Opinion issued January 20, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01013-CR

NO. 01-09-01014-CR

NO. 01-09-01015-CR

JAMES DEAN MARTIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case Nos. 09CR0384, 09CR0385, 09CR2573

MEMORANDUM OPINION

Appellant, James Dean Martin, was found guilty by a jury of retaliation, child endangerment, and use of a terroristic threat. Appellant pleaded not guilty to all

charges. The appellant chose to have the jury set his punishment, and the jury assessed punishment. The offenses were enhanced by two prior offenses of indecency with a child, to which appellant pleaded true. The jury assessed a sentence of 99 years' confinement for retaliation, 20 years' confinement and a $10,000 fine for endangering a child, and 365 days' confinement in county jail and $4,000 fine for use of a terroristic threat. The trial court certified that this not a plea bargain case and that appellant has the right of appeal. Appellant timely filed a notice of appeal.

Appellant's court-appointed appellate counsel has filed a motion to withdraw, along with an *Anders* brief stating that the record presents no reversible error and that therefore the appeal is frivolous. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). We affirm trial court's judgment and grant counsel's motion to withdraw.

An attorney has an ethical obligation to refuse to prosecute a frivolous appeal. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008). 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 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 her *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;

(2) the attorney has informed us 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).

Counsel's brief meets the *Anders* requirements by presenting a professional evaluation of the record. *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, 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 grounds of error that warrant 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.).

Appellant filed a pro se response, arguing (1) that he has been denied the right to severance of all offenses; (2) that he has been denied "fair and qualified" indigent defense counsel; (3) that no evidence exists to support his conviction of retaliation; (4) that evidence was insufficient or contrary to the evidence to support the allegation of retribution in his retaliation conviction; (5) that the State failed to prove the underlying crime existed and that "crime" is not defined under the retaliation statute; (6) that no evidence exists to support the verdict or is contrary to the allegations; (7) that the child endangerment statute is unconstitutional on its face and unconstitutionally applied; (8) that, on the child endangerment charge, the court gave erroneous jury instructions and mislead the jury about the law; (9) that no evidence exists to support the claim that appellant did not surrender his daughter to an emergency care provider; (10) that the verdict was contrary to law and evidence; (11) that the jury was selected improperly by an unauthorized person; (12) that there was insufficient evidence to support his conviction of endangerment; and (13) that the penal code does not contemplate the child endangerment offense under which he was charged.

We have independently reviewed the entire record, and we conclude that no reversible error exists, that there are no arguable grounds for review, and that, therefore, the appeal is frivolous. *See Schulman*, 252 S.W.3d at 407 n.12 (explaining that appeal is frivolous when it does not present any argument that

could "conceivably persuade the court"); *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). Although we may issue an opinion explaining why the appeal lacks arguable merit, we are not required to do so. *See Garner*, 300 S.W.3d at 767. 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 grant counsel's motion to withdraw[1] and affirm the trial court's judgment. Attorney Kelly W. Case 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).

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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

[1] 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).