



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00356-CR

John Stewart **MUELLER**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Bandera County, Texas
Trial Court No. CR-19-0000009
Honorable M. Rex Emerson, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Beth Watkins, Justice

Delivered and Filed: August 4, 2021

MOTION TO WITHDRAW GRANTED; ABATED

After his motion to suppress was denied, John Stewart Mueller pleaded guilty to felony DWI as a habitual offender. The trial court assessed his sentence at fifty years in prison. Mueller's court-appointed attorney filed a brief containing a professional evaluation of the record in accordance with *Anders v. California*, 386 U.S. 738 (1967). Counsel concluded that the appeal has no merit and filed a motion to withdraw as counsel. Counsel provided Mueller with a copy of the brief and informed him of his right to review the record and file his own brief. *See Kelly v. State*, 436 S.W.3d 313, 319 (Tex. Crim. App. 2014). Mueller asked for and was provided with the

record, but he did not file a pro se brief.¹ The State filed a letter agreeing that there are no non-frivolous claims which could be raised.

Once we determine that the procedural requirements of *Anders* have been satisfied, we engage in an independent review of the briefs and the record to determine whether: (1) we agree with counsel's conclusion that the appeal is wholly frivolous, in which case we issue an opinion stating there is no reversible error; or (2) we conclude that arguable grounds for appeal exist, in which case we remand the cause to the trial court. *Meza v. State*, 206 S.W.3d 684, 689 (Tex. Crim. App. 2006). If we determine that a nonfrivolous ground for appeal exists, we must abate the appeal and remand the case to the trial court for appointment of new counsel. *In re Schulman*, 252 S.W.3d 403, 409 (Tex. Crim. App. 2008). The new attorney will then be required to file a brief raising the nonfrivolous grounds we have identified, as well as any additional grounds the attorney discovers. *Crawford v. State*, 138 S.W.3d 16, 18 (Tex. App.—San Antonio 2004, no pet.).

After reviewing the briefs and the record, we conclude the appeal is not wholly frivolous and there are arguable grounds for appeal, including whether Mueller's sentence was properly enhanced, and whether the deadly weapon finding in the judgment is in error. *See* TEX. PENAL CODE ANN. § 49.09(g) ("A conviction may be used for purposes of enhancement under this section or enhancement under Subchapter D, Chapter 12, but not under both this section and Subchapter D."); *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997) ("[P]rior convictions used as enhancements must be pled in some form[.]"); *see McCoy v. State*, Nos. 05-01-00810-CR & 05-01-00811-CR, 2002 WL 89407, at *1 (Tex. App.—Dallas Jan. 24, 2002, no pet.) (not designated for publication) (discrepancy between the oral pronouncement of sentence and its written

¹ Mueller, acting pro se, did attempt an interlocutory appeal from the order denying his motion to suppress. *See Mueller v. State*, No. 04-19-00665-CR, 2019 WL 6331405 (Tex. App.—San Antonio Nov. 27, 2019, no pet.) (not designated for publication).

memorialization is an arguable point of error). We have the authority to modify a judgment to speak the truth when we have the necessary information before us to do so. *Ferguson v. State*, 435 S.W.3d 291, 293–94 (Tex. App.—Waco 2014, pet. struck) (collecting *Anders* cases in which courts of appeals have reformed judgments to speak the truth and affirmed as modified); see TEX. R. APP. P. 43.2(b). In this case, however, we do not have the necessary information before us.²

Accordingly, we grant appellate counsel’s motion to withdraw, abate the appeal and remand the case to the trial court. The trial court shall, within thirty days of our opinion and order, appoint new counsel on appeal to present all arguable grounds of error, including but not limited to the nonfrivolous ground noted in this opinion. *Crawford*, 138 S.W.3d at 18.

Beth Watkins, Justice

DO NOT PUBLISH

² The clerk’s record contains the original and two amended indictments. In the first, the State pled two Bexar County felony DWIs as the jurisdictional enhancements, included a deadly weapon allegation, but did not allege punishment enhancements. In the second, the State pled two misdemeanor DWIs (one Bexar County and one Comal County) as the jurisdictional enhancements, included a deadly weapon allegation, but did not allege punishment enhancements. In the third, the State pled two Bexar County felony DWIs as the jurisdictional enhancements, included a deadly weapon allegation then crossed it out, and did not allege punishment enhancements. The judgment lists the conviction as “Driving While Intoxicated 3rd Or More—Habitual Offender,” with an affirmative deadly weapon finding, and N/A findings on the first and second enhancement paragraphs.