Opinion issued February 22, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00242-CR

ALEXANDER ADAM JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1489376

CONCURRING OPINION

I join the majority opinion. I write separately to address a serious procedural issue presented by this case and others involving the representation of criminal defendants—the routine filing of non-meritorious and repetitive briefs on ancillary

issues or issues previously decided adversely to the appellant by counsel appointed to represent indigent defendants on appeal.

Here, appellant, Alexander Adam Jackson, was found guilty of murder and sentenced to fifty years' confinement. In three issues on appeal, Jackson contends that: (1) his conviction is void because the record does not show that the visiting judge presiding over the trial took the constitutionally required oath of office; (2) the trial court erred by denying his motion to suppress statements he made to police that he claims were taken in violation of his *Miranda*[1] rights; and (3) the judgment should be reformed to accurately reflect appellant's jail-time credit toward his sentence. I join the panel's opinion denying Jackson relief on his first and second issues and granting him relief on this third. I write to address an additional issue—the responsibility of counsel to an indigent criminal defendant.

Only one of the issues presented by counsel in this case addresses the merits—Jackson's argument that the trial court failed to suppress his statements to police allegedly taken in violation of *Miranda*. However, the record plainly shows that Jackson was timely read his *Miranda* rights twice. Therefore, taking this issue together with Jackson's meritorious argument regarding time served, I conclude that

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) (prohibiting use of accused's oral statement made during custodial interrogation unless certain warnings are given and accused voluntarily, knowingly, and intelligently waives rights).

the brief is barely adequate to satisfy minimum briefing requirements. *See* TEX. R. APP. P. 38.1(i) (providing that appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record).

The better practice for defense counsel in a criminal case is to fully vet the case and to determine whether the defendant has a meritorious defense or not. If the defendant does, counsel should make the argument required by the facts of the case that shows to the best of counsel's ability why the trial court's judgment should be reversed. If the defendant does not, the only proper course to ensure adequate protection of the defendant's constitutional rights is for defense counsel to draft an *Anders* brief[2] that shows that counsel has fully considered all possible defenses and there are none and that also shows why each apparent potential defense is non-meritorious. *Anders* briefs provide valuable constitutional protections to defendants in such cases and alert the appellate courts to pay particular attention to the file. In neither case should the defense present repetitive, non-meritorious, or frivolous arguments to the Court.

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[2] *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400 (1968) (holding defendant was denied fair procedure and equality where appointed counsel prepared no brief but advised appellate court by letter that he found no merit in appeal without expressly determining that appeal was frivolous).

Jackson contends in his second issue that his conviction is void because the appellate record does not show that the visiting judge presiding over the trial took the constitutionally required oaths of office.[3] This case was tried by the Honorable Lee Duggan, Jr., a retired former district court judge and Justice on this Court. As the panel notes, Jackson did not object to a trial before Judge Duggan. As the panel also points out, this Court has long indulged a presumption in favor of the regularity of the proceedings in the trial court, absent any evidence of impropriety. *Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000) (per curiam); *Murphy v. State*, 95 S.W.3d 317, 320 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (citing *McCloud v. State*, 527 S.W.2d 885, 887 (Tex. Crim. App. 1975)). We have likewise long held that, to rebut the presumption, a challenge to a visiting trial court judge for an alleged failure to take the constitutionally required oath requires a prima facie showing that the trial judge did not take the oath. *Murphy*, 95 S.W.3d at 320.

Jackson's counsel did nothing to overcome the presumption of regularity that has been repeatedly affirmed by the Texas Court of Criminal Appeals and by this Court. Instead, he relies on *Herrod v. State*—a 1983 Court of Criminal Appeals case—for the proposition that the presumption of regularity does not apply to

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[3] *See* TEX. CONST. art. XVI, § 1 (setting out two oaths for "elected and appointed officers" to take prior to beginning duties of their office, including oath to faithfully execute duties of office and uphold Texas and United States constitutions and anti-bribery oath).

challenges to the lack of a visiting judge's oath of office. *See* 650 S.W.2d 814 (Tex. Crim. App. 1983).

In a previous appeal filed by this same counsel's office and raising this exact same issue earlier this year, this Court declined to apply *Herrod* when the case, as here, involved a retired district judge sitting on a district court bench. We stated,

> Smith relies on *Herrod v. State* for the proposition that the presumption of regularity does not apply to challenges to the lack of a visiting judge's oath of office. *See* 650 S.W.2d 814 (Tex. Crim. App. 1983). *Herrod*, however, is distinguishable. In that case, the Court of Criminal Appeals observed that, at the time, retired district judges had to satisfy special statutory requirements to sit as judges in the criminal county courts. *Id.* at 817. The *Herrod* Court noted, however, that the analysis is different for retired district judges sitting on a district court. *Id.* In those circumstances, "an eligible retired district judge who has duly filed his election to continue in a judicial capacity is still a district judge." *Id.* ("It has been held that where an eligible retired district judge has duly filed his election to continue in a judicial capacity no formal order need be entered by the presiding judge of the administrative district or by the duly elected judge of said district court for him (retired judge) to exchange benches and preside over a trial in a district court."). Because the trial judge in this case was a retired district judge sitting on a district court, this different analysis recognized in *Herrod* applies here, and thus its holding does not.

