



**IN THE
TENTH COURT OF APPEALS**

No. 10-12-00176-CR

HAROLD ANDREW PIVONKA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 361st District Court
Brazos County, Texas
Trial Court No. 09-03777-CRF-361**

ABATEMENT ORDER

Harold Pivonka made an open plea of guilty to the offense of indecency with a child (sexual contact). At the sentencing hearing, the trial court sentenced him to eight years' imprisonment. Pivonka appealed.

Pivonka's appointed appellate counsel has filed a motion to withdraw and an *Anders* brief, asserting that she has diligently reviewed the appellate record and that, in her opinion, the appeal is frivolous. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Although informed of his right to do so, Pivonka has not filed a

pro se response to the *Anders* brief.

In an *Anders* case, we must, “after a full examination of all the proceedings, ... decide whether the case is wholly frivolous.” *Id.* at 744, 87 S.Ct. at 1400; *accord Stafford v. State*, 813 S.W.2d 503, 509-11 (Tex. Crim. App. 1991). 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, 1902 n.10, 100 L.Ed.2d 440 (1988).

Our role in this *Anders* appeal is limited to determining whether arguable grounds for appeal exist. *Bledsoe v. State*, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005). If we determine that an arguable ground for appeal exists, we must abate the appeal and remand the case to the trial court to allow the court-appointed attorney to withdraw. *See id.* The trial court must then appoint another attorney to present all arguable grounds for appeal. *See id.* “Only after the issues have been briefed by new counsel may [we] address the merits of the issues raised.” *Id.*

Our independent review of the record indicates that Pivonka, although indigent, was assessed attorney’s fees in the judgment of conviction. Based on our independent review of the record, we find that this is an arguable ground for appeal. *See Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010); *Wiley v. State*, --- S.W.3d ---, 2012 WL 5972443 (Tex. App.—Waco Nov. 29, 2012, pet. filed). Because court-appointed counsel’s brief does not address this arguable ground, we abate this appeal and remand this case to the trial court for the withdrawal of current counsel and the appointment of new counsel. A copy of the order appointing new counsel shall be forwarded to the Clerk of this Court within ten days of the date of this opinion. Only after new counsel is

appointed and the issue identified in this opinion, as well as any other issues that counsel wishes to advance in the brief on the merits, are addressed will we reach the merits of this appeal. Upon receipt of the appointment of new counsel, we will reinstate the appeal and new counsel will then have thirty days to file a brief unless a motion for extension of time is filed and granted by this Court.

PER CURIAM

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Appeal abated
Order issued and filed January 17, 2013
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