In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00392-CR
No. 07-16-00393-CR
No. 07-16-00394-CR

DANIEL MARTEZ JOHNSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Potter County, Texas
Trial Court No. 54,384-B; Honorable John Board, Presiding

April 12, 2017

MEMORANDUM OPINION

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

In March 2007, Appellant, Daniel Martez Johnson, was placed on deferred adjudication community supervision for ten years and assessed a fine of $2,500 for aggravated sexual assault (Count One)[1] and indecency with a child by sexual contact

[1] TEX. PENAL CODE ANN. §§ 22.021(a)(1)(iii) & (a)(2)(B) (West Supp. 2016) (causing the sexual organ of a victim under 14 years of age to contact the sexual organ of the defendant). An offense under this section is a first degree felony.

(Counts Two and Three).[2] Three years later, the State moved to proceed with an adjudication of guilt but that motion was later dismissed. Then, on November 24, 2015, the State again moved to proceed with adjudication alleging that Appellant violated six conditions of community supervision.

At a hearing on the State's motion, Appellant pleaded not true to a new offense but pleaded true to the remaining allegations. After hearing testimony, the trial court found all allegations to be true and proceeded to hear punishment evidence. The trial court then pronounced Appellant guilty on all three counts and assessed a fifty-year sentence on Count One and twenty-year sentences on Counts Two and Three, with the three sentences to run consecutively. The trial court did not assess the fine originally assessed.[3] In presenting these appeals, counsel has filed an *Anders*[4] 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 reflect 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,

[2] TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011) (sexual contact with a victim under 17 years of age). We note that Count Two originally charged Appellant with aggravated sexual assault (digital penetration of a victim under 14 years of age); however, during the original plea hearing, the State elected to proceed with Count Two as indecency with a child. An offense under this section is a second degree felony.

[3] The *Bill of Costs* appended to the judgment entered in Count One reflects that the fine was paid in full during the period Appellant was on deferred adjudication community supervision.

[4] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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 Appellant, (2) notifying him of the right to file a *pro se* response if he desired to do so, and (3) informing him of the right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408.[5] By letter, this court granted Appellant an opportunity to exercise his right to file a response to counsel's brief, should he be so inclined. *Id.* at 409 n.23. Appellant did not file a response. Neither did the State favor us with a brief.

BACKGROUND

Appellant was granted deferred adjudication community supervision for sexually abusing a former girlfriend's daughter when she was eleven and twelve years old. Almost nine years later, the State moved to proceed based on commission of a new offense—domestic violence against his then girlfriend. The State also alleged other violations less serious than the new offense such as consuming alcohol, patronizing a bar, and failing to pay certain fees.[6]

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

[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 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.

[6] Appellant introduced receipts of fee payments into evidence to show he was current on those obligations.

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 his [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). Additionally, a plea of true standing alone is sufficient to support a trial court's revocation order. *Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. 1979).

ANALYSIS

Appellant contested the new domestic violence offense but admitted the other violations of his community supervision. The evidence presented at the revocation hearing tended to show that when he drinks excessively, he engages in conduct that seriously jeopardizes his community supervision. The domestic violence charge was the result of drinking in a gentlemen's club which resulted in an altercation with his then

girlfriend. He was charged with intentionally, knowingly, or recklessly causing bodily injury to her by impeding her normal breathing or blood circulation by choking her, a violation of section 22.01(b)(2)(B) of the Texas Penal Code and a third degree felony.[7]

The victim reluctantly testified under subpoena that she and Appellant scuffled and he put his hands around her neck. She admitted she could not breathe but could not recall details due to her intoxication at the time. She testified she suffered contusions to her head and right eye and had marks on her neck but thought they may have been caused when her brother interceded in the scuffle and she fell. She did not want Appellant prosecuted because her memory was impaired due to her intoxication.[8] The officer who responded to the domestic violence call, however, testified that the victim claimed she had been assaulted by Appellant. She had marks on her face and neck and told the officer that Appellant had punched her in the face and choked her.

The evidence at the adjudication hearing supports the trial court's finding of true to the allegation that Appellant committed the new offense of assaulting his then girlfriend by the required burden of proof—a preponderance of the evidence. Additionally, his pleas of true to the remaining allegations are sufficient alone to support the trial court's adjudication of guilt on each offense.

The imposition of consecutive sentences was within the trial court's discretion because Appellant was convicted of more than one offense arising out of the same criminal episode and the victim was under age seventeen. TEX. PENAL CODE ANN. §

[7] At the conclusion of the adjudication hearing, the State announced that in light of the consecutive sentences, it was dismissing the domestic violence case.

[8] The defense attempted to introduce an affidavit of non-prosecution; the trial court sustained the State's objection but did not prohibit defense counsel from questioning the victim about it.

3.01 (West 2011), § 3.03(b)(2)(A) (West Supp. 2016). Moreover, any arguable issue on appeal was procedurally defaulted when Appellant failed to object to his sentences. *See* TEX. R. APP. P. 33.1(a)(1). *See also Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999).

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 Appellant's convictions. *See Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

CONCLUSION

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

Patrick A. Pirtle
Justice

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