Motion to Withdraw Granted, Affirmed as Modified, and Majority and Dissenting Opinion filed August 31, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00398-CR

JUCHWAY RHODES JUNIOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1692996

M A J O R I T Y O P I N I O N

Appellant Juchway Rhodes Junior pleaded not guilty to the first-degree felony offense of theft of property with an aggregate value of at least $300,000. *See* Tex. Pen. Code Ann. § 31.03(a), (e)(7). A jury found him guilty. Appellant elected to have the court assess punishment, and after appellant pleaded true to two enhancement paragraphs, the court assessed punishment at forty years confinement

in the Texas Department of Corrections, Institutional Division. During the oral pronouncement of sentence and at the State's request, the court also recommended that restitution in the amount of $442,422.30 be a condition of any parole. The written judgment, however, orders restitution of $442,422.30 payable to the victim, and also orders appellant to pay $290 in court costs and $265 in fees.

Counsel's Motion to Withdraw

Appellant's appointed counsel filed a motion to withdraw and a brief concluding that this appeal is frivolous and without merit. *See Anders v. California*, 386 U.S. 738 (1967). However, counsel asserts that the judgment should be modified (1) to delete or reduce certain amounts listed on the bill of costs and (2) to delete the restitution portion of the written judgment because it does not conform to the oral pronouncement.

The brief meets the requirements of *Anders* by presenting a professional evaluation of the record and supplying us with references to the record and legal authority. *See id.* at 744; *see also High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978); *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969). Counsel sent copies of the brief and motion to withdraw to appellant and informed appellant of his rights in compliance with the requirements of *Kelly v. State*, 436 S.W.3d 313 (2014). Appellant was advised of his right to review the appellate record and file a pro se brief. In addition, counsel advised appellant to immediately file a motion in this court if he wished to review the appellate record and enclosed a form motion for that purpose. Appellant did not request access to the record. This court then set a deadline for appellant to file a pro se brief. No pro se brief was filed. The State declined to file a brief in response to the *Anders* brief.

The trial court's written judgment imposes $442,422.30 in restitution payable to the victim. The record shows, however, that such a restitution order was not part of the trial court's oral pronouncement of appellant's sentence. Rather, during the punishment hearing the trial court granted the State's request to recommend that appellant pay $442,422.30 in restitution as a condition of parole.[1]

A trial court's pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Thomas v. State*, No. 01-13-00598-CR, 2013 WL 6729025, at *2 (Tex. App.—Houston [1st Dist.] Dec. 19, 2013, no pet.) (mem. op., not designated for publication). Thus, "when there is a variation between the oral pronouncement of sentence and the written memorialization of the sentence, the oral pronouncement controls." *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998); *Thomas*, 2013 WL 6729025, at *2. Because restitution is punishment, it must be included in the oral pronouncement of sentence to be valid. *See Thomas*, 2013 WL 6729025; *see also Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006) ("We have held that restitution is punishment...."). When, as here, the trial court did not include an order to pay restitution to the victim in its oral pronouncement of appellant's sentence, the court cannot assess such restitution in its written judgment. *Thomas*, 2013 WL 6729025, at *2 (in *Anders* appeal, modifying judgment to delete payment of $825.98 as restitution).

[1] A Texas trial court is without authority to place any condition on a convicted defendant's parole but may make a recommendation of a condition of parole. *See Bray v. State*, 179 S.W.3d 725, 728 (Tex. App.—Fort Worth 2005, no pet.); *McNeill v. State*, 991 S.W.2d 300, 302 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd, untimely filed).

Further, appellant's counsel has drawn our attention to three errors regarding costs and fees that he contends may be corrected by modification of the judgment because the listed costs or fees do not comply with statutory requirements. First, the bill of costs lists a cost of $185 for "Consolidated Court Cost – State." However, for offenses committed prior to January 2020, such as appellant's offense, the statutory amount for this court cost was $133. Tex. Loc. Gov't Code Ann. § 133.102. Thus, we agree that the judgment should be modified to reflect the amount of $133 in costs for "Consolidated Court Cost – State."

