



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

No. 07-21-00176-CR

MIGUEL MARIN RODRIGUEZ-BARRAZA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-20L-153; Honorable Roland Saul, Presiding

February 17, 2022

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

Following a plea of not guilty, Appellant, Miguel Marin Rodriguez-Barraza, was convicted by the trial court for possession of cocaine in an amount less than one gram.¹ Punishment was assessed at two years confinement in a state jail facility, suspended in

¹ TEX. HEALTH & SAFETY CODE ANN. § 481.115(b). The offense is a state jail felony punishable for any term of not more than two years or less than 180 days and a fine up to \$10,000. TEX. PENAL CODE ANN. § 12.35(a), (b).

favor of a five-year term of community supervision, and a \$2,500 fine. In presenting this appeal, counsel has filed an *Anders*² brief in support of a motion to withdraw. We affirm and grant counsel's motion to withdraw.

In support of his motion to withdraw, counsel certifies he has conducted a conscientious examination of the record, and in his opinion, it reflects no potentially plausible basis for reversal of Appellant's conviction. *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 record supports 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 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 408.³ 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.

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

³ Notwithstanding that Appellant was informed of his right to file a *pro se* petition for discretionary review on 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 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.

BACKGROUND

During the evening on September 19, 2020, a Hereford police officer initiated a traffic stop of a vehicle. In addition to the driver and a passenger in the front seat, Appellant was riding in the rear passenger seat. After the officer obtained the driver's consent to search the vehicle, he discovered an open container of beer and a small, clear bag that contained a white substance he recognized as cocaine. The cocaine was found "in the back seat on – behind the passenger's side between the seat and the door." He asked the three occupants to whom the cocaine belonged and all three denied possessing it.

Another officer arrived on the scene and the three individuals were issued *Miranda* warnings. After a brief investigation, the officer who initiated the stop determined the cocaine belonged to Appellant and arrested him. He conducted a pat-down search and found \$3,006 in cash on Appellant's person.

During the officer's direct examination, he testified that in reviewing his body camera footage, he observed Appellant in the rear passenger seat "leaning over with his arm kind of moving behind him - - as that may have been when the narcotics may have been dropped." During cross-examination, defense counsel strategized that Appellant was arrested solely due to the amount of cash he possessed. The officer denied the implication and again explained that his body camera footage showed Appellant making a furtive gesture while sitting in the rear passenger seat. Specifically, the officer testified Appellant's movement as "there on his right-hand next to the door in the location of where the narcotics were located."

The driver of the vehicle testified and confirmed that Appellant, who is his uncle, was sitting in the rear passenger seat. He also testified that he knew the cocaine belonged to Appellant. His assertion was based on his experience of living with his uncle.

The State also presented evidence from a police department investigator that the substance collected on the night of Appellant's arrest was cocaine. After the evidence was processed and tested, the weight of the cocaine was determined to be .37 grams. A report from the Texas Department of Public Safety Crime Laboratory confirming the results was admitted into evidence without objection.

After the State rested, Appellant moved for a directed verdict arguing that his mere presence where the cocaine was found was insufficient to link him to possession of it. Before the State could fully respond, the trial court inquired whether Appellant had signed a waiver of the right to a jury trial as required by article 1.13 of the Texas Code of Criminal Procedure. Defense counsel acknowledged that a written waiver had not been filed but noted that case law provided that so long as Appellant always intended to waive a jury trial and agreed to sign a waiver, any failure to comply with the statute was not harmful. After a recess, Appellant signed a waiver and it was accepted by the trial court.

The State continued with its response to the motion for directed verdict by arguing that additional evidence other than proximity to the cocaine such as the body camera footage, the driver's testimony, and the large amount of cash on Appellant's person supported the State's theory that Appellant possessed the cocaine. The trial court denied Appellant's motion for a directed verdict and found him guilty beyond a reasonable doubt.

By the *Anders* brief, counsel evaluates the sufficiency of the evidence to support Appellant's conviction and also assesses any potential harm from Appellant's untimely execution of a written waiver of the right to a jury trial. He candidly concedes there are no meritorious grounds to advance on appeal on which relief may be granted.

APPLICABLE LAW—POSSESSION OF A CONTROLLED SUBSTANCE

A person commits the offense of possession of a controlled substance if he knowingly or intentionally possesses a controlled substance listed in Penalty Group 1 of the Texas Health and Safety Code. TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (b). Cocaine is a controlled substance listed in Penalty Group 1. § 481.102(3)(D). Possession is defined as exercising care, custody, control, or management of the substance. § 481.002(38); TEX. PENAL CODE ANN. § 1.07(a)(39). The State is required to prove possession and that the accused knew the matter he possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), *overruled on other grounds*, *Robinson v. State*, 466 S.W.3d 166, 173 (Tex. Crim. App. 2015).

WAIVER OF TRIAL BY JURY

Article 1.13(a) of the Texas Code of Criminal Procedure provides in relevant part that a waiver of the right to a jury trial must be made in person by the defendant in open court with the consent and approval of the court and the attorney representing the State. TEX. CODE CRIM. PROC. ANN. art. 1.13(a). The statute continues that the written waiver shall be filed in the papers of the cause before the defendant enters his plea. *Id.*

ANALYSIS

As presented by counsel in the *Anders* brief, the evidence is sufficient to link Appellant to possession of the cocaine. See *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016) (citing *Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006)).⁴ As the Court held in *Evans*, it is not the number of links that is dispositive but rather the logical force of all of the evidence, direct and circumstantial. *Evans*, 202 S.W.3d at 162.

Regarding the untimely written waiver of the right to a jury trial, counsel properly concludes that Appellant was not harmed by executing it until after he entered his plea of not guilty. The record shows that once Appellant did sign the waiver of the right to a jury trial, when questioned by the trial court on whether it was always his intention to waive his right to a jury trial, he answered affirmatively. While the failure to file the written waiver prior to the entry of Appellant's plea was error, such error was harmless. See *McCain v. State*, 67 S.W.3d 204, 210-11 (Tex. Crim. App. 2002) (holding that where an applicant for a writ of habeas corpus did not claim he desired and was deprived of his constitutional right to a jury trial and the record shows he agreed to the waiver, his conviction would not be set aside for failing to timely sign a written waiver in compliance with article 1.13 of the Texas Code of Criminal Procedure).

⁴ A non-inclusive list of links to establish possession of contraband include the following: (1) the defendant's presence during a search; (2) whether the contraband is in plain view; (3) the defendant's proximity and accessibility to the contraband; (4) whether the defendant was under the influence when arrested; (5) whether the defendant possessed the contraband when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the contraband was found; (12) whether the place where the contraband was found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the defendant's conduct indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162 n.12.

We too have independently examined the record to determine whether there are any non-frivolous issues which might support the 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; *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 record, we agree with counsel that there is no plausible basis for reversal of Appellant's conviction. See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

CONCLUSION

The trial court's judgment is affirmed and counsel's motion to withdraw is granted.

Patrick A. Pirtle
Justice

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