In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-22-00002-CR

SHANE HARLEY ESSARY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th District Court
Fannin County, Texas
Trial Court No. CR-20-27823

Before Morriss, C.J., Stevens and van Cleef, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

In the same proceeding, Shane Harley Essary entered open pleas of guilty to aggravated assault against a public servant with a deadly weapon[1] in this case[2] and in another case,[3] our cause number 06-22-00003-CR. After a pre-sentence investigation (PSI) report and additional evidence were received, the trial court sentenced Essary to forty years' imprisonment. This appeal followed.

Essary's appellate counsel filed a brief that outlined the procedural history of the case, provided a detailed summary of the evidence elicited during the trial court proceedings, and stated that counsel found no meritorious issues to raise on appeal. Meeting the requirements of *Anders v. California*, counsel has provided a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *Anders v. California*, 386 U.S. 738, 743–44 (1967); *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008) (orig. proceeding); *Stafford v. State*, 813 S.W.2d 503, 509–10 (Tex. Crim. App. 1991); *High v. State*, 573 S.W.2d 807, 812–13 (Tex. Crim. App. [Panel Op.] 1978).

Essary's counsel filed a motion with this Court seeking to withdraw as counsel in this appeal and provided Essary with a copy of the brief and the motion to withdraw. His counsel also informed Essary of his right to review the record and to file a pro se response and provided Essary with a pro se motion for access to the appellate record. On March 7, 2022, Essary filed

[1]*See* TEX. PENAL CODE ANN. § 22.02(b)(2)(B) (Supp.).

[2]The trial court's case number CR-20-27823.

[3]The trial court's case number CR-20-27902.

his pro se motion for access to the appellate record. We were informed by Essary's appellate counsel that she mailed a paper copy of the appellate record to Essary on March 7, 2022. This Court forwarded a digital copy of an exhibit contained in the appellate record to Essary on March 9, 2022, and notified Essary that his pro se response was due on April 25, 2022. By letter dated May 4, 2022, we notified Essary that the case would be submitted on briefs on May 25, 2022. We did not receive a pro se response from Essary.

In our review of the record in this case, we noted that, although the trial court found Essary guilty in both causes, it pronounced but one sentence of forty years. The Texas Penal Code requires that when a defendant "is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced." TEX. PENAL CODE ANN. § 3.03(a) (Supp.); *White v. State*, 543 S.W.2d 130, 132 (Tex. Crim. App. 1976). Further, the trial court is required to pronounce sentence orally in the defendant's presence. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(a) (Supp.); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). "[I]t is the pronouncement of sentence that is the appealable event, and the written sentence or order simply memorializes it and should comport therewith." *Madding*, 70 S.W.3d at 135 (quoting *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998)). Further, when the trial court fails to pronounce sentence on a charged offense, an appellate court is without jurisdiction to hear an appeal on that conviction. *See Thompson v. State*, 108 S.W.3d 287, 293 (Tex. Crim. App. 2003); *White*, 543 S.W.2d at 132; *Keys v. State*, 340 S.W.3d 526, 529 (Tex. App.—Texarkana 2011, order).

In this case, since the trial court pronounced a sentence on an offense, we originally had jurisdiction over the conviction in one of the causes but did not have jurisdiction over the conviction in the cause for which a sentence was not pronounced. *See White*, 543 S.W.2d at 132. However, since the trial court found Essary guilty of both offenses and pronounced only one sentence, we were unable to determine to which conviction the pronounced sentenced applied. In *Keys*, the trial court failed to pronounce sentence on the charged offense. This Court declined to dismiss Keys's appeal for lack of jurisdiction. Instead, we abated the matter to the trial court to orally pronounce sentence in Keys's presence in reliance on Rule 44.4 of the Texas Rules of Appellate Procedure, finding, "Rule 44.4 directs us, in this circumstance in which the error can be corrected by the trial court, not to dismiss, but first to direct that the trial court take the corrective action and then, once the error has been corrected, to address the other issues on appeal."[4] *Keys*, 340 S.W.3d at 529 (citing TEX. R. APP. P. 44.4).

We abated this case to the trial court to orally pronounce guilt and a sentence in each case in Essary's presence and to enter a new judgment of conviction reflecting the date sentence was imposed as the date the trial court orally pronounced guilt and orally imposed sentence in each

[4]Rule 44.4 provides:

> (a) *Generally*. A court of appeals must not affirm or reverse a judgment or dismiss an appeal if:
>
> (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and
>
> (2) the trial court can correct its action or failure to act.
>
> (b) *Court of Appeals Direction if Error Remediable*. If the circumstances described in (a) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.

TEX. R. APP. P. 44.4.

case. We have received a supplemental reporter's record and a supplemental clerk's record showing that on June 24, 2022, the trial court held a hearing, in which Essary participated by teleconference,[5] and it assessed punishment of forty years' imprisonment in this case, with the sentence to run concurrently with the sentence pronounced in the judgment on appeal in our companion cause number 06-22-00003-CR.

With the receipt of the supplemental record in this case, we have reviewed the entire appellate record and have independently determined that no reversible error exists. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005). In the *Anders* context, once we determine that the appeal is without merit, we must affirm the trial court's judgment. *See id*.

We affirm the trial court's judgment.[6]

Scott E. Stevens
Justice

Date Submitted: July 1, 2022
Date Decided: July 14, 2022

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[5]*See* Supreme Court of Texas, *Fifty-Second Emergency Order Regarding the COVID-19 State of Disaster*, Misc. Dkt. No. 22-9048 (June 20, 2022) (authorizing all courts in Texas in any civil or criminal case to require anyone involved in any hearing, including a party, "to participate remotely, such as by teleconferencing").

[6]Since we agree that this case presents no reversible error, we also, in accordance with *Anders*, grant counsel's request to withdraw from further representation of appellant in this case. *See Anders*, 386 U.S. at 744. No substitute counsel will be appointed. Should appellant desire to seek further review of this case by the Texas Court of Criminal Appeals, appellant must either retain an attorney to file a petition for discretionary review or file a pro se petition for discretionary review. Any petition for discretionary review (1) must be filed within thirty days from either the date of this opinion or the date on which the last timely motion for rehearing was overruled by this Court, *see* TEX. R. APP. P. 68.2, (2) must be filed with the clerk of the Texas Court of Criminal Appeals, *see* TEX. R. APP. P. 68.3, and (3) should comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure, *see* TEX. R. APP. P. 68.4.