Second, the bill of costs lists a cost of $105 for "Consolidated Court Cost – Local." However, this cost was added by amendment in 2019 and is only applicable to offenses committed on or after January 1, 2020. *See id.* § 134.101. We agree that the judgment should be modified to delete the assessment of $105 for "Consolidated Court Cost – Local."

Finally, the bill of costs lists a cost of $185 for "Attach/Convey Witness." A defendant convicted of a felony or misdemeanor is responsible for reimbursing certain fees for services performed by a peace officer, such as $5 for summoning a witness, $0.29 per mile for mileage required of an officer to summon or attach a witness, and $10 per day spent by an officer who attaches a witness on the order of a court outside the county. Tex. Code Crim. Proc. art. 102.011(a)(3), (b)(3), (c). We see nothing in the record demonstrating that a peace officer served a subpoena on any witness or conveyed or attached any witness. We therefore agree that the judgment should be modified to delete the assessment of $185 for "Attach/Convey Witness."

Because the judge did not order restitution as part of appellant's sentence during oral pronouncement of the sentence, appellant is entitled to have the

restitution order deleted from his sentence. *See Burt v. State*, 445 S.W.3d 752, 759-60 (Tex. Crim. App. 2014). However, because the court's oral pronouncement of sentence undisputedly included a recommendation that restitution should be a condition of any parole, because our obligation when confronted with a conflict between the oral pronouncement of sentence and the written judgment is to conform the written judgment to the oral pronouncement[2] and "make the judgment speak the truth",[3] and because we have the necessary information for reformation,[4] we modify the trial court's judgment to delete the language requiring restitution in the amount of $442,422.30 to the victim and to state instead that the trial court recommends to the parole board that restitution of $442,422.30 be a condition of any parole. *See Henderson v. State*, Nos. 04-15-00648-CR, 04-15-00649-CR, 2016 WL 2753863, at *2 (Tex. App.—San Antonio May 11, 2016, no pet.) (mem. op., not designated for publication) (in *Anders* case when counsel briefed issue of restitution and requested modification of judgment, court agreed and modified judgment to delete restitution order and affirmed as modified); *Thomas*, 2013 WL 6729025, at *2. Further, we modify the judgment to: (1) reflect the amount of $133 in costs for "Consolidated Court Cost – State;" (2) reflect the amount of $0 for "Consolidated Court Cost – Local;" and (3) reflect the amount of $0 for "Attach/Convey Witness."

We have thoroughly reviewed the record and counsel's brief. We agree with counsel that, except for the modifications identified above, the appeal is wholly

[2] *See Coffey*, 979 S.W.2d at 328.

[3] *See* Tex. R. App. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

[4] *Banks v. State*, 708 S.W.2d 460, 462 (Tex. Crim. App. 1986).

frivolous and without merit. *See Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005). We therefore grant the motion to withdraw filed by appellant's counsel and affirm the trial court's judgment as modified.[5]

Response to the Dissent

Our dissenting colleague accuses us of failing to follow proper *Anders* procedure and of depriving appellant of his constitutional right to meaningful appellate counsel. This accusation is baseless.

A criminal defense attorney must zealously represent the client's interest on appeal, but if the appointed attorney determines, after a conscientious examination of the record, that the appeal is wholly frivolous, the attorney is duty-bound by ethical standards to request permission to withdraw. *See Anders*, 386 U.S. at 744; *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). The motion to withdraw must be accompanied by a sufficient brief assuring the appellate court that counsel's determination is indeed based on a thorough study of the record. *In re Schulman*, 252 S.W.3d at 406. In the so-called *Anders* brief, counsel must also point out "any potentially plausible points of error" if counsel concludes any exist. *Id*. at 406 & n.9. Counsel's duty to withdraw is based on applicable professional and ethical responsibilities as an officer of the court "not to burden the judicial

[5] No substitute counsel will be appointed. Should appellant wish to seek further review of this case by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or file a pro se petition for discretionary review. Any petition for discretionary review must be filed within thirty days after either this opinion is rendered or the last timely motion for rehearing or motion for en banc reconsideration is overruled by this court. *See* Tex. R. App. P. 68.2. Any petition for discretionary review must be filed with the clerk of the Court of Criminal Appeals. *See id*. R. 68.3. Any petition for discretionary review must comply with the requirements of rule 68.4 of the Texas Rules of Appellate Procedure. *See id*. R. 68.4.

system with false claims, frivolous pleadings, or burdensome time demands." *Id*. at 407.

