

NO. 07-10-00385-CR and 07-10-0386-CR  
IN THE COURT OF APPEALS  
FOR THE SEVENTH DISTRICT OF TEXAS  
AT AMARILLO  
PANEL D  
APRIL 12, 2011

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DEMARCUS XAVIER MATTHEWS, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

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FROM THE 251ST DISTRICT COURT OF POTTER COUNTY;  
NO. 58,832-C, 58,972-C; HONORABLE ANA ESTEVEZ, JUDGE

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Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

### **ORDER OF ABATEMENT AND REMAND**

In two cases on appeal, appellant Demarcus Xavier Matthews challenges his conviction and sentence. On a finding that appellant lacked the means to employ appellate counsel, the trial court appointed James Abbott Jr. to represent appellant on appeal. In both cases, Mr. Abbott filed a motion to withdraw from representation supported by an *Anders* brief.<sup>1</sup> On the request of appellant, the court extended the deadline for filing a *pro se* response to counsel's *Anders* brief until April 6, 2011.

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<sup>1</sup> *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

On April 6, 2011, attorney James E. Wooldridge filed a “notice of substitution of counsel” and a “motion to extend time to file appellant’s *Anders* response” in each case. By the notice, Mr. Wooldridge states he has been retained to represent appellant in his two appeals. The notice contains a prayer requesting the withdrawal of Mr. Abbott and substitution of Mr. Wooldridge as appellate counsel. Although the notice and the motion contain a certificate reflecting service on the Potter County District Attorney, neither indicate service on Mr. Abbott.

The trial court is responsible for appointing counsel to represent indigent defendants, Tex. Code Crim. Proc. Ann. art. 1.051(d) (West Supp. 2010), and possesses the authority to relieve or replace appointed counsel on a finding of good cause. Tex. Code Crim. Proc. Ann. art. 26.04(j)(2) (West Supp. 2010). Under some circumstances, it is appropriate for the trial court to exercise the authority to appoint or substitute counsel following abatement and remand. *Meza v. State*, 206 S.W.3d 684, 688 (Tex.Crim.App. 2006). Notwithstanding the notices filed by Mr. Wooldridge, Mr. Abbott remains appellant’s counsel on appeal “until charges are dismissed, the defendant is acquitted, appeals are exhausted, or [Mr. Abbott] is relieved of his duties by the court or replaced by other counsel after a finding of good cause is entered on the record.” Tex. Code Crim. Proc. Ann. art. 26.04(j)(2) (West Supp. 2010).

In light of Mr. Wooldridge’s statement to this court that he has been retained to prosecute appellant’s appeals, we now abate the appeals and remand them to the trial court for further proceedings.

On remand, the trial court shall use whatever means it finds necessary to determine the following:

1. Whether appellant still desires to prosecute his appeals;
2. Whether Mr. Wooldridge has been retained to represent appellant in the two appeals;
3. Whether Mr. Abbott desires to be relieved of his duties as appellate counsel in light of Mr. Wooldridge's representation, and if so, good cause exists to relieve Mr. Abbott of his duties;
4. If Mr. Wooldridge is to be substituted for Mr. Abbott as appellant's counsel, whether appellant's consent to the substitution was properly obtained; and,
5. Any additional issues the trial court finds material to ensuring appellant receives effective assistance of counsel on appeal.

If the trial court finds that Mr. Wooldridge has been retained to represent appellant, that appellant properly consented to the substitution of counsel, and that Mr. Abbott desires to withdraw, the trial court may allow Mr. Abbott to withdraw as counsel.

Concerning the trial court's resolution of the foregoing issues, it shall execute findings of fact and conclusions of law, and shall cause its findings, conclusions, and any orders the court signs to be included in supplemental clerk's records. Should the trial court conduct a hearing of this matter, the evidence and argument presented shall be included in a supplemental reporter's record. The trial court shall cause the supplemental clerk's records and the supplemental reporter's record, if any, to be filed with the clerk of this court on or before May 11, 2011. Should additional time be

necessary for performing these tasks, the trial court may request same on or before May 11, 2011.

Appellant's motion for additional time requested an additional thirty days from April 6 to file his response to counsel's *Anders* brief. The motion is dismissed as moot. Should the trial court continue Mr. Abbott as appellant's counsel, appellant's *pro se* response to the *Anders* brief shall be filed thirty days from the date the cases are reinstated in this court. Should the trial court authorize the withdrawal of Mr. Abbott and substitution of Mr. Wooldridge as appellant's appellate counsel, appellant's appellate brief shall be due thirty days from the date the cases are reinstated.<sup>2</sup>

It is so ordered.

Per Curiam

Do not publish.

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<sup>2</sup> In the motion for additional time, Mr. Wooldridge states meritorious grounds exist for an appeal and he requires additional time to present a response to the *Anders* brief. Should the trial court permit Mr. Abbott to withdraw from appellant's representation and allow Mr. Wooldridge to assume the duties of appellate counsel, the issue of a response to Mr. Abbott's *Anders* brief, filed in support of his motion to withdraw, will be moot. A response to an *Anders* brief is not a brief on the merits. Rather, it provides the means for an indigent defendant to point out issues he believes warrant a full merits brief by new counsel. *See In re Schulman*, 252 S.W.3d 403, 409 n.23 (Tex.Crim.App. 2009) (explaining a *pro se* response "is not a merits brief, it is merely an informal opportunity for the indigent defendant to present what he believes are claims or issues or areas of procedural or substantive concern that arguably deserve a full merits brief by a second attorney"). Therefore, if allowed to appear as appellant's counsel, any meritorious ground for appeal Mr. Wooldridge intends to raise on appellant's behalf shall be presented to this court in a brief complying with the requirements of Rule of Appellate Procedure 38.1. Tex. R. App. P. 38.1.