders* brief says. Even though Mr. Keith might have filed such a motion, or such a brief I should say, even so, you would still have the right to file an appeal on your own.

In response, Appellant answered in the affirmative again. The hearing concluded with the trial court finding that Appellant's waiver of his right to appeal was done knowingly, intelligently, and intentionally and that Appellant no longer wished to appeal.

I write separately from the majority as I continue to be concerned that Appellant's desire to waive his right to appeal was based upon the conflicted advice from his attorney that an appeal would be frivolous. Such a belief held by counsel should have triggered a motion to withdraw accompanied by an *Anders* brief, not a request by counsel that Appellant himself remove the conflict by voluntarily waiving his constitutional right to appeal. *See Anders*, 386 U.S. at 744; *In re Shulman*, 252 S.W.3d at 407 (describing the *Anders* brief as an "obligation" of counsel). As the Texas Court of Criminal Appeals observed, "the ethical rules for attorneys do require them to zealously represent their clients until the point when they are permitted to withdraw from the case." *Kelly v. State*, 436 S.W.3d 313, 323 (Tex.Crim.App. 2014).

After the hearing, my concerns are now compounded by: (1) the Appellant's testimony that—at least at one time—he believed himself to be "really innocent;" (2) the Appellant's misplaced fear that his sentence and fine could continue to get more severe if he pursues an appeal; and (3) that Appellant's hearing-attorney and the trial court both provided over-simplified explanations of the *Anders* process, both explicitly describing the appeal as something he would have to do on his own.

The main purpose of an *Anders* brief is so that an appellant is not completely on his or her own; it exists so that an indigent client who wishes to appeal his conviction or sentence has as much assistance from an advocate as the advocate can lend without violating his or her honor or other duties to the court. *See Anders*, 386 U.S. at 744. This procedure serves the attorney's professional responsibilities to zealously advocate for his client and to refrain from filing frivolous pleadings. *In re Shulman*, 252 S.W.3d at 406–07. Further, it protects the attorney from future allegations of ineffectiveness or lack of due diligence. *Id*. at 408. The *Anders* brief serves two other important purposes, given that a copy must also be provided to the defendant. *See Anders*, 386

U.S. at 744. It provides the specific citations to the record in the event that a defendant wishes to exercise his or her right to file a *pro se* brief. *Id*. And it also provides the appellate court with a framework so that it may conduct its own independent review of the record to ensure that the attorney has indeed made a legally correct determination that the appeal is frivolous. *In re Shulman*, 252 S.W.3d at 407.

These citations to *Anders* and *Shulman* paint a different picture of this process than what was presented to Appellant on the record. First, an *Anders* brief is more detailed than a mere statement to the appellate court that an appeal is frivolous; while that may be the conclusion, an *Anders* brief must explain how that conclusion was reached by addressing all plausible points of error. *See In re Shulman*, 252 S.W.3d at 406. Second, although the Appellant would be given an opportunity to respond to an *Anders* brief, he would be under no obligation to do so. *See id*. at 408 (stating that the brief provides the defendant with appropriate citations to the record if he wishes to exercise his right to file a *pro se* brief). Third, filing a *pro se* brief in an already-existing appeal—with an *Anders* brief for reference—is hardly the same as filing an appeal alone, as it was explained to him by the hearing-attorney and the trial court; if he chose to respond, it would be with the benefit of knowing all legally-plausible arguments, along with relevant citations to the trial record. Lastly, all of that is to say nothing of this Court's current inability to conduct our own efficient and independent review of the record to decide whether the case is wholly frivolous. *See Anders*, 386 U.S. at 744. Indeed, we will not do so here, since this case is being treated as a voluntary dismissal under Texas Rule of Appellate Procedure 42.2(a).

In short, I would hold that the moment Mr. Keith became of the opinion that an appeal would be frivolous, he was required to file with this Court a motion to withdraw accompanied by an *Anders* brief with a copy of each provided to the Appellant. *See Anders*, 386 U.S. at 744. We

would then have given the Appellant adequate time to file a *pro se* brief, if he so chose. Then we would have conducted our own review of the case—with record and *Anders* brief in hand—to determine whether the appeal was wholly frivolous. Because I believe that a voluntary dismissal is not properly supported by our record, I part ways with the majority. Most concerning here, Appellant confirms on this record that he has been informed by his counsel that his appeal would be frivolous and, even though he believed himself to be innocent of the charge and had been frustrated by the result of his trial, he now holds a mistaken belief that his punishment could get worse by continuing with this appeal. At this juncture, instead of a voluntary dismissal, I would deny Appellant's Motion to Dismiss, abate the appeal, and remand for the trial court to appoint new counsel to represent Appellant on this matter. For these reasons, I respectfully dissent.

March 29, 2021

GINA M. PALAFOX, Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

(Do Not Publish)