



**IN THE
TENTH COURT OF APPEALS**

No. 10-08-00258-CR

DAVID NATHANIEL CHANNELL,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 413th District Court
Johnson County, Texas
Trial Court No. F41169**

MEMORANDUM OPINION

David Nathaniel Channell pleaded guilty to the offense of possession of a controlled substance less than one gram, a state jail felony. TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (Vernon 2003). In accordance with a plea bargain agreement, the trial court sentenced Channell to two years in the state jail, probated for five years. TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 2006).

A motion to revoke probation was filed by the State. At the hearing, Channell pled true to the allegations in the State's motion to revoke, and the trial court found the allegations to be true. After a punishment hearing, the trial court sentenced Channell to

confinement in the state jail of the Texas Department of Criminal Justice—Institutional Division for two (2) years, subject to a hearing on shock probation after a period of 120 days. At the hearing to consider shock probation, the trial court sentenced Channell to eighteen (18) months in the state jail. We affirm.

Channell's appellate counsel filed an *Anders* brief and a motion to withdraw as counsel. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Counsel concludes that the appeal is frivolous.

Counsel informed Channell of the right to file a *pro se* brief, and Channell has filed one. However, we review Channell's brief solely to determine if there are any arguable grounds for appeal. *Bledsoe v. State*, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005). *See also In re Schulman*, 252 S.W.3d 403, 409 n. 23 (Tex. Crim. App. 2008).

Counsel's brief evidences a professional evaluation of the record for error, and we conclude that counsel performed the duties required of appointed counsel. *See Anders*, 386 U.S. at 744; *High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978); *see also In re Schulman*, 252 S.W.3d at 407.

In reviewing an *Anders* appeal, we must, "after a full examination of all the proceedings, . . . decide whether the case is wholly frivolous." *Anders* at 744; *accord Stafford v. State*, 813 S.W.2d 503, 509-11 (Tex. Crim. App. 1991); *Coronado v. State*, 996 S.W.2d 283, 285 (Tex. App.—Waco 1999, order) (per curiam), *disp. on merits*, 25 S.W.3d 806 (Tex. App.—Waco 2000, pet. ref'd). An appeal is "wholly frivolous" or "without merit" when it "lacks any basis in law or fact." *McCoy v. Court of Appeals*, 486 U.S. 429, 439 n.10, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988). Arguments are frivolous when they

"cannot conceivably persuade the court." *McCoy*, 486 U.S. at 436. An appeal is not wholly frivolous when it is based on "arguable grounds." *Stafford*, 813 S.W.2d at 511.

After a review of the briefs and the entire record in this appeal, we determine the appeal to be wholly frivolous. See *Bledsoe v. State*, 178 S.W.3d at 826-27. Accordingly, we affirm the trial court's judgment.

Should Channell wish to seek further review of this case by the Texas Court of Criminal Appeals, Channell must either retain an attorney to file a petition for discretionary review or Channell must file a *pro se* petition for discretionary review. Any petition for discretionary review must be filed within thirty days from the date of either this opinion or the last timely motion for rehearing that was overruled by this Court. See TEX. R. APP. P. 68.2. Any petition for discretionary review must be filed with this Court, after which it will be forwarded to the Texas Court of Criminal Appeals along with the rest of the filings in this case. See TEX. R. APP. P. 68.3. Any petition for discretionary review should comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure. See TEX. R. APP. P. 68.4. See *In re Schulman*, 252 S.W.3d 403, 409 n.22 (Tex. Crim. App. 2008) (citing *Glover v. State*, No. 06-07-00060-CR, 2007 Tex. App. LEXIS 9162 (Tex. App.—Texarkana, Nov. 20, 2007, pet. ref'd) (not designated for publication)).¹

Counsel's request that she be allowed to withdraw from representation of Channell is granted. Additionally, counsel must send Channell a copy of our decision,

¹ We note that counsel has an affirmative duty to ensure that the client has, at some point, been informed of his right to file a *pro se* PDR. The preferred mechanism for this is a letter sent to the client with the Anders brief and the motion to withdraw as counsel. *In re Schulman*, 252 S.W.3d 403, 408 n. 22 (Tex. Crim. App. 2008).

notify Channell of his right to file a *pro se* petition for discretionary review, and send this Court a letter certifying counsel's compliance with Texas Rule of Appellate Procedure 48.4. TEX. R. APP. P. 48.4; *see In re Schulman*, 252 S.W.3d at 409 n. 22.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Reyna, and
Justice Davis

Affirmed

Opinion delivered and filed August 5, 2009

Do not publish

[CR25]