



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

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No. 07-16-00091-CR  
No. 07-16-00092-CR  
No. 07-16-00093-CR

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**PENNY DIANE SUTTER AKA PENNY DIANE THATEN, APPELLANT**

**V.**

**THE STATE OF TEXAS, APPELLEE**

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On Appeal from the 100th District Court  
Childress County, Texas  
Trial Court Nos. 5547, 5548, and 5691; Honorable Stuart Messer, Presiding

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August 31, 2016

**MEMORANDUM OPINION**

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

In August 2014, pursuant to pleas of guilty, Appellant, Penny Diane Sutter aka Penny Diane Thaten, was placed on deferred adjudication community supervision for five years, for three methamphetamine-related felony offenses. In April 2015, the State moved to proceed to adjudication alleging various violations of the conditions of community supervision. At the hearing on the State's motions, Appellant entered pleas

of not true to the allegations. After presentation of testimony and evidence, the trial court adjudicated Appellant guilty and assessed punishment for the following offenses:

Cause No. 5547	Possession of methamphetamine with intent to deliver in an amount of one gram or more but less than four	TEX. HEALTH & SAFETY CODE § 481.112(c) (West 2010) (a second degree felony)	Eighteen years confinement and a \$2,000 fine
Cause No. 5548	Tampering with evidence	TEX. PENAL CODE ANN. § 37.09(a)(1) (West Supp. 2016) (a third degree felony)	Ten years confinement and no fine
Cause No. 5691	Possession of methamphetamine in an amount of one gram or more but less than four	TEX. HEALTH & SAFETY CODE § 481.115(c) (West 2010) (a third degree felony)	Ten years confinement and no fine

The sentences were ordered to run concurrently. In presenting these appeals, counsel has filed an *Anders*<sup>1</sup> brief in support of a motion to withdraw. We grant counsel's motion and affirm.

In support of his motion to withdraw, counsel certifies he has conducted a conscientious examination of the records, and in his opinion, they reflects no potentially plausible basis for reversal of Appellant's convictions. *Anders v. California*, 386 U.S. 738, 744-45, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). Counsel candidly discusses why, under the controlling authorities, the records support that conclusion. See *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. 1978). Counsel has demonstrated that he has complied with the requirements of *Anders* and *In re Schulman* by (1) providing a copy of the brief to

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

Appellant, (2) notifying her of the right to file a *pro se* response if she desired to do so,<sup>2</sup> and (3) informing her of the right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408.<sup>3</sup> By letter, this court granted Appellant an opportunity to exercise her right to file a response to counsel's brief, should she be so inclined. *Id.* at 409 n.23. Appellant did not file a response. Neither did the State favor us with a brief.

According to one community supervision officer who has known Appellant for decades, she reviewed all of the conditions of community supervision with Appellant, who verbally and in writing acknowledged that she understood them. The community supervision officer who monitored Appellant sponsored State's Exhibits 7 and 8 which were Appellant's signed admissions of methamphetamine use on three separate occasions. The officer conceded that Appellant successfully completed a ninety-day program but opined that she did not need to remain on community supervision. The trial court found the State had established by a preponderance of the evidence that Appellant violated the conditions of her community supervision on at least three separate occasions and adjudicated her guilty in all three causes.

The punishment evidence established that Appellant had a traumatic childhood and has sought relief in methamphetamine. She is a grandmother and her grandchildren, at times, depend on her for child care and emotional support.

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<sup>2</sup> See *Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014) (regarding Appellant's right of access to the record for purposes of filing a *pro se* response).

<sup>3</sup> Notwithstanding that Appellant was informed of her right to file a *pro se* petition for discretionary review upon execution of the *Trial Court's Certification of Defendant's Right of Appeal*, counsel must comply with Rule 48.4 of the Texas Rules of Appellate Procedure which provides that counsel shall within five days after this opinion is handed down, send Appellant a copy of the opinion and judgment together with notification of her right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408 n.22 & 411 n.35. The duty to send the client a copy of this court's decision is an informational one, not a representational one. It is ministerial in nature, does not involve legal advice, and exists after the court of appeals has granted counsel's motion to withdraw. *Id.* at 411 n.33.

Appellant's counselor testified that Appellant graduated from an outpatient program and was one of his more successful patients who took advantage of services. Appellant's former sister-in-law also offered testimony favorable to Appellant. She explained Appellant's positive role in the family and requested the court to show mercy.

Favorable testimony notwithstanding, the trial court assessed punishment at eighteen years confinement in cause number 5547, and ten years confinement in cause numbers 5548 and 5691. No objection was made to the imposition of sentences.

#### STANDARD OF REVIEW

An appeal from a court's order adjudicating guilt is reviewed in the same manner as a revocation hearing. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (West Supp. 2016). When reviewing an order revoking community supervision imposed under an order of deferred adjudication, the sole question before this court is whether the trial court abused its discretion. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013) (citing *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006)). In a revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated a condition of community supervision as alleged in the motion to revoke. *Cobb v. State*, 851 S.W.2d 871, 874 (Tex. Crim. App. 1993). In a revocation context, "a preponderance of the evidence" means "that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of [her community supervision]." *Hacker*, 389 S.W.3d at 865 (citing *Rickels*, 202 S.W.3d at 764). The trial court abuses its discretion in revoking community supervision if, as to every ground alleged, the State fails to meet its burden of proof. *Cardona v. State*, 665 S.W.2d 492, 494 (Tex. Crim. App. 1984). In determining the

sufficiency of the evidence to sustain a revocation, we view the evidence in the light most favorable to the trial court's ruling. *Jones v. State*, 589 S.W.2d 419, 421 (Tex. Crim. App. 1979).

By the *Anders* brief, counsel raises insufficiency of the evidence, ineffective assistance of counsel, and severity of her punishment as potential arguable issues. Counsel then concedes that based on applicable law, the issues have no merit.

We have independently examined the records to determine whether there are any non-frivolous issues which might support these appeals. See *Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *In re Schulman*, 252 S.W.3d at 409; *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We have found no such issues. See *Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969). After reviewing the records and counsel's brief, we agree with counsel that there is no plausible basis for reversal of any of the convictions. See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

Accordingly, the trial court's judgments are affirmed and counsel's motion to withdraw is granted.

Patrick A. Pirtle  
Justice

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