



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

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No. 07-16-00449-CR

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**CHRISTOPHER MICHAEL CAREY, APPELLANT**

**V.**

**THE STATE OF TEXAS, APPELLEE**

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On Appeal from the 251st District Court  
Potter County, Texas  
Trial Court No. 71,837-C, Honorable Richard Dambold, Presiding

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November 29, 2017

**ORDER OF ABATEMENT AND REMAND**

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

A jury found appellant, Christopher Michael Carey, guilty of evading arrest or detention<sup>1</sup> enhanced to a state jail felony due to appellant having been previously convicted of an evading arrest or detention offense.<sup>2</sup> The trial court set appellant's punishment at five years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant appealed this judgment.

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<sup>1</sup> See TEX. PENAL CODE ANN. § 38.04(a) (West 2016).

<sup>2</sup> See *id.* § 38.04(b)(1).

Appellant's court-appointed appellate counsel filed a motion to withdraw from the representation supported by an *Anders*<sup>3</sup> brief. In his motion to withdraw, counsel stated that "he has diligently searched the record and has failed to find any meritorious points on appeal." The brief cites applicable case law, briefly discusses the case background, and analyzes one possible issue. Counsel finds no arguable grounds supporting reversible error.

Counsel notified appellant by letter of his motion to withdraw, provided him a copy of the motion, *Anders* brief, and appellate record; informed him of his right to file a pro se response; and informed him of his right to seek discretionary review before the Texas Court of Criminal Appeals should this Court find the appeal frivolous. See *Kelly v. State*, 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014) (specifying appointed counsel's obligations on the filing of a motion to withdraw supported by an *Anders* brief). By letter, this Court also informed appellant of his right to file a pro se response to counsel's *Anders* brief. Appellant did not, however, file a pro se response.

Pursuant to our obligations when appointed counsel files an *Anders* brief, we have reviewed the appellate record. See *Stafford v. State*, 813 S.W.2d 503, 510 (Tex. Crim. App. 1991); *High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978). After doing so, we are not satisfied that the appeal is wholly frivolous. See *High*, 573 S.W.2d at 811 ("in the last analysis, it is up to the court, not counsel, 'after a full examination of all proceedings, to decide whether the case is wholly frivolous'") (quoting *Anders*, 386 U.S. at 744); see also *Penon v. Ohio*, 488 U.S. 75, 82, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (*Anders* brief aids court in determining both that counsel has conducted the

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<sup>3</sup> *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

requisite review of the case and that “appeal is indeed so frivolous that it may be decided without an adversary presentation”). The record reveals a matter, not mentioned in the *Anders* brief, that requires further briefing.

The record reflects that an officer was dispatched to the 1500 block of North Polk where a black man wearing basketball shorts and no shirt was allegedly checking to see if cars in that area were locked. When the officer arrived in the area, he noticed an individual that matched the description. The officer got out of his unmarked patrol vehicle and called appellant over to the officer’s location. After asking appellant where he was going, the officer asked appellant if he could search appellant’s person. Appellant agreed but as soon as the officer began to search appellant, appellant fled on foot. Appellant was subsequently apprehended and placed under arrest for evading arrest or detention. We believe that these facts present an open question as to whether the officer was attempting to detain appellant at the time that appellant fled. See *Thomas v. State*, No. 14-09-00935-CR, 2010 Tex. App. LEXIS 10068, at \*8-10 (Tex. App.—Houston [14th Dist.] Dec. 21, 2010, pet. ref’d) (mem. op., not designated for publication) (plain-clothed police officers that identified themselves as law enforcement and asked suspect general questions and for consent to search his bags and person was not a detention); *but see Fields v. State*, No. 13-98-00029-CR, 1999 Tex. App. LEXIS 5984, at \*12 (Tex. App.—Corpus Christi Aug. 12, 1999, no pet.) (suspect that exited his vehicle, answered an officer’s questions, and only fled after the officer prepared to conduct a pat-down search sufficient to establish that suspect evaded detention).

We grant counsel's motion to withdraw. See *Stafford*, 813 S.W.2d at 511. We abate the appeal and remand the cause to the 251st District Court of Potter County. On remand, the trial court shall appoint new counsel to represent appellant in this appeal. The trial court shall cause the name, email and postal addresses, telephone number, and state bar number of the newly-appointed counsel to be included in a supplemental record. The record of that appointment shall be filed with the clerk of this Court on or before Friday, December 29, 2017.

Additionally, the trial court shall order the newly-appointed counsel to file an appellant's brief, according to the Texas Rules of Appellate Procedure, addressing the issue of whether the officer sought to detain appellant, and any other arguably meritorious ground counsel sees for reversal or modification of the trial court's judgment. Absent a request for extension from newly-appointed counsel, the appellate brief shall be filed no later than thirty days from the date of counsel's appointment. A response brief may be filed by the State within thirty days after the filing of the appellant's brief.

It is so ordered.

Per Curiam

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