When an appellate court receives from appointed counsel a motion to withdraw accompanied by a brief demonstrating discharge of counsel's required duties, the court of appeals will, as the Court of Criminal Appeals puts it: "either agree that the appeal is wholly frivolous, grant the attorney's motion to withdraw, and dismiss the appeal, or it will determine that there may be plausible grounds for appeal. If the court of appeals decides that there are any colorable claims for appeal, it will: (1) grant the original attorney's motion to withdraw; and (2) abate the case and send it back to the trial court to appoint a new attorney with directions to file a merits brief." *Id*. at 409. According to the dissenting justice, we have deviated from these prescribed options because we have identified at counsel's urging not only plausible but "nonjudgment error" and corrected the judgment accordingly,[6] but we have denied appellant the right to counsel because we have not abated and remanded the case for appointment of a new attorney charged with filing a non-*Anders* merits brief.

To be clear, we are modifying the written judgment to conform it to the trial court's oral pronouncement, as we are authorized to do. Tex. R. App. P. 43.2(b) (appellate court may modify the trial court's judgment and affirm it as modified); *Banks*, 708 S.W.2d at 462; *Knight v. State*, 581 S.W.2d 692, 694 (Tex. Crim. App. 1979) (when court has necessary data and evidence before it for reformation, the judgment and sentence may be reformed on appeal). As stated, when there is a conflict between the oral pronouncement of sentence in open court and the

[6] The majority opinion does not use the term "nonjudgment error."

sentence set out in the written judgment, the oral pronouncement controls. *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003). The solution in those cases in which the oral pronouncement and the written judgment conflict is to reform the written judgment to conform to the sentence that was orally pronounced. *Id*.

To be sure, modification or reformation of a judgment is not explicitly mentioned in *In re Schulman*, *Bledsoe*, *Stafford*,[7] or any other Court of Criminal Appeals authority discussing permissible actions an appellate court may take in *Anders* cases. But we are reminded that *Anders* procedure is "not constitutional dogma," that *Anders* outlines "merely one method" of satisfying constitutional requirements for indigent criminal appeals, and that state procedures for protecting indigent defendants' constitutional rights may vary from *Anders* "'so long as those procedures adequately safeguard a defendant's right to appellate counsel.'" *In re Schulman*, 252 S.W.3d at 408, 410 (quoting *Smith v. Robbins*, 528 U.S. 259, 265 (2000)).

Based on explicit authority permitting modification of judgments, Texas appellate courts, including our state's highest criminal court and our Houston courts of appeals, have for decades granted motions to withdraw in *Anders* cases while modifying judgments and affirming those judgments as modified when non-reversible error is brought to the court's attention by appointed counsel or is recognized independently. *E.g.*, *Weddle v. State*, 522 S.W.2d 475, 476 (Tex. Crim. App. 1975)[8]; *Johnson v. State*, 490 S.W.2d 587, 587-88 (Tex. Crim. App. 1973) (in

[7] *Stafford v. State*, 813 S.W.2d 503 (Tex. Crim. App. 1991).

[8] In *Weddle*, court-appointed counsel filed an *Anders* brief in which counsel asserted the appeal was frivolous, but he also directed the court to an arguable point of error, namely, that the

