In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00208-CR
No. 07-16-00209-CR

BLAKE JAY SMITH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court Nos. 70,158-E & 71,179-E; Honorable Douglas Woodburn, Presiding

July 10, 2017

MEMORANDUM OPINION

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

On May 16, 2016, before a jury, Appellant, Blake Jay Smith, entered an open plea of guilty to the offenses of unauthorized use of a motor vehicle[1] and evading arrest or detention.[2] The punishment range of each offense was enhanced by two previous

[1] *See* TEX. PENAL CODE ANN. § 31.07(a) (West 2016). An offense under this section is a state jail felony. *Id.* at § 31.07(b).

[2] *See* TEX. PENAL CODE ANN. § 38.04(a) (West 2016). If, as alleged here, the actor uses a vehicle while in flight, an offense under this section is a third degree felony. *Id.* at § 38.04(b)(2)(A).

felony convictions.[3] At trial, Appellant contested whether he used or exhibited a deadly weapon while committing the offense of evading arrest or detention. After hearing evidence relevant to that issue, the jury returned a verdict finding that Appellant did use or exhibit a deadly weapon in the commission of that offense. On May 18, after hearing substantial punishment evidence, the jury assessed Appellant's sentence at twenty years confinement for the unauthorized use of a vehicle conviction and sixty years for the evading arrest or detention conviction. Following imposition of sentence, Appellant timely filed his notice of appeal. We affirm.

Appellant's attorney has filed an *Anders* brief and a motion to withdraw. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). In support of his motion to withdraw, counsel certifies that he has diligently reviewed the records, and in his opinion, the records reflect no reversible error upon which an appeal can be predicated. *Id*. at 744-45; *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). In compliance with *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978), counsel has candidly discussed why, under the controlling authorities, there are no errors in the trial court's judgments. Additionally, counsel has certified that he has provided Appellant a copy of the *Anders* brief and motion to withdraw and appropriately advised Appellant of his right to file a *pro se* response in these appeals. *Stafford v. State*, 813 S.W.2d 503, 510 (Tex. Crim. App. 1991). By letter, this court has also advised Appellant of his right to file such a response. Additionally, Appellant's counsel has certified that he has provided Appellant with a copy of the records to use in preparation of a *pro se* response. *See Kelly v. State*, 436 S.W.3d 313, 319-20 (Tex.

[3] As enhanced, the unauthorized use of a motor vehicle was punishable as a second degree felony. *See* TEX. PENAL CODE ANN. § 12.425(b) (West Supp. 2016). As enhanced, the evading arrest or detention offense was punishable by confinement for any term of not more than 99 years or less than 25 years. *See id.* at § 12.42(d).

Crim. App. 2014). Appellant subsequently filed a response. The State did not file a brief.

ANALYSIS

Here, Appellant entered a plea of "guilty" to the allegations contained in each indictment and a plea of "true" concerning the allegations of each enhancement. By his *Anders* brief, counsel raises grounds that could possibly support these appeals but ultimately concludes the appeals are frivolous. Appellant's response primarily focuses on where he feels the records show that his trial counsel was ineffective because he did not know the applicable ranges of punishment for the charged offenses and, therefore, gave Appellant deficient advice concerning plea bargain offers purportedly made by the State. The only place in the records where counsel's knowledge of the law and the legal advice provided are addressed is a brief statement made by Appellant to the trial court shortly before argument on punishment. In that colloquy, Appellant complained about the advice trial counsel had provided and trial counsel explained to the trial court that Appellant's view was the result of a misunderstanding concerning what were offers from the State and what were counteroffers proposed by trial counsel. Notwithstanding the allegations contained in Appellant's response, the present records are insufficient to establish that trial counsel improperly advised Appellant.[4]

When we have an *Anders* brief by counsel and a *pro se* response by an appellant, we have two choices. We may determine that the appeal is wholly frivolous

[4] In his educational burdens letter, appellate counsel has advised Appellant that he may be able to pursue his ineffective assistance of counsel claim by means of a writ of habeas corpus filed in compliance with article 11.07 of the Texas Code of Criminal Procedure. As the records on direct appeal contain no evidence regarding trial counsel's alleged misunderstanding of the applicable range of punishment as to each offense, a writ of habeas corpus proceeding would provide an avenue for developing a record concerning Appellant's entitlement to relief on that basis.

and issue an opinion explaining that we have reviewed the record and find no reversible error; *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005) (citing *Anders*, 386 U.S. at 744), or we may determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief issues. *Id.* (citing *Stafford*, 813 S.W.2d at 510).

We too have independently examined the entire record to determine whether there are any non-frivolous issues that were preserved in the trial court 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. We have found no such issues. *See Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969).

CONCLUSION

After carefully reviewing the appellate records, counsel's brief, and Appellant's response, we conclude there are no plausible grounds for appellate review. We therefore affirm the trial court's judgments and grant counsel's motion to withdraw.[5] TEX. R. APP. P. 43.2(a).

Patrick A. Pirtle
Justice

Do not publish.

[5] Notwithstanding that Appellant was informed of his 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 judgments together with notification of his 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 the court of appeals'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.