Smith v. State, No. 01-15-01055-CR, 2017 WL 929544, at *2 (Tex. App.—Houston [1st Dist.] Mar. 9, 2017, pet. ref'd) (not designated for publication). I note that our opinion in *Smith* issued on March 9, 2017, and Jackson's brief in this case was filed by the same office that had represented Smith on May 24, 2017.

Jackson's counsel now attempts to persuade us to overturn both *Smith* and *Murphy*—the binding precedent from this Court upon which this Court relied in

Smith—on the exact same grounds, namely that we should follow *Herrod*.[4] And counsel again makes the frivolous argument that while *Herrod* acknowledges that retired district court judges can sit on a district court bench, even absent a proper assignment in the record, the record must nonetheless show that that the retired district court judge took the required oaths. As the panel opinion, which I join, points out, "There would be a presumption of regularity if another district court judge sat for Judge McSpadden, and the same is true for a retired district court judge sitting by assignment." Slip Op. at 7. Our opinion then states, "Appellant provides no authority requiring that this Court revisit our holding in *Smith v. State*, and we decline to do so." *Id.*

Nor is this all. The same office of appointed defense counsel then *again* made the same long-rejected argument that the visiting judge did not take the required oaths of office with the same abject failure of evidence to rebut the presumption of

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[4] Neither the Texas Supreme Court nor the Court of Criminal Appeals has taken steps to correct the disparity between civil and criminal cases that arose in 2003, when the Texas Supreme Court amended Texas Rule of Appellate Procedure 47, which provided all opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value, whether or not designated "unpublished." It left unchanged the rule in criminal cases that cases designated "do not publish" lack precedential value. *See* TEX. R. APP. P. 47.2 & cmt; TEX. R. APP. P. 47.7 & cmt. The pernicious effect of this failure to amend Rule 47.2 and Rule 47.7 with respect to criminal cases is that many cases that are either the only case on point, the only recent case, or the most closely applicable case are specifically designated as lacking precedential value. This rule has consequently come to be honored much more in the breach than in the observance and is an open invitation to counsel to argue that an argument made directly contrary to a court's prior case law is not binding on counsel, as is the case here.

regularity in a felony indecency-with-a-child case recently decided by this Court. *See Macias v. State*, — S.W.3d —, No. 01-16-00664-CR, 2017 WL 5150315 (Tex. App.—Houston [1st Dist.] Nov. 7, 2017, pet. filed). In that case, we quoted *Smith* for the proposition that "'[t]he mere absence of proof in the record that a visiting judge took the judicial oath of office does not overcome the presumption' of regularity," and we observed that Macias's counsel cited "no authority requiring that the appellate record affirmatively demonstrate that visiting judges took the oaths of office prior to beginning their assignments." *Id.* at *8, n.3. Although this Court issued *Macias* months after Jackson filed his brief in this case, appellate counsel presented no supplementary briefing discussing *Macias* or its impact on Jackson's second issue.

In short, Jackson's counsel has both rejected the principle of *stare decisis* and failed to comply with the briefing requirements specifically set out in Texas Rule of Appellate Procedure 38.1(i). *See* TEX. R. APP. P. 38.1(i) (requiring appellate brief to include "a clear and concise argument for the contentions made, *with appropriate citations to authorities* and to the record") (emphasis added).

Counsel has also ignored Texas Disciplinary Rule of Professional Conduct 3.01 (Meritorious Claims and Contentions) which provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). The "Comment" immediately following Rule 3.01 states, "A filing or assertion is frivolous if . . . the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law." *Id.* R. 3.01 cmt. 2. Here, it is at best a close question whether Jackson has made a good faith argument for the reversal of existing law.

Finally, defense counsel has at least skirted the question of counsel's compliance with Rule 3.03 (Candor Toward the Tribunal), which provides that a lawyer "shall not knowingly . . . fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *Id.* R. 3.03 & cmt. 1, 3.

I join in the panel opinion and concur in the judgment for the reasons set forth herein. I expect that future briefs will conform to the guidelines set out in this concurrence and will confine themselves to the defendant's meritorious arguments, so as not to distract from them and to waste judicial resources, or, alternatively, that counsel will show with specificity why the case presents no such arguments, in conformity with the requirements of *Anders*.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Caughey.

Justice Keyes, concurring.

Publish. TEX. R. APP. P. 47.2(b).