

Abated and Opinion Filed October 28, 2021



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01105-CR

JAMES MARCEL ENGLISH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 196th District Court
Hunt County, Texas
Trial Court Cause No. 31659

MEMORANDUM OPINION

Before Justices Schenck, Smith, and Garcia
Opinion by Justice Garcia

In this criminal case, appellant's appointed counsel has filed a motion to withdraw as counsel, supported by an *Anders*¹ brief. We conclude that the *Anders* brief is formally deficient. We grant counsel's motion to withdraw but strike the *Anders* brief and remand for appointment of new appellate counsel to represent appellant.

¹ *Anders v. California*, 386 U.S. 738, 744 (1967).

I. Background

Pursuant to a plea bargain, appellant James Marcel English pleaded guilty to unlawful possession of a firearm by a felon. The trial court rendered an order of deferred adjudication that placed appellant on community supervision for five years.

About halfway through appellant's five-year term of community supervision, the State filed its first amended third motion to revoke appellant's community supervision. The State alleged nine violations of the terms and conditions of appellant's community supervision.

At the hearing of the State's motion to revoke, appellant was represented by appointed counsel. Appellant pleaded true to some of the alleged violations and not true to others. Three witnesses testified, including appellant. At the end of the hearing, the trial judge orally found some of the State's allegations true, revoked appellant's probation, found appellant guilty of unlawful possession of a firearm by a felon, and sentenced appellant to seven years in prison. The judge then asked the State to prepare a judgment and ended the hearing.

Another hearing took place the next day, and appellant appeared without an attorney. Addressing appellant, the trial judge said, "Again, your attorney waived the right to be here this afternoon for this portion of the proceeding because I've already made all of the decisions I'm going to make. Nothing is going to change." The judge later reiterated that he had previously announced appellant's sentence of seven years in prison, and he explained appellant's credit for time served and his

right to appeal. That same day, the judge signed a judgment adjudicating appellant's guilt and sentencing him to seven years in prison. The judge also certified appellant's right to appeal and appointed new counsel to represent appellant on appeal.

Appellant's appellate counsel timely filed a notice of appeal. He later filed a motion to withdraw and an *Anders* brief. Both counsel and this Court informed appellant of his right to file a response to the motion to withdraw. Appellant has not filed a response.

II. Analysis

In *Anders*, the Supreme Court outlined a procedure to ensure that an indigent criminal defendant's right to counsel on appeal is honored when his or her appointed attorney concludes that the appeal is without merit. *See Arevalos v. State*, 606 S.W.3d 912, 914–15 (Tex. App.—Dallas 2020, order), *subsequent proceeding*, No. 05-19-00466-CR, 2020 WL 5087778 (Tex. App.—Dallas Aug. 28, 2020, order) (mem. op., not designated for publication), *disp. on merits*, 2021 WL 2948582 (Tex. App.—Dallas June 30, 2021, no pet.) (mem. op., not designated for publication). If the attorney concludes that the appeal is wholly frivolous, he or she should request permission to withdraw, simultaneously filing a brief that refers to anything in the record that might arguably support the appeal. *Id.* at 915. This “*Anders* brief” must satisfy the appellate court that the appointed attorney's motion to withdraw is based on a conscientious and thorough review of both the record and the law. *Id.*

When we receive an *Anders* brief, we conduct our own independent review of the record. *Id.* If we conclude that (1) appellate counsel has exercised professional diligence in evaluating the record for error and (2) the appeal is frivolous, we grant counsel’s motion to withdraw and affirm the trial court’s judgment. *Id.* However, if we conclude that the *Anders* brief is formally deficient, such as by failing to cite legal authority, failing to provide record references, or failing to discuss issues appearing prominently in the record, we will strike the *Anders* brief and either order appointed counsel to file a new brief or abate the appeal and return the case to the trial court for the appointment of new counsel. *Id.* at 915–16 & n.4.

Here, the filed *Anders* brief discusses the evidence adduced at the revocation hearing, the trial court’s evidentiary rulings, the judgment and sentence, and the effectiveness of trial counsel. Nevertheless, we conclude that the *Anders* brief is formally deficient because it does not discuss the separate hearing at which the trial judge completed the sentencing process and appellant’s appointed trial counsel did not appear. Accordingly, and without deciding whether that hearing presents any arguable issues, we strike the *Anders* brief. *See Porter v. State*, No. 05-19-00194-CR, 2020 WL 4592830, at *2 (Tex. App.—Dallas Aug. 11, 2020, order) (mem. op., not designated for publication) (striking *Anders* brief because, among other things, brief failed to address some phases of the case).

We have the discretion to allow appointed counsel to rebrief after we strike an *Anders* brief for formal deficiencies. *See, e.g., Arevalos*, 606 S.W.3d at 916. In this case, however, we opt to grant counsel’s motion to withdraw and to remand for appointment of new appellate counsel. We have held that appointed appellate counsel may not file an *Anders* brief if he or she also served as trial counsel. *Chandler v. State*, 988 S.W.2d 827, 828 (Tex. App.—Dallas 1999, order), *disp. on merits*, No. 05-97-00773-CR, 2000 WL 1048495 (Tex. App.—Dallas July 31, 2000, no pet.) (not designated for publication). In this case, the record reflects that appointed appellate counsel briefly served as appellant’s trial counsel, though he was appointed after appellant’s original plea proceeding had concluded and he was replaced before the State filed the amended motion to revoke at issue in this appeal. Although we need not, and thus do not, decide whether *Chandler* applies on the facts of this case, we deem it prudent to grant counsel’s motion to withdraw.

III. Conclusion

We grant counsel’s motion to withdraw. We strike the *Anders* brief filed by counsel.

We remand this case to the trial court and order the trial court to appoint new appellate counsel to represent appellant. New appellate counsel should investigate the record and either (1) file a brief that addresses arguable issues found in the record or (2) if no such arguable issues exist, file an *Anders* brief that complies with the requirements of *Anders* and its progeny.

We remove this appeal from the submission docket and abate the appeal for the trial court to comply with the dictates of this opinion.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
201105F.P05