



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-15-00648-CR & 04-15-00649-CR

Antoine D. **HENDERSON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2011CR10023 & 2012CR6073
Honorable Mary D. Roman, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 11, 2016

MOTION TO WITHDRAW GRANTED; AFFIRMED AS MODIFIED

Antoine D. Henderson pled guilty to drug charges in two cases in exchange for the State's recommendation that adjudication be deferred. The trial court deferred adjudication, placed Henderson on community supervision for a period of ten years in each case, fined him \$1,500, and assessed restitution in the amount of \$342 to be paid to the San Antonio Police Department.

The State later filed motions to adjudicate guilt, alleging Henderson violated various conditions of his community supervision. Henderson pled true to the allegation that he violated a condition of his community supervision in each case by committing the offense of possession of

marijuana. The trial court adjudicated Henderson guilty of possession of over 400 grams of a controlled substance in penalty group four in cause number 2011CR10023 and orally pronounced a sentence of imprisonment for twenty years. In cause number 2012CR6073, the trial court adjudicated Henderson guilty of possession of five or more, but less than fifty, pounds of marijuana and pronounced a sentence of ten years' imprisonment, to run consecutively with the sentence imposed in cause number 2011CR10023. The sentences pronounced in open court did not include fines or restitution orders; however, the subsequent written judgments each included restitution in the amount of \$342. Henderson appealed both judgments.

Henderson's court-appointed appellate attorney filed a motion to withdraw and a brief in which he raises no arguable points of error and concludes this appeal is frivolous and without merit. However, counsel asserts the judgments should be modified to delete the restitution awards.

The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978), and *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969). Counsel sent copies of the brief and motion to withdraw to Henderson and informed Henderson 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 Henderson to file a pro se brief. No pro se brief was filed.

The orders deferring adjudication and placing Henderson on community supervision included restitution to the San Antonio Police Department in the amount of \$342. However, the trial court's subsequent adjudication of Henderson's guilt set aside the previous order deferring adjudication, including any previously imposed fines or restitution. *See Taylor v. State*, 131

S.W.3d 497, 502 (Tex. Crim. App. 2004); *Alexander v. State*, 301 S.W.3d 361, 363 (Tex. App.—Fort Worth 2009, no pet.). When the trial court adjudicates guilt, the defendant’s sentence must be pronounced orally in his presence. *Taylor*, 131 S.W.3d at 500. If there is any conflict between the oral pronouncement and the sentence in the written judgment, the oral pronouncement controls. *Id.*

Restitution was not mentioned at the hearing on the State’s motions to revoke community supervision and adjudicate Henderson. The trial court’s oral pronouncement of sentence on each charge consisted only of a sentence of imprisonment. When neither the parties nor the judge mention restitution during the sentencing hearing or as part of the oral pronouncement of sentence, the defendant is entitled to have the restitution order deleted from his sentence. *Burt v. State*, 445 S.W.3d 752, 759-60 (Tex. Crim. App. 2014). Therefore, we modify the trial court’s judgments to delete the language requiring restitution in the amount of \$342 to the San Antonio Police Department. *See Wiedenfeld v. State*, 450 S.W.3d 905, 907-08 (Tex. App.—San Antonio 2014, no pet.) (modifying judgment in *Anders* appeal to delete fine that was not orally pronounced as part of sentence and affirming judgment as reformed); *Alexander*, 301 S.W.3d at 364 (modifying judgment in *Anders* appeal to delete restitution that was not orally pronounced as part of sentence and affirming judgment as reformed).

We have thoroughly reviewed the record and counsel’s brief. We agree with counsel that, except for the modification to delete the restitution orders, the appeal is wholly 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 Henderson's counsel and affirm the trial court's judgments as modified.¹

Luz Elena D. Chapa, Justice

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¹ No substitute counsel will be appointed. Should Henderson 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.