Opinion issued July 7, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00626-CR

MICHAEL MORENO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 952558

MEMORANDUM OPINION

Appellant, Michael Moreno, was charged with the offense of burglary of a habitation, enhanced by two prior felony convictions. Appellant pleaded not guilty to the primary offense and pleaded "true" to the enhancements. A jury found appellant guilty and affirmatively answered the special issue submitted on the use of a deadly weapon. The trial court found the enhancements true and assessed punishment at 45 years' confinement. This court affirmed appellant's conviction in *Moreno v. State*, No. 01-04-00067-CR, 2005 WL 1910809, at *7 (Tex. App.—Houston [1st Dist.] Aug. 11, 2005, no pet.). Subsequently, appellant moved for post-conviction DNA testing.[1] The trial court denied the motion, and appellant appealed.

Appellant's counsel on appeal has filed a motion to withdraw, along with 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 affirm the 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

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[1] *See* Act of Apr. 3, 2001, 77th Leg., R.S., ch. 2, § 2, 2001 Tex. Gen. Laws 2, 3, *amended by* Act of May 24, 2007, 80th Leg., R.S., ch. 1006, § 4, 2007 Tex. Gen. Laws 3523, 3524 (current version at TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon Supp. 2010)). The current version of article 64.03 applies to a motion for DNA testing filed on or after September 1, 2007, the effective date of the amendments. Here, appellant's motion was filed on January 24, 2007. Accordingly, we apply the former version of article 64.03 in this case.

appointed attorney finds a case to be wholly frivolous, his obligation to his client is to seek leave to withdraw. *Id*. 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 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];
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> (2) the attorney has informed us that he has performed the above duties;
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> (3) the defendant has had time in which to file a pro se response; and
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> (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 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 and record to appellant, and the record reflects that appellant was informed of his right to file a

response. *Schulman*, 252 S.W.3d at 408. More than 30 days have passed, and appellant has not filed a pro se brief. *See id.* at 409 n.23 (adopting 30-day period for response).

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 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 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.).

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, and that therefore the appeal is frivolous. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *Garner*, 300 S.W.3d at 767 (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 the appeal is wholly frivolous); *Mitchell*, 193 S.W.3d at 155. 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[2] and affirm the trial court's judgment. Attorney Bob Wicoff 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).

PER CURIAM

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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

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[2] Appointed counsel still has a duty to inform appellant of the result of this appeal and that appellant 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).