**Motion to Withdraw Granted, Affirmed as Modified, and Majority and Dissenting Opinions 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**

## DISSENTING OPINION

By failing to follow the procedure in *Bledsoe v. State*,[1] the majority sure raises a lot of interesting questions:

[1] *Bledsoe*, 178 S.W.3d 824 (Tex. Crim. App. 2005).

● Do the Texas Rules of Appellate Procedure authorize Texas intermediate appellate courts to change the practice mandated by *Anders v. California* by reclassifying a nonfrivolous error in the judgment as a "nonjudgment error" or "nonjudgment mistake" and thus something the intermediate appellate court can and should modify and as modified affirm?[2]

● Is a restitution order that is a part of the "Judgment of Conviction by Jury" legally not a part of that judgment such that appointed counsel has no duty to the client to argue on appeal that the restitution order is nonfrivolous error?[3]

● Is arguing on appeal that the trial court erred in ordering $442,422.30 in restitution an unethical frivolous argument under *Anders* that would subject appointed counsel to potential judicial sanctions and potential disciplinary action by the bar, even though this court must "fix" that unethical frivolous argument by using Texas Rule of Appellate Procedure 43.2(b) to classify it as "nonjudgment error"?

● Although the majority does not make the argument, does the law dignify "fixing" a $442,422.30 "nonjudgment error" or "nonjudgment mistake" restitution order but not "fixing" one for $5.00, thus haggling over the amount?

If it seems silly that we're here, then I don't disagree. But here we are.[4]

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[2] *Anders*, 386 U.S. 738 (1967); Tex. R. App. P. 43.2(b).

[3] The first page of the "Judgment of Conviction" is attached to this dissenting opinion so there is no question where the mistake is. And appointed counsel actually did argue it was error: "Because the district court did not order restitution at the time it pronounced sentence, the inclusion of a restitution requirement in the written judgment was error."

[4] Perhaps a more conventional phrasing of the legal mess unleashed by the majority might be:

Few, if any, opinions of the Supreme Court of the United States are so familiar to justices and staff attorneys at the courts of appeals as *Anders v. California*, 386 U.S. 738 (1967). And its holding is well known:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

*Id.* at 744 (omitting footnote 3).

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Does the law allow appointed counsel for a convicted indigent defendant to file a brief that identifies "error" in the four-corners of the criminal judgment, call that an *Anders* brief, request permission to withdraw as counsel, and forward a copy of the brief to the indigent defendant to allow the defendant to raise any points on appeal? Can the appellate court conclude that the "nonjudgment error" warrants correction, correct that "nonjudgment error," yet allow counsel to withdraw and deprive defendant of the right to counsel guaranteed by the federal and state constitutions throughout the entire proceeding in the court of appeals because the judgment contains no nonfrivolous error?

Here, the majority identifies what I believe is nonfrivolous error in the judgment[5], corrects that error, and allows appointed counsel to withdraw. In doing so, the majority cites *Bledsoe v. State*, yet does not follow it:

> When faced with an *Anders* brief and if a later *pro se* brief is filed, the court of appeals has two choices. It may determine that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error. *Anders*, 386 U.S. at 744. Or, it may determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues. [*Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991).] Only after the issues have been briefed by new counsel may the court of appeals address the merits of the issues raised. *Id.* at 509–10 (quoting *Anders,* 386 U.S. at 744).

*Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005).

It seems clear to me that we must follow the precedent of the Supreme Court of the United States and the Court of Criminal Appeals of Texas.[6] Even though the majority "fixes" things for appellant, it does so while depriving appellant of the right to counsel for the duration of this appeal.[7] No matter how well intentioned

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[5] The majority studiously avoids labelling the mistaken restitution order that the majority proceeds to "fix," suggesting that if we eliminate the word for whatever it is, then we won't have to think about how it fits into *Anders* practice.

[6] The majority cites a bunch of cases that do what the majority does, yet not even one engages the issue whether that action is permissible when appointed counsel files an *Anders* brief. Mere recitation of what a court did is not precedent. *See In re Kholaif*, 624 S.W.3d 228, 230–31 (order), *mand. dism'd*, 615 S.W.3d 369 (Tex. App.—Houston [14th Dist.] 2020) (orig. proceeding) (discussing precedent).

