In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00023-CR

JOSE LUIS BARBOZA, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court Number Two
Tarrant County, Texas
Trial Court No. 1440597D; Honorable Wayne Salvant, Presiding

April 23, 2018

MEMORANDUM OPINION

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

Appellant, Jose Luis Barboza, Jr., was convicted by a jury of aggravated assault (count one of the indictment)[1] and assault of a family or household member (count two),[2]

[1] *See* TEX. PENAL CODE ANN. § 22.02(a)(1), (b) (West 2011) (a second degree felony).

[2] *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(A), (West Supp. 2017) (a third degree felony).

enhanced by two prior felony convictions where the second previous felony conviction was for an offense that occurred subsequent to the first previous felony conviction having become final.[3] At the punishment phase of trial, Appellant plead true to the enhancements in open court and the jury assessed punishment at ninety-nine years confinement for each offense. The trial court ordered that the sentences be served concurrently. This appeal followed.[4] Appellant's attorney has filed an *Anders* brief in support of a motion to withdraw. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). We modify the trial court's judgment to correct a typographical error, affirm the judgment as modified, and grant counsel's motion to withdraw.

BACKGROUND

In the afternoon of January 5, 2016, a police communications officer received four calls describing the same event, i.e., an ongoing domestic assault on a major highway that was interrupted twice when the victim attempted to escape from her attacker. One caller observed a woman running from a van into traffic and a man subsequently chasing her down, dragging her by the hair across an intersection, and forcing her back into the van. When the witness was able to pull alongside the van, he observed the woman covered in blood being repeatedly beaten.

[3] As enhanced the offense was punishable by confinement for any term of not more than 99 years or less than 25 years. TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2017).

[4] Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between the precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

Appellant was ultimately arrested at a park where the van, identified by the caller, was stuck in mud. Officers discovered the victim covered with blood—one eye was sunken, her face indented and swollen, and clumps of her hair were missing. Officers described the van's interior as covered in blood with blood spatters on the windows and clumps of hair at various locations in the van. With blood on his face, Appellant was taken into custody near the van. His hoodie had blood-soaked sleeves.

The victim testified that she was repeatedly beaten by Appellant in the van during a rolling domestic assault that lasted approximately twenty miles. Due to the assault, she underwent three surgeries to repair her broken face, broken nose, and torn retina. Ultimately, however, she suffered permanent damage to her face and eye.

ANDERS

In support of his motion to withdraw, counsel certifies that he has diligently reviewed the record, and in his opinion, the record reflects no potentially plausible basis for reversal of the conviction. *Anders*, 386 U.S. 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. 1978), counsel has candidly discussed why, under the controlling authorities, the record supports that conclusion.

Additionally, counsel has demonstrated 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 his right to review the records and file a *pro se* response if he desired to do so,[5] and (3) informing him of his right to file a *pro se* petition for discretionary review. *In re*

[5] *See Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014) (regarding an appellant's right of access to the record for purposes of filing a *pro se* response).

Schulman, 252 S.W.3d at 408.[6] By letter, this court also advised Appellant of his right to file such a response.

Appellant subsequently filed a *pro se* motion for access to the appellate record. We denied that motion and, instead, ordered Appellant's counsel to prepare and deliver to Appellant a readily accessible copy of the record. Appellant's counsel has certified that he has provided Appellant with a copy of the record to use in preparation of a *pro se* response. Appellant subsequently filed a response. The State responded by letter and agreed with Appellant's counsel that no arguable grounds for relief exist and Appellant's appeal is frivolous.

ANALYSIS

By his *Anders* brief, counsel raises grounds that could possibly support an appeal but ultimately concludes an appeal would be frivolous. Appellant's response raises a multitude of grounds, including ineffective assistance of counsel. Although we have not determined the merits of Appellant's response, we note that, notwithstanding his allegations, the present record is insufficient to establish that an appeal based on ineffective assistance of counsel would be non-frivolous.[7]

[6] 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 judgment 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 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.

[7] Appellant may be able to pursue an 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 that affirmatively demonstrates any ineffectiveness. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). *See Badillo v. State*, 255 S.W.3d 125, 129 (Tex. App.—San Antonio 2008, no pet.) ("a silent record on the reasoning behind counsel's actions is sufficient to deny relief").

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 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 those issues. *Id.* (citing *Stafford v. State*, 813 S.W.2d 503, 510 (Tex. Crim. App. 1991)).

Here, we too have independently examined the entire record to determine whether there are any non-frivolous issues that were preserved in the trial court that might support this appeal. *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).

REFORMATION OF JUDGMENT

We reform the trial court's judgment as to count two of the indictment because it contains a typographical error in its citation of the statute applicable to the offense. This court has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2; *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment as to count two to reflect that the "Statute for Offense" is "22.01(b)(2)(A)" rather than "22.01(B)(2)(A)."

CONCLUSION

We modify the trial court's judgment as to count two of the indictment to reflect that the "Statute for Offense" is "22.01(b)(2)(A)" rather than "22.01(B)(2)(A)," affirm the judgment as modified, and grant counsel's motion to withdraw.

Patrick A. Pirtle
Justice

Do not publish.