Anders case, court modified judgment to make it speak the truth and affirmed as modified); *Greer v. State*, No. 14-22-00548-CR, 2023 WL 4663175, at *1 (Tex. App.—Houston [14th Dist.] July 20, 2023, n.p.h.) (mem. op., not designated for publication); *Garrison v. State*, Nos. 01-12-01144-CR, 01-12-01145-CR, 01-12-01146-CR, 2014 WL 2932854, at *1 (Tex. App.—Houston [1st Dist.] June 26, 2014, pet. ref'd) (mem. op., not designated for publication); *Melendres v. State*, Nos. 14-00-00784-CR, 14-00-00785-CR, 2001 WL 363500, at *1 (Tex. App.—Houston [14th Dist.] Apr. 12, 2001, no pet.) (mem. op., not designated for publication); *Ortiz v. State*, No. 14-00-00304-CR, 2000 WL 1784981, at *3 (Tex. App.—Houston [14th Dist.] Dec. 7, 2000, no pet.) (mem. op., not designated for publication). These include cases when, like the present one, the court modifies a judgment to correct a variance with the oral pronouncement. *E.g.*, *Jimenez v. State*, No. 11-22-00205-CR, 2023 WL 3872633, at *2 (Tex. App.—Eastland June 8, 2023, n.p.h.) (mem. op., not designated for publication) (*Anders* case where variance between written judgment and oral pronouncement was non-reversible error; affirmed as modified); *Van Flowers v. State*, 629 S.W.3d 707, 711 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (noting that consistent with its authority to modify a judgment to include or delete an affirmative finding, a court of appeals can modify judgments to correct errors with respect to court costs and fees, fines, and conflicts between the trial court's oral pronouncement and the written judgment, among other things); *Henderson*, 2016 WL 2753863, at *2; *Thomas*, 2013 WL 6729025, at *2. We see no reason to deviate now from this historical

written judgment incorrectly stated that appellant was arraigned when he was not. The Court of Criminal Appeals agreed with counsel's point, reformed the judgment, and affirmed the judgment as reformed.

and routinely accepted practice, in which the Court of Criminal Appeals itself has engaged and never declared as running afoul of *Anders* or the Constitution.

The key point of *Anders* is to safeguard indigent defendants' rights to appellate counsel. *See In re Schulman*, 252 S.W.3d at 410. We do not share the dissenting justice's view that the appellant in this case either has been denied the right to appellate counsel or that granting counsel's motion to withdraw will impair that right. Much to the contrary, counsel has performed his duty consistent with *Anders* and identified issues meriting modification of the judgment even if they do not qualify as non-frivolous, arguable issues for reversal of the conviction or sentence.[9] As explained, we agree in particular with counsel's argument that the restitution portion in the written judgment conflicts with the trial court's oral pronouncement of sentence. But our conclusion on that score does not compel reversal of the judgment. Our research has uncovered only one other instance among Texas state appeals when appellate counsel filed an *Anders* brief asserting that the appeal was frivolous but nonetheless urged the court to modify the judgment to delete a restitution award when it conflicted with the oral pronouncement of judgment. *Henderson*, 2016 WL 2753863, at *1. In that case, the court of appeals agreed with counsel, modified the judgment, affirmed the judgment as modified, and granted counsel's motion to withdraw. *Id*. at *2. We agree and are doing the same. That resolution is hardly cause for alarm. Nothing about our judgment is inconsistent with *Anders* or appellant's constitutional rights.

[9] Appellant has not filed a pro se brief, though afforded a reasonable opportunity to do so. In this respect, today's case is distinguishable from *Bledsoe* at least because, in that case, the defendant filed a pro se brief in response to counsel's *Anders* brief. *Bledsoe*, 178 S.W.3d at 826. The defendant in *Ortiz* also filed a pro se response.

Regardless whether this case may be said to involve "nonjudgment error" or "nonfrivolous error", the case does not present one of reversible error, and we are not reversing any part of the judgment. Not only is the conflict between the written judgment and oral pronouncement not reversible error, the First Court of Appeals has said this type of variance is not even "an arguable issue." *Hudson v. State*, No. 01-17-00759-CR, 2018 WL 6175316, at *1 (Tex. App.—Houston [1st Dist.] Nov. 27, 2018, no pet.) (mem. op., not designated for publication). The dissent's insistence on forcing another attorney to file a "non-*Anders*" brief addressing the same issue that the first counsel has already briefed, that entitles appellant to no more than a modification of the judgment and affirmance, and on which the court needs no further enlightenment, seems to us a waste of time and resources that advances no constitutionally required end.

/s/ Kevin Jewell
Justice

Panel Consists of Justices Jewell, Spain, and Wilson. (Spain, J., dissenting).

Publish — Tex. R. App. P. 47.2(b)