Opinion issued January 13, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00121-CR

DEAUNDRE RANDALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 1221858

MEMORANDUM OPINION

Appellant, Deaundre Randall, was indicted for the offense of capital murder. The case was tried to a jury and resulted in a mistrial. On re-trial, appellant pleaded

guilty to the reduced offense of murder in exchange for the State's recommendation that punishment be capped at confinement for 40 years. The trial court found appellant guilty and, in accordance with appellant's plea agreement with the State, assessed punishment at confinement for 40 years. The trial court's certification states that appellant waived his right of appeal. Nevertheless, appellant, proceeding pro se, timely filed a notice of appeal and requested the appointment of appellate counsel.

Appellant's appointed counsel on appeal has filed a motion to withdraw, along with an *Anders* brief asserting that the trial court correctly certified that appellant waived his right of appeal. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). The brief also reflects that counsel delivered a copy of the brief to appellant and advised him of his right to file a pro se response. *See In re Schulman* 252 S.W.3d 403, 408 (Tex. Crim. App. 2008). More than 30 days have passed, and appellant has not filed a response. *See id.* at 409 n.23 (adopting 30-day period for response).

Generally, when this Court receives an *Anders* brief from a defendant's court-appointed appellate counsel, we conduct a review of the entire record to determine whether the appeal is frivolous. *See Anders*, 386 U.S. at 744, 87 S.Ct. at 1400; *Schulman*, 252 S.W.3d at 408. An appeal is frivolous when it does not

present any argument that could "conceivably persuade the court." *Schulman*, 252 S.W.3d at 407 n.12.

Here, however, we do not undertake the usual *Anders* analysis. A valid waiver of the right to appeal will prevent a defendant from appealing without the consent of the trial court. TEX. CODE CRIM. PROC. ANN. art. 1.14(a) (Vernon 2005); *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003). The waiver may be oral or written, but must be knowingly, intelligently, and voluntarily made. *Monreal*, 99 S.W.3d at 617; *Delatorre v. State*, 957 S.W.2d 145, 149 (Tex. App.—Austin 1997, pet. ref'd). "One way to indicate that the waiver was knowing and intelligent is for the actual punishment or the maximum punishment to have been determined by the plea agreement when the waiver was made." *Ex parte Delaney*, 207 S.W.3d 794, 799 (Tex. Crim. App. 2006); *see Wilson v. State*, 264 S.W.3d 104, 109 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Here, the record shows that appellant waived his right of appeal as part of an agreement on sentencing, and the agreement was followed by the court. Appellant and his trial counsel signed a waiver of constitutional rights, an agreement to stipulate to evidence, and a judicial confession. Appellant initialed the trial court's written admonishments and attested that he understood the consequences of his plea and had freely, knowingly, and voluntarily executed his statement. The plea papers

reflect that appellant pleaded guilty to the reduced offense of murder, in exchange for the State's recommendation that punishment be capped at confinement for 40 years. An agreement to plead guilty in exchange for a reduction in the charge constitutes a plea agreement. *See State v. Moore*, 240 S.W.3d 248, 250 (Tex. Crim. App. 2007). In addition, an agreement to a recommended cap on punishment constitutes a plea bargain. *See Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003); *Wilson*, 264 S.W.3d at 109. Further, appellant expressly agreed to waive any right of appeal he may have if the trial court accepted "the foregoing plea bargain agreement between [appellant] and the prosecutor." The record reflects that the trial court accepted the agreement and, in accordance therewith, assessed punishment at confinement for 40 years. These facts are sufficient to show a valid waiver of the right to appeal because they show that the waiver was made voluntarily, knowingly, and intelligently. *See Wilson*, 264 S.W.3d at 109. The trial court certified that appellant waived the right of appeal.

We note that the plea papers also state that appellant's plea was "without an agreed recommendation." Further, the trial court's judgment states, "Term of Plea Bargain: *Without an Agreed Recommendation*—PSI Hearing—Cap of 40 Years—State Reduces from Capital Murder" and "Appeal waived. No permission to appeal granted." (Emphasis added). However, such language does not convert the

plea to an open plea when, as here, the plea was entered pursuant to agreed sentencing cap.[1] *See Threadgill v. State*, 120 S.W.3d 871, 872 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding statement in record indicating that there was no agreed recommendation did not convert proceeding into open plea when plea was entered pursuant to agreed sentencing cap).

Based on the foregoing, we conclude that appellant waived his right of appeal knowingly, intelligently, and voluntarily. *See Delaney*, 207 S.W.3d at 798–99; *Wilson*, 264 S.W.3d at 109. The record supports the trial court's certification that appellant waived his right of appeal. *See* TEX. R. APP. P. 25.2. Because appellant has no right of appeal, we must dismiss this appeal "without further action." *Chavez v. State*, 183 S.W.3d 675, 680 (Tex. Crim. App. 2006) ("In such circumstances, no inquiry into even possibly meritorious claims may be made."); *see also Terrell v. State*, 245 S.W.3d 602, 606 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Accordingly, we grant counsel's motion to withdraw[2] and dismiss the appeal for lack of jurisdiction. *See Stephens v. State*, 35 S.W.3d 770, 771–72 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Attorney Leora Teicher Kahn must

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[1] There is no defect to correct because the certification conforms to the record and the trial court opted against giving appellant permission to appeal. See TEX. R. APP. P. 25.2(a)(2)(B).

[2] 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).

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). Any other pending motions are denied as moot.

PER CURIAM

Panel consists of Justices Jennings, Alcala, and Sharp.

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