[7] If we make an error while modifying, and as so modified, affirming the "nonjudgment error," then appellant will have no counsel who could point out that error in a motion for rehearing because we allowed that counsel to withdraw. I suppose if appellant can't raise this "nonjudgment error" or "nonjudgment mistake" but we can and should "fix" it, then maybe it

this court is, that's not the adversarial system guaranteed in the federal and state constitutions.[8]

I dissent from this court's judgment. I would abate the appeal and remand the case to the trial court for the limited purpose of appointing new appellate counsel for the indigent defendant to argue the appeal as required by the federal and state constitutions and precedent from the court of criminal appeals.[9]

/s/ Charles A. Spain
Justice

Panel consists of Justices Jewell, Spain, and Wilson (Jewell, J., majority).
Publish — Tex. R. App. P. 47.2(b).

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might make sense to some that appellant can't tell us we didn't do it right. To be clear, I don't think that.

[8] If appointed counsel had filed an appellant's brief identifying the error in the restitution order as an issue or point on appeal and had not asked to withdraw as counsel, then I wouldn't have a problem. But I just can't accept the majority's argument that this restitution-order nonfrivolous error cannot be raised by appellant in an issue or point, yet we can nonetheless "fix" it. I'm somewhat surprised the majority doesn't criticize appointed counsel for mentioning the "error" at all. *Supra* note 3.

[9] If the court of criminal appeals were to modify *Bledsoe* and hold that the proper procedure in this unusual situation is to deny appointed counsel's motion to withdraw and order appointed counsel to file an appellant's brief raising the error in the restitution order as an issue or point in that brief, then that's fine by me.

CAUSE NO. 169299601010

INCIDENT NO./TRN: 9267584766D001

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| THE STATE OF TEXAS | § | IN THE 230TH DISTRICT |
| | § | |
| V. | § | COURT |
| | § | |
| RHODES, JUCHWAY JR | § | HARRIS COUNTY, TEXAS |
| | § | |
| STATE ID NO.: TX03699206 | § | |

# JUDGMENT OF CONVICTION BY JURY

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|---|---|---|---|
| Judge Presiding: | CHRIS MORTON | Date Sentence Imposed: | 4/7/2022 |
| Attorney for State: | VALERIE TURNER AND SHEILA HANSEL | Attorney for Defendant: | CUCCI, JOHN JR. |

Offense for which Defendant Convicted:
THEFT AGGREGATE >=$300K MULTI CW

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| Charging Instrument: INDICTMENT | Statute for Offense: |
| Date of Offense: 12/14/2016 THROUGH 07/27/2017 | Plea to Offense: ~~GUILTY~~ NOT GUILTY |
| Degree of Offense: 1ST DEGREE FELONY | |
| Verdict of Jury: GUILTY | Findings on Deadly Weapon: N/A |
| 1st Enhancement Paragraph: PLEADED TRUE | Finding on 1st Enhancement Paragraph: FOUND TRUE |
| 2nd Enhancement Paragraph: PLEADED TRUE | Finding on 2nd Enhancement Paragraph: FOUND TRUE |
| Punishment Assessed by: COURT | Date Sentence Commences: (Date does not apply to conferment/deferred adjudication) 4/7/2022 |
| Punishment and Place of Confinement: | 40 YEARS TDCJ, CORRECTIONAL INSTITUTIONS DIVISION |

THIS SENTENCE SHALL RUN: N/A.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A .
(The determination setting forth the conditions of community supervision is incorporated herein by this reference.)

☐ Defendant is required to register as sex offender in accordance with Chapter 62, Tex. Code Crim. Proc.
(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A .

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| Fines: $ N/A | Restitution: $ 442,422.30 | Restitution Payable to: VICTIM (See special finding or order of restitution which is incorporated herein by this reference.) |
| Court Costs: $ 290.00 | Reimbursement Fees: $ 265 | |

Was the victim impact statement returned to the attorney representing the State? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

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| Total Jail Time Credit: 2 DAYS | If Defendant is to serve sentence in county jail or is given credit toward the fine and costs, enter days credited below. N/A DAYS | NOTES: N/A |

This cause was called for trial by jury and the parties appeared. The State appeared by her District Attorney as named above.

Counsel / Waiver of Counsel (select one)