Opinion issued November 17, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00068-CR

JONOTHON MACK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 428th District Court
Hays County, Texas[1]
Trial Court Case No. CR-18-1168-D

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court from the Court of Appeals for the Third District of Texas. *See* Misc. Docket No. 19-9120 (Tex. Dec. 20, 2019); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

Appellant, Jonothon Mack, was convicted by a jury of assault-bodily injury family violence and sexual assault. *See* TEX. PENAL CODE §§ 22.01, 22.021. A jury sentenced him to 365 days in jail for the assault-bodily injury conviction and 12 years for the sexual assault, with the sentences to run concurrently. *See id.* §§ 12.21, 12.33. Appellant timely filed a notice of appeal.

Appellant's appointed counsel on appeal has filed a motion to withdraw, along with a brief stating that the record presents no reversible error and the appeal is without merit and is frivolous. *See Anders v. California*, 386 U.S. 738 (1967). Appellant did not file a response to the *Anders* brief. The State filed a letter brief, agreeing that the record does not reflect reversible error and asking this Court to dismiss the appeal and affirm the trial court.

Counsel's brief meets the *Anders* requirements by presenting a professional evaluation of the record and supplying us with references to the record and legal authority. 386 U.S. at 744; *see also High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978). Counsel indicates that he has thoroughly reviewed the record and 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, 155 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

We have independently reviewed the entire record in this appeal, and we conclude that no reversible error exists in the record, there are no arguable grounds

for review, and the appeal is frivolous. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400 (emphasizing that reviewing court—and not counsel—determines, after full examination of proceedings, whether appeal is wholly frivolous); *Garner v. State*, 300 S.W.3d 763, 767 (Tex. Crim. App. 2009) (reviewing court must determine whether arguable grounds for review exist); *Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005) (same); *Mitchell*, 193 S.W.3d at 155 (reviewing court determines whether arguable grounds exist by reviewing entire record). We note that an appellant may challenge a holding that there are no arguable grounds for appeal by filing a petition for discretionary review in the Texas Court of Criminal Appeals. *See Bledsoe*, 178 S.W.3d at 827 & n.6.

Appellant's appointed counsel also argues that the judgment must be reformed because the trial court improperly assessed a $35 "Precept to Serve" fee and a $133 "State Fee/Consolidated Court Costs" fee in the Amended Bill of Costs. Counsel contends that because neither fee is listed on the Office of Court Administration ("OCA") Chart[2] as an authorized charge, the charges should be deleted from the judgment. Appellant's counsel neither cites any authority in making his argument, nor does he refer to the numerous statutes that apply to the imposition of court costs.

[2] This chart is a summary of the court costs and statutory authorizations for various felony prosecutions. Available at http://www.courts.state.tx.us/oca/pdf/DC-CRFeeChart.pdf.

Accordingly, we hold that appellant has waived this complaint. *See* TEX. R. APP. P. 38.1(i).

Counsel next argues that the Amended Bill of Costs improperly assessed $14,887.15 in attorney's fees. It is well established that in order to assess court-appointed attorney's fees in a judgment, a trial court must determine that the defendant has financial resources that enable him to offset in part or in whole the costs of legal services provided. *See* TEX. CODE CRIM. PROC. art. 26.05(g); *see also Mayer v. State*, 309 S.W.3d 552, 555–56 (Tex. Crim. App. 2010); *Armstrong v. State*, 340 S.W.3d 759, 765–66 (Tex. Crim. App. 2011) (holding that "defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees"). Furthermore, not only must the trial court make a determination regarding the defendant's ability to pay, the record must reflect some factual basis to support that determination. *Barrera v. State*, 291 S.W.3d 515, 518 (Tex. App.—Amarillo 2009, no pet.); *Perez v. State*, 280 S.W.3d 886, 887 (Tex. App.—Amarillo 2009, no pet.).

Here, the clerk's record reflects that the trial court appointed trial and appellate counsel to appellant and that appellant's prior appellate attorney filed appellant's request for a clerk's record on appeal, noting that "Defendant has been found indigent and requests that the clerk's record be prepared free of charge." Likewise, appellant's request for a reporter's record also indicates that appellant was

found indigent. Unless a material change in his financial resources occurs, once a criminal defendant has been found to be indigent, he is presumed to remain indigent for the remainder of the proceedings. TEX. CODE CRIM. PROC. art. 26.04(p).

The record in this case neither contains evidence that appellant had the financial resources that would enable him to offset in part or in whole the costs of the legal services provided to him at any time, nor does it show that the trial court made a finding that appellant could afford attorney's fees. We therefore conclude that the Amended Bill of Costs dated July 7, 2020, assessing the reimbursement of attorney's fees in the amount of $14,887.15, is not supported by sufficient evidence and is, therefore, improper. *See Mayer*, 309 S.W.3d at 555–56; *Gordon v. State*, No. 06-19-00224-CR, 2020 WL 1917939, at *2 (Tex. App.—Texarkana Apr. 21, 2020, no pet.) (mem. op., not designated for publication) (holding that assessment of attorney fees was erroneous when trial court made no finding that appellant had ability to pay). When the evidence does not support an order to pay attorney's fees, the proper remedy is to delete the order. *Mayer*, 309 S.W.3d at 557. Accordingly, we modify the judgment to delete the requirement that appellant pay $14,887.15 in attorney's fees as reflected in the Amended Bill of Costs dated July 7, 2020.

Except for the modification discussed above, we affirm the remainder of the judgments of the trial court and grant counsel's motion to withdraw.[3] Attorney John Jasuta must immediately send appellant the required notice and file a copy of the notice with the Clerk of this Court. *See* TEX. R. APP. P. 6.5(c). We dismiss any pending motions as moot.

PER CURIAM

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

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

[3] 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 Ex Parte Wilson*, 956 S.W.2d 25, 27 (Tex. Crim. App. 1997).