IN THE
TENTH COURT OF APPEALS

No. 10-15-00323-CR
No. 10-15-00340-CR

JOSHUA DUANTA RICHARDSON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court Nos. 2014-0271-C1 and 2015-195-C1

MEMORANDUM OPINION

Appellant Joshua Duanta Richardson was charged in a five-count indictment in No. 10-15-00323-CR with: (1) assault family violence by occlusion with a prior conviction (enhanced), a first-degree felony; (2) assault family violence with a prior conviction (enhanced), a second-degree felony; (3) attempted sexual assault (enhanced), a second-degree felony; (4) unauthorized use of a motor vehicle, a state-jail felony; and (5) criminal mischief of $1,500 or more but less than $20,000, a state-jail felony. Appellant made open

pleas of guilty to counts 1, 2, 4, and 5, and the State abandoned count 3 as part of its plea negotiation with Appellant.[1] Appellant pled true to the enhancement paragraph. After a punishment hearing without witnesses, the trial court sentenced Appellant to 20 years and 12 years in prison on counts 1 and 2, respectively, and 2 years in state jail on counts 4 and 5, respectively.[2] All four sentences were ordered to be served concurrently.

In No. 10-15-00340-CR, Appellant was charged by indictment with the third-degree felony of evading arrest or detention with a motor vehicle. An enhancement paragraph alleged a prior felony, thus increasing the punishment range to a second-degree felony. Appellant made an open plea of guilty and pled true to the enhancement paragraph. After a punishment hearing, the trial court sentenced Appellant to 12 years in prison, to be served concurrently. These appeals ensued. We will affirm.

In accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), in each case Appellant's court-appointed appellate counsel filed a brief and motion to withdraw, stating that his review of the records yielded no grounds of error upon which an appeal can be predicated. Counsel's briefs meet the requirements of *Anders*; they present a professional evaluation demonstrating why there are no arguable grounds to advance on appeal. *See In re Schulman*, 252 S.W.3d 403, 407 n.9 (Tex. Crim.

[1] The State also agreed to cap its sentencing request to the trial court on Count 1 at 20 years but with the further understanding that the trial court could go above or below that cap in sentencing Appellant on Count 1. It appears from several remarks in the record that the trial court initially indicated that it would assess a 12-year sentence on Count 1, subject to its review of a presentence investigation that it was ordering.

[2] After being sentenced to 20 years on Count 1, Appellant asked to withdraw his open plea of guilty; the trial court rejected that request.

App. 2008) ("In Texas, an *Anders* brief need not specifically advance 'arguable' points of error if counsel finds none, but it must provide record references to the facts and procedural history and set out pertinent legal authorities."); *Stafford v. State*, 813 S.W.2d 503, 510 n.3 (Tex. Crim. App. 1991).

In compliance with *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978), Appellant's counsel has discussed why there is no reversible error in the trial court's judgments. Counsel has informed us that he has: (1) examined the records and found no arguable grounds to advance on appeal; (2) served a copy of each brief and motion to withdraw on Appellant; and (3) provided Appellant with a copy of the records and informed him of his right to file a pro se response. *See Anders*, 386 U.S. at 744, 87 S.Ct. at 1400; *Stafford*, 813 S.W.2d at 510 n.3; *see also Schulman*, 252 S.W.3d at 409 n.23. The Clerk of the Court also informed Appellant of his right to file a pro se response.

Appellant filed a pro se response in No. 10-15-00323-CR.[3] Appellant argues that the trial court erred when it refused to allow Appellant to withdraw his open guilty plea because there was an implied agreement for a sentence of 12 years on Count 1.

> A defendant may withdraw his guilty plea as a matter of right without assigning reason until judgment has been pronounced or the case has been taken under advisement. *Grant v. State,* 172 S.W.3d 98, 100 (Tex. App.—Texarkana 2005, no pet.); *see Stanton v. State,* 159 Tex. Crim. 275, 262 S.W.2d 497, 498 (1953). However, when the defendant decides to withdraw his guilty plea after the trial court takes the case under advisement or pronounces judgment, the decision to accept or reject the withdrawal is within the sound discretion of the trial court. *Jackson v. State,* 590 S.W.2d 514, 515 (Tex. Crim. App. [Panel Op.] 1979) (citing *McWherter v. State,* 571 S.W.2d 312 (Tex. Crim. App. [Panel Op.] 1978)). An abuse of discretion is

[3] After being notified of its right to file a reply to Appellant's pro se response, the State notified the Court that it would not file a reply, but the State did note that, from the record, it appears that there is no justiciable issue presented by the *Anders* brief or the pro se response.

> shown only when the trial court's ruling lies outside the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

Hernandez v. State, 438 S.W.3d 876, 878 (Tex. App.—Texarkana 2014, pet. ref'd); *see Coronado v. State*, 25 S.W.3d 806, 809 (Tex. App.—Waco 2000, pet. ref'd).

At the June 30, 2015 plea hearing, Appellant stated that he was pleading guilty because he was guilty and not because of any promises made to him. The trial court admonished Appellant that, as to Count 1, the punishment range was five to 99 years or life. The prosecutor then stated that, for Count 1, the open plea was being made with the understanding that the State was capping its sentence request at 20 years with the further understanding that the trial court could "go above or below that." Both Appellant and his attorney stated that they understood the plea arrangement that the prosecutor had stated. Appellant also said, in response to the trial court, that he understood that the trial court was ordering a presentence investigation and that, once it was received, the trial court could assess a maximum sentence.

At the August 28, 2015 sentencing hearing, after the trial court stated that it had reviewed the presentence investigation, the State argued for a 20-year sentence on Count 1. Appellant's counsel then argued that Count 1 had been enhanced to a first-degree felony because of Appellant's prior convictions and asked the trial court to "stick with" the 12-year sentence that the trial court had allegedly arrived at earlier. At that point the trial court focused on the criminal mischief count, which involved Appellant's driving the assault victim's car into the river, and the trial court recessed the hearing for a week so that the trial court judge could have "more time to look at this."

At the September 4, 2015 hearing, the State again recommended a 20-year sentence on Count 1, and Appellant's attorney again asked the trial court to impose its alleged original decision of a 12-year sentence. The trial court then stated:

> If I had analyzed this case before and calmly reflected on it, I have analyzed it even further and even more calmly reflected on it, and I think the first time I calmly reflected on it, I did not fully appreciate the gravity of what is charged here. So I'm going to accept the State's recommendation.

Based on the applicable law and the record before us, Appellant's issue is plainly not an arguable ground to advance in this appeal.

Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to determine whether the case is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346, 349-50, 102 L.Ed.2d 300 (1988). We have reviewed the records and counsel's briefs and have found nothing that would arguably support an appeal. *See Bledsoe v. State*, 178 S.W.3d 824, 827-28 (Tex. Crim. App. 2005); *Stafford*, 813 S.W.2d at 509. Accordingly, the judgments of the trial court are affirmed.

Appellant's attorney has moved to withdraw as counsel for Appellant in each case. *See Anders*, 386 U.S. at 744, 87 S.Ct. at 1400; *see also Schulman*, 252 S.W.3d at 408 n.17. We grant counsel's motions to withdraw. Within five days of the date of this opinion, counsel is ordered to send a copy of this opinion and this Court's judgments to Appellant and to advise him of his right to file a petition for discretionary review in each case.[4] *See* TEX. R.

[4] New appellate counsel will not be appointed for Appellant. Should Appellant wish to seek further review of this case by the Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or must file a pro se petition for discretionary review. Any petition for discretionary review must be filed within thirty days from the date of this opinion or from the date the last timely motion for rehearing was overruled by this Court. *See* TEX. R. APP. P. 68.2. Any petition for discretionary review must be filed with the Clerk of the Court of Criminal Appeals. *See id.* at R. 68.3. Any petition for

APP. P. 48.4; *see also Schulman*, 252 S.W.3d at 412 n.35; *Ex parte Owens*, 206 S.W.3d 670, 673 (Tex. Crim. App. 2006).

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed February 11, 2016
Do not publish
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discretionary review should comply with the requirements of rule 68.4 of the Texas Rules of Appellate Procedure. *See id.* at R. 68.4; *see also Schulman*, 252 S.W.3d at 409 n.22.