

NO. 12-11-00216-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

STEVEN JAMES DAVIS, § *APPEALS FROM THE 123RD*
APPELLANT

V. § *JUDICIAL DISTRICT COURT*

THE STATE OF TEXAS, § *SHELBY COUNTY, TEXAS*
APPELLEE

MEMORANDUM OPINION
PER CURIAM

Steven James Davis appeals his conviction for sexual assault of a child. Appellant's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969). We modify the judgment and, as modified, affirm.

BACKGROUND

Appellant was charged by indictment with the offense of sexual assault of a child, a second degree felony,¹ and entered a plea of guilty to that offense. Appellant and his counsel signed various documents in connection with his guilty plea, including an agreement to stipulate testimony and judicial confession in which Appellant swore, and judicially confessed, that all allegations pleaded in the indictment were true and correct. The trial court found that the evidence substantiated Appellant's guilt, deferred further proceedings without entering an adjudication of guilt, and ordered that Appellant be placed on deferred adjudication community supervision for

¹ See TEX. PENAL CODE ANN. § 22.011(a)(2)(A) (West 2011).

five years.² The trial court also ordered that Appellant pay a \$3,000.00 fine, attorney's fees, and court costs.

Later, the State filed a motion to proceed with an adjudication of guilt, alleging that Appellant had violated the terms of his community supervision. At the hearing on the motion, Appellant pleaded "not true" to the allegations in the State's motion. After a hearing, the trial court found it "true" that Appellant violated the conditions of his community supervision, specifically finding the allegations in subparagraphs A and B of the State's motion to be "true," revoked Appellant's community supervision, and adjudged Appellant guilty as charged as alleged in the indictment. The trial court assessed Appellant's punishment at twenty years of imprisonment.³ This appeal followed.

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant's counsel filed a brief in compliance with *Anders* and *Gainous*, stating that he has diligently reviewed the appellate record and is of the opinion that the record reflects no reversible error and that there is no error upon which an appeal can be predicated. From our review of Appellant's brief, it is apparent that his counsel is well acquainted with the facts in this case. In compliance with *Anders*, *Gainous*, and *High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978), counsel's brief presents a chronological summation of the procedural history of the case, and further states that counsel is unable to raise any arguable issues for appeal. In Appellant's pro se brief, he argues that there was insufficient investigation to prove that he committed the alleged offenses in the State's motion that violated the terms and conditions of his community supervision. We have reviewed the record for reversible error and have found none. See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

We note, however, that the trial court's written judgment incorrectly reflects that Appellant pleaded "true" to the allegations in the State's motion to proceed with an adjudication of guilt. We have authority to modify a judgment to speak the truth when we have the necessary information before us to do so. See TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim.

² See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (West Supp. 2011).

³ An individual adjudged guilty of a second degree felony shall be