



**IN THE  
TENTH COURT OF APPEALS**

**No. 10-09-00068-CR**

**MARLIN JAMES RAY, JR.,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

**From the 85th District Court  
Brazos County, Texas  
Trial Court No. 08-02494-CRF-85**

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**MEMORANDUM OPINION**

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Marlin James Ray, Jr. was convicted by a jury of burglary of a habitation with intent to commit theft. TEX. PEN. CODE ANN. § 30.02 (Vernon 2003). This offense was enhanced to a first degree felony based on prior convictions of Ray, Jr., to which Ray, Jr. pled true to the jury. TEX. PEN. CODE ANN. § 12.42(b) (Vernon 2003). Based on the jury's verdict on punishment, the trial court assessed punishment at forty years in the Texas Department of Criminal Justice – Institutional Division. See TEX. PEN. CODE ANN. § 12.32 (Vernon 2003). We affirm.

Ray, Jr.'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.

Ray, Jr. has filed a *pro se* brief. However, we review Ray, Jr.'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 Ray, Jr. wish to seek further review of this case by the Texas Court of Criminal Appeals, Ray, Jr. must either retain an attorney to file a petition for discretionary review or Ray, Jr. 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 also 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)).<sup>1</sup>

Counsel's request that he be allowed to withdraw from representation of Ray, Jr. is granted. Additionally, counsel must send Ray, Jr. a copy of our decision, notify Ray, Jr. of his right to file a *pro se* petition for discretionary review, and send this Court a

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<sup>1</sup> 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).

letter certifying counsel's compliance with Texas Rule of Appellate Procedure 48.4. TEX.

R. APP. P. 48.4; *see also 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 October 28, 2009

Do not publish

[CRPM]