Opinion issued December 30, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00923-CR

WARREN LEE GARDINER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 534487

MEMORANDUM OPINION

In 1990, a jury convicted appellant, Warren Lee Gardiner, of the offense of aggravated sexual assault, and the jury assessed punishment at confinement for 43

years and a fine of $10,000. Appellant's conviction was affirmed on appeal. *Gardiner v. State*, 11-90-00024-CR (Tex. App.—Eastland February 7, 1991, no pet.) (not designated for publication). In 1996, all evidence in this case was destroyed pursuant to the trial court's destruction order.

In 2010, appellant filed a pro se motion for post-conviction DNA testing, under Chapter 64 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. ch. 64 (West 2006 & Supp. 2011). Appellant's appointed counsel filed a memorandum to the trial court, advising that no biological evidence still exists for DNA testing. On September 28, 2010, the trial court denied appellant's motion for DNA testing.

On appeal, appellant's appointed counsel 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). Appellant filed a pro se response. The State waived its opportunity to file an appellee's brief.

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. *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*. 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 PDR;
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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
>
> (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.).

The Court's records reflect that appellant has acknowledged having received a copy of the clerk's record from counsel. There is not a reporter's record. In his pro se response, appellant contends that his appointed counsel was ineffective for having failed to fully review the record and for having advised the trial court that appellant is not eligible for DNA testing. Although nothing suggests that counsel was ineffective in this case, there is not a constitutional right to counsel in a proceeding under Chapter 64, therefore appellant does not have a constitutional right to effective counsel. *See Hughes v. State*, 135 S.W.3d 926, 928 (Tex. App.—Dallas 2004, pet. ref'd).

We have independently reviewed the 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; *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[1] 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 Justices Keyes, Higley, and Massengale.

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).