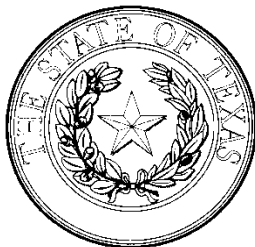


Opinion issued September 22, 2011.



In The
Court of Appeals
For The
First District of Texas

NOS. 01-09-00434-CR & 01-09-00435-CR

ERNEST OSIL SAMUEL, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case Nos. 1207867 & 1207868

MEMORANDUM OPINION

Appellant, Ernest Osil Samuel, was charged with aggravated robbery and burglary of a habitation.¹ The primary offenses were enhanced by two prior felony

¹ Appellant was charged with aggravated robbery in trial court cause number 1207867, resulting in appeal number 01-09-00434-CR. See TEX. PENAL CODE

convictions. Appellant pleaded not guilty to the two primary offenses, but he pleaded “true” to the enhancements. In each case, a jury found appellant guilty and found the enhancements true, and it assessed appellant’s punishment at confinement for life for the aggravated robbery and at 77 years’ confinement for the burglary of a habitation, with the sentences to run concurrently. The trial court certified appellant’s right to appeal, and appellant timely filed a notice of appeal.

Appellant’s appointed counsel on appeal has filed a motion to withdraw and an *Anders* brief stating that the record presents no reversible error and therefore the appeal is without merit and is frivolous. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). We grant counsel’s motion to withdraw and affirm the trial court’s judgment.

An attorney has an ethical obligation to refuse to prosecute a frivolous appeal. *Schulman v. State*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (citing *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436, 108 S. Ct. 1895, 1901 (1988)). If an appointed attorney finds a case to be wholly frivolous, his obligation to his client is to seek leave to withdraw. *Id.* at 407. Counsel’s obligation to the

ANN. §§ 29.02, 29.03 (West Supp. 2010) (providing elements of aggravated robbery). Appellant was charged with burglary of a habitation in trial court cause number 1207868, resulting in appeal number 01-09-00435-CR. *See* TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2003) (providing elements of burglary of a habitation).

appellate court is to assure it, through an *Anders* brief, that, after a complete review of the record, the request to withdraw is well-founded. *Id.*

We may not grant the motion to withdraw until:

- (1) the attorney has sent a copy of his *Anders* brief to his client along with a letter explaining that the defendant has the right to file a pro se brief within 30 days, and he has ensured that his client has, at some point, been informed of his right to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals;
- (2) the attorney has informed this Court that he has performed the above duties;
- (3) the defendant has had time in which to file a pro se response; and
- (4) we have reviewed the record, the *Anders* brief, and any pro se brief.

See id. at 408–09. If we agree that the appeal is wholly frivolous, we will grant the attorney’s motion to withdraw and affirm the trial court’s judgment. *See Garner v. State*, 300 S.W.3d 763, 766 (Tex. Crim. App. 2009). If we conclude that arguable grounds for appeal exist, we will grant the motion to withdraw, abate the case, and remand it to the trial court to appoint new counsel to file a brief on the merits. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005).

Here, counsel’s brief reflects that he delivered a copy of the brief to appellant and informed him of his right to examine the appellate record and to file a response. *See id.* at 408. Appellant filed a pro se response arguing in five issues

that there is insufficient evidence that he used or exhibited a deadly weapon during the burglary and the aggravated robbery or that he did so intentionally and knowingly and that the indictment for the aggravated robbery was deficient.

Counsel's brief meets the *Anders* requirements by presenting a professional evaluation of the record.² *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *see also High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978). Counsel discusses the evidence adduced at the trial, supplies us with references to the record, and provides us with citation to legal authorities. Counsel indicates that he has thoroughly reviewed the record and that he is unable to advance any ground of error that warrants reversal. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *Mitchell v. State*, 193 S.W.3d 153, 154 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

We have independently reviewed the entire record, and we conclude that no reversible error exists in the record, that there are no arguable grounds for review,

² Appointed counsel's brief initially claims that it relies on *Anders v. California*, but then proceeds to identify and develop what it refers to as "arguable grounds of error." This is not a proper recitation of the standard prescribed by *Anders*. *See* 386 U.S. 738, 744, 87 S. Ct. 1396, 1400 (1967). In an *Anders* brief, appointed counsel must present a professional evaluation of the record and detail why there are no arguable grounds for reversal in the case. *Id.* at 744, 87 S. Ct. at 1400; *see also High v. State*, 573 S.W.2d 807, 810 (Tex. Crim. App. 1978). Nevertheless, counsel's brief reveals a professional evaluation of the record in that it articulates various arguments relevant to Samuel's case that the evidence and the law do not arguably support. Likewise, our independent review of the record, as well as the arguments set forth in Samuel's pro se brief, confirm that no arguable grounds for reversal exist.

and that therefore the appeal is frivolous. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *Garner v. State*, 300 S.W.3d 763, 767 (Tex. Crim. App. 2009) (explaining that frivolity is determined by considering whether there are “arguable grounds” for review); *Bledsoe*, 178 S.W.3d at 826–27 (emphasizing that reviewing court—and not counsel—determines, after full examination of proceedings, whether appeal is wholly frivolous); *Mitchell*, 193 S.W.3d at 155. An appellant may challenge a holding that there are no arguable grounds for appeal by filing a petition for discretionary review in the Court of Criminal Appeals. *See Bledsoe*, 178 S.W.3d 827 & n.6.

We affirm the judgments of the trial court and grant counsel’s motion to withdraw.³ Attorney Ellis McCullough must immediately send the notice required by Texas Rule of Appellate Procedure 6.5(c) and file a copy of that notice with the Clerk of this Court. *See* TEX. R. APP. P. 6.5(c). The Clerk of the Court is ordered to send a copy of this opinion to Samuel. All other pending motions are denied as moot.

PER CURIAM

Panel consists of Justices Jennings, Bland, and Massengale.

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

³ Appointed counsel still has a duty to inform appellant of the result of this appeal and that he may, on his own, pursue discretionary review in the Texas Court of Criminal Appeals. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005).