NUMBERS 13-16-00502-CR, 13-16-00503-CR & 13-16-00504-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ALEX JUSTIN LOPEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 36th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Alex Justin Lopez is the subject of three judgments of conviction:

- The first conviction, appellate cause number 13-16-00502-CR, is for one count of sexual assault, *see* TEX. PENAL CODE ANN. § 22.011 (West, Westlaw through 2017 R.S.), and one count of indecency with a child, *see id*. § 21.11 (West, Westlaw through 2017 R.S.), for which the trial court sentenced Lopez to twenty years' confinement on each count.

- The second conviction, appellate cause number 13-16-00503-CR, is for one count of possession of child pornography, *see id*. § 43.26 (West, Westlaw through 2017 R.S.), for which the trial court sentenced Lopez to ten years' confinement.

- The third conviction, appellate cause number 13-16-00504-CR, is for one count of unlawful possession of a firearm, *see id*. § 46.04 (West, Westlaw through 2017 R.S.), for which the trial court sentenced Lopez to ten years' confinement.

The twenty-year sentences in the first conviction are to run concurrently with each other, and the ten-year sentences in the second and third convictions are to run concurrently with each other. However, the trial court ordered the ten-year sentences to be served consecutively after the twenty-year sentences are served.

In appellate cause numbers 13-16-00502-CR and 13-16-00503-CR, Lopez's court-appointed counsel has filed an *Anders* brief. *See Anders v. California*, 386 U.S. 738, 744 (1967). In appellate cause number 13-16-00504-CR, Lopez contends by a single issue that his conviction for unlawful possession of a firearm is void because he was not a convicted felon at the time he possessed the firearm.

In this consolidated memorandum opinion,[1] we affirm the convictions for sexual assault, indecency with a child, and possession of child pornography (appellate cause numbers 13-16-00502-CR and 13-16-00503-CR). We reverse and render an acquittal for the conviction for unlawful possession of a firearm (appellate cause number 13-16-00504-CR).

I. BACKGROUND

In July or August 2013, Lopez, according to the indictments in the *Anders* appeal

[1] We will issue one opinion for all three appellate cause numbers in the interest of judicial economy.

(appellate cause number 13-16-00502-CR), committed one count of sexual assault. *See* TEX. PENAL CODE ANN. § 22.011.

In November 2013, Lopez, again according to the indictments in the *Anders* appeal, committed one count of indecency with a child (appellate cause number 13-16-00502-CR), *see id*. at § 21.11, and one count of possession of child pornography (appellate cause number 13-16-00503-CR). *See id*. § 43.26.

In September 2014, the trial court signed orders of deferred adjudication in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR, and it placed Lopez on community supervision for a period of ten years.

In January 2015, Lopez, according to the indictment in the non-*Anders* appeal, committed one count of unlawful possession of a firearm. This third indictment alleges that Lopez had been convicted of the felony offense of sexual assault on September 5, 2014 in appellate cause number 13-16-00502-CR. In October 2015, the trial court signed an order of deferred adjudication in appellate cause number 13-16-00504-CR, and it placed Lopez on community supervision for a period of six years.

Eventually, the State moved to revoke Lopez's community supervision in all three appellate cause numbers. In September 2016, Lopez and the State entered into an open plea agreement wherein Lopez agreed to plead true to all of the allegations in the three motions to revoke in exchange for a recommendation by the State of twelve-years' confinement for all three appellate cause numbers. The trial court rejected the recommendation, and it sentenced Lopez as provided above.

Pending before us are *Anders'* briefs in two causes (appellate cause numbers 13-16-00502-CR and 13-16-00503-CR) and an ordinary appeal. We turn to the ordinary appeal before addressing the *Anders'* briefs.

I. DISCUSSION

A. Unlawful Possession of a Firearm

The trial court adjudicated Lopez guilty in appellate cause number 13-16-00504-CR on one count of unlawful possession of a firearm and sentenced him to ten years' confinement. To be clear, Lopez is not challenging the decision to revoke the community supervision that he was placed on in appellate cause number 13-16-00504-CR. Instead, Lopez collaterally attacks the underlying order of deferred adjudication. By a single issue, Lopez contends that the conviction in appellate cause number 13-16-00504-CR should be rendered an acquittal because he was not a convicted felon on January 17, 2015, the date he possessed the firearm, and therefore, the order of deferred adjudication is void. The State has not filed an appellee's brief.

In *Nix v. State*, the Texas Court of Criminal Appeals recognized that the original plea of a defendant placed on deferred adjudication generally cannot be attacked on an appeal of the revocation proceedings. 65 S.W.3d 664, 667–68 (Tex. Crim. App. 2001) *abrogation on other grounds recognized by Wright v. State*, 506 S.W.3d 478, 482 (Tex. Crim. App. 2016). The exception to the general ruled articulated in *Nix* is if a judgment is void. 65 S.W.3d at 668. A judgment of conviction may be void when the record reflects that there is no evidence to support the conviction. *Id*.

We construe Lopez's argument that the judgment in appellate cause number 13-16-00504-CR is void as a legal sufficiency challenge. Section 46.04(a)(1) of the Texas Penal Code provides:

> A person who has been convicted of a felony commits an offense if he possesses a firearm after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later[.]

See TEX. PENAL CODE ANN. § 46.04(a)(1). Deferred adjudication-probation status, which is what Lopez had at the time he possessed the firearm, is not the same as convicted status. *See State v. Juvrud*, 187 S.W.3d 492, 495 (Tex. Crim. App. 2006) (holding that under deferred adjudication, "the initial grant of community supervision is not deemed a conviction" for general purposes); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (West, Westlaw through 2017 R.S.). Therefore, there was no predicate felony conviction to sustain a conviction for unlawful possession of a firearm. *See* TEX. PENAL CODE ANN. § 46.04(a) (West, Westlaw through 2017 R.S.); *Cuellar v. State*, 70 S.W.3d 815, 820 (Tex. Crim. App. 2002) (holding that section 49.04(a) requires a felony conviction as an element of the offense and, because the appellant's prior felony conviction was set aside pursuant to an article 42.12, § 20 order, there was no predicate felony to support conviction under section 46.04(a)). The evidence, therefore, is legally insufficient to support a conviction for unlawful possession.

Furthermore, assuming without deciding (1) that unlawful carrying of a weapon, *see* TEX. PENAL CODE ANN. § 46.02(a) (West, Westlaw through 2017 R.S.), is a lesser-included offense of unlawful possession of a firearm, *see id*. at § 46.04(a), and (2) that

we must determine whether there is evidence of all of the elements of unlawful carrying of a weapon in the context of an open plea, *see generally, Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014) (providing that upon determining a jury's verdict of guilty as to the count submitted is legally insufficient, an appellate court must employ a two-part test in determining whether to render an acquittal or reform a judgment to reflect a conviction on a lesser-included offense), we find no evidence that would support a conviction for unlawful carrying of a weapon. *See* TEX. PENAL CODE ANN. § 46.02(a). Section 46.02(a) of the Texas Penal Code provides:

> A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun, illegal knife, or club if the person is not:
>
> (1) on the person's own premises or premises under the person's control; or
>
> (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

Id. The record fails to indicate where Lopez allegedly carried the firearm. Moreover, Lopez's judicial confession that was used to place him on deferred adjudication for the offense of unlawful possession erroneously states that he was convicted of sexual assault on September 5, 2014. *See Juvrud*, 187 S.W.3d at 495; *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5.

Lopez's first issue in appellate cause number 13-16-00504-CR is sustained. We now turn to the *Anders'* briefs.

B. *Anders'* Brief

1. Applicable Law

Pursuant to *Anders v. California*, Lopez's court-appointed appellate counsel has filed with this Court in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR a motion to withdraw and a brief stating that his review of the record yielded no grounds of reversible error upon which an appeal can be predicated. *See id.* Counsel's brief meets the requirements of *Anders* as it presents 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. App. 2008) (orig. proceeding) ("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.") (citing *Hawkins v. State*, 112 S.W.3d 340, 343–44 (Tex. App.—Corpus Christi 2003, no pet.)); *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) and *Kelly v. State*, 436 S.W.3d 313, 319–22 (Tex. Crim. App. 2014), Lopez's counsel carefully discussed why, under controlling authority, there is no reversible error in the trial court's judgment. Lopez's counsel has also informed this Court that Lopez has been (1) notified that counsel has filed an *Anders* brief and a motion to withdraw; (2) provided with copies of both pleadings; (3) informed of his rights to file a pro se response, review the record preparatory to filing that response, and seek discretionary review if we concluded that the appeal is frivolous; and (4) provided with a form motion for pro se access to the appellate record with instructions to file the motion within ten days. *See*

Anders, 386 U.S. at 744; *Kelly*, 436 S.W.3d at 319–20, *Stafford*, 813 S.W.2d at 510 n.3; *see also In re Schulman*, 252 S.W.3d at 409 n.23. More than an adequate period of time has passed, and Lopez has not filed a pro se response.[2]

2. Independent Review

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 (1988). We have reviewed the entire record and counsel's brief, and we have found nothing that would arguably support an appeal in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR. *See id.* at 827–28 ("Due to the nature of *Anders* briefs, by indicating in the opinion that it considered the issues raised in the briefs and reviewed the record for reversible error but found none, the court of appeals met the requirement of Texas Rule of Appellate Procedure 47.1."); *Stafford*, 813 S.W.2d at 509. Accordingly, we affirm the judgments of the trial court in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR.

3. Motion to Withdraw

In accordance with *Anders*, Lopez's attorney has asked this Court for permission to withdraw as counsel. *See Anders*, 386 U.S. at 744; *see also In re Schulman*, 252 S.W.3d at 408 n.17 (citing *Jeffery v. State*, 903 S.W.2d 776, 779–80 (Tex. App.—Dallas 1995, no pet.) ("[I]f an attorney believes the appeal is frivolous, he must withdraw from

[2] The Texas Court of Criminal Appeals has held that "the pro se response need not comply with the rules of appellate procedure in order to be considered. Rather, the response should identify for the court those issues which the indigent appellant believes the court should consider in deciding whether the case presents any meritorious issues." *In re Schulman*, 252 S.W.3d 403, 409 n.23 (Tex. Crim. App. 2008) (orig. proceeding) (quoting *Wilson v. State*, 955 S.W.2d 693, 696–97 (Tex. App.—Waco 1997, no pet.)).

representing the appellant. To withdraw from representation, the appointed attorney must file a motion to withdraw accompanied by a brief showing the appellate court that the appeal is frivolous.") (citations omitted)). We grant counsel's motion to withdraw in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR only. Within five days of the date of this Court's opinion, counsel is ordered to send a copy of this opinion and this Court's judgments to Lopez and to advise him of his right to file a petition for discretionary review.[3] *See* TEX. R. APP. P. 48.4; *see also In re Schulman*, 252 S.W.3d at 412 n.35; *Ex parte Owens*, 206 S.W.3d 670, 673 (Tex. Crim. App. 2006).

III. CONCLUSION

We affirm the convictions for sexual assault, indecency with a child (appellate cause number 13-16-00502-CR), and possession of child pornography (appellate cause number 13-16-00503-CR). We reverse and render an acquittal for the conviction for unlawful possession of a firearm (appellate cause number 13-16-00504-CR).

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
24th day of August, 2017.

[3] No substitute counsel will be appointed in appellate cause numbers 13-16-00502-CR and 13-16-00503-CR. Should Lopez wish to seek further review of appellate cause numbers 13-16-00502-CR and 13-16-00503-CR by the Texas Court of Criminal Appeals, he 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 must be filed within thirty days from the date of either this opinion or the last timely motion for rehearing or timely motion for en banc reconsideration that was overruled by this Court. *See* TEX. R. APP. P. 68.2. A petition for discretionary review must be filed with the clerk of the Court of Criminal Appeals. *See id.* R. 68.3. Any petition for discretionary review should comply with the requirements of Texas Rule of Appellate Procedure 68.4. *See id.* R. 68.4.