Opinion filed May 18, 2017

In The

Eleventh Court of Appeals

No. 11-16-00335-CR

CHRISTI LYNN TUCKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 91st District Court
Eastland County, Texas
Trial Court Cause No. 23278

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

Appellant, Christi Lynn Tucker, originally pleaded guilty to the third-degree felony offense of assault causing bodily injury to a family or household member, with a prior conviction for that offense. Pursuant to the terms of the plea agreement, the trial court deferred a finding of guilt and placed Appellant on community supervision for three years. The State subsequently filed its first motion to proceed with an adjudication of Appellant's guilt. The terms and conditions of Appellant's community supervision were modified and extended, and the State's motion to

adjudicate was dismissed. The State subsequently filed its second motion to proceed with an adjudication of Appellant's guilt. At a contested hearing on that motion, the trial court found the State's allegations to be true, adjudicated her guilty of the charged offense, and assessed her punishment at confinement for ten years. However, the trial court suspended the imposition of Appellant's sentence and placed her on community supervision for five years, and Appellant was required to go to SAFP as a condition of her community supervision. We modify the judgment and 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 and without merit. 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 form motion for pro se access to the appellate record. Counsel also advised Appellant of her right to review the record and file a response to counsel's brief.[1] Appellant filed the motion for pro se access, and this court sent the clerk's record and the reporter's record to her in February 2017. Appellant has not filed a 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);

[1]This court granted Appellant more than thirty days in which to exercise her right to file a response to counsel's brief.

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.).

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. We note that proof of one violation of the terms and conditions of community supervision is sufficient to support revocation. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009). The record from the adjudication hearing shows that the State presented testimony about various violations by Appellant of the terms and conditions of her community supervision as alleged in the State's motion to adjudicate. Appellant testified at the hearing and admitted that she had a substance abuse problem and that she had used methamphetamine on more than one occasion in violation of the terms and conditions of her community supervision. We note that proof of one violation of the terms and conditions of community supervision is sufficient to support revocation and to proceed with an adjudication of guilt. *See id.* Based upon our review of the record, we agree with counsel that no arguable grounds for appeal exist.

We note, however, that the judgment contains a nonreversible error. First, there is a variation between the oral pronouncement of sentence and the written judgment of adjudication. The judgment includes a fine of $2,000. When the trial court adjudicated Appellant's guilt, assessed her punishment, and orally pronounced the sentence in open court, the trial court did not mention a fine. The trial court was required to pronounce the sentence in Appellant's presence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03 (West Supp. 2016); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). When there is a variation between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Coffey v. State*, 979 S.W.2d 326, 328–29 (Tex. Crim. App. 1998); *see also Taylor*, 131 S.W.3d at 500–02 (explaining the distinction between regular community supervision, in

which sentence is imposed but suspended when a defendant is placed on community supervision, and deferred-adjudication community supervision, in which the adjudication of guilt and the imposition of sentence are deferred). Because the trial court did not mention any fine when it orally pronounced Appellant's sentence and because we have the necessary information for reformation, we modify the trial court's judgment to delete the fine. *See Taylor*, 131 S.W.3d at 502; *Cerna v. State*, No. 11-14-00362-CR, 2015 WL 3918259, at *2 (Tex. App.—Eastland June 25, 2015, no pet.) (mem. op., not designated for publication).

Second, the written judgment of adjudication contains an assessment for attorney's fees in the amount of $250. The record reflects that the trial court had found Appellant to be indigent and had appointed counsel to represent her during the adjudication proceedings. 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); *Guerra v. State*, No. 11-16-00214-CR, 2017 WL 390791, at *1 (Tex. App.—Eastland Jan. 26, 2017, no pet.) (mem. op., not designated for publication). In this case, the record contains no such proof or finding.[2] The $250 assessment for attorney's fees that is contained on the written judgment adjudicating Appellant's guilt is erroneous. Other than the necessary reformation of the judgment, we agree with counsel that this appeal is frivolous and without merit.

[2]We note that the record indicates that Appellant's original fines and fees, including the $2,000 fine and $350 for attorney's fees that were assessed when guilt was deferred, were paid in a lump sum by an unknown person on behalf of Appellant during the period of Appellant's deferred adjudication.

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.

We modify the judgment to delete the $2,000 fine and the $250 attorney-fee assessment. Finding the appeal is otherwise meritless, we grant counsel's motion to withdraw and dismiss the appeal.

PER CURIAM

May 18, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Countiss.[3]

Bailey, J., not participating.

[3]Richard N. Countiss, Retired Justice, Court of Appeals, 7th District of Texas at Amarillo, sitting by assignment.