



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00370-CR

HOWARD EUGENE DAVIS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 19th District Court
McLennan County, Texas
Trial Court No. 2014-1691-C1, Honorable Ralph T. Strother, Presiding

April 6, 2016

MEMORANDUM OPINION

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

Howard Eugene Davis, appellant, appeals his conviction for Aggravated Robbery. Appellant waived his right to a jury trial, entered a judicial confession, and pled guilty to the charge without an agreement on punishment. Appellant waived his right to have a jury assess punishment. Thereafter, the trial court, upon conducting a hearing on punishment, sentenced appellant to serve thirty-five years in the Institutional Division of the Texas Department of Criminal Justice.¹

¹ Because the appeal was transferred to this court from the Waco Court of Appeals, we apply the latter's precedent where available should no controlling precedent from a higher court exist. See TEX. R. APP. P. 41.3.

Appellant's counsel has filed a motion to withdraw, together with an *Anders*² brief, wherein he certifies that, after diligently searching the record, he has concluded that the appeal is without merit. Along with his brief, he has filed a copy of a letter sent to appellant informing him of counsel's belief that there was no reversible error and of appellant's right to respond *pro se*. By letter, this court notified appellant of his right to file his own brief or response by March 21, 2016, if he wished to do so. To date, no response has been received.

In compliance with the principles enunciated in *Anders*, appellate counsel discussed potential areas for appeal. Those areas included the effectiveness of counsel, the sufficiency of the indictment, the voluntariness of the plea, and the sufficiency of the evidence underlying the finding of guilt. However, counsel then explained why the issues lacked merit.

In addition, we conducted our own review of the record to assess the accuracy of counsel's conclusions and to uncover arguable error pursuant to *In re Schulman*, 252 S.W.3d 403 (Tex. Crim. App. 2008) and *Stafford v. State*, 813 S.W.2d 508 (Tex. Crim. App. 1991). None was found.³

² See *Anders v. California*, 386 U.S. 738, 744-45, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

³ Unmentioned by appellant's counsel was the issue of whether the trial court should have permitted appellant to withdraw his plea once he testified that he had no firearm. Such evidence would tend to raise a fact question regarding whether a deadly weapon was used or exhibited during the robbery, as alleged in the indictment. Nonetheless, appellant admitted to so using or exhibiting a firearm via his judicial confession that accompanied his open plea. Furthermore, the trial court had accepted appellant's plea and waiver of rights and found him guilty before appellant denied having a firearm while testifying at the punishment hearing. So too did no one broach the matter with the trial court at that time or ask that the plea be withdrawn. Under these circumstances, the issue was not preserved for review. See *Mendez v. State*, 138 S.W.3d 334, 350 (Tex. Crim. App. 2004) (stating that a trial court is not obligated to *sua sponte* withdraw a defendant's plea of guilty so long as the court fulfills its obligation to consider the evidence submitted even if evidence is adduced that either makes the defendant's innocence evident or raises an issue as to the defendant's guilt); see also *Aldrich v. State*, 104 S.W.3d 890, 894-95 (Tex. Crim. App. 2003) (stating that whether to undertake such additional inquiry into the voluntary and knowing nature of the plea is solely within the discretion of the trial court and to complain of this issue on appeal, the appellant is required to make a timely and specific objection, motion or complaint to the trial court).

Accordingly, the motion to withdraw is granted, and the judgment of the trial court is affirmed.⁴

Brian Quinn
Chief Justice

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⁴ Appellant has the right to file a petition for discretionary review with the Court of Criminal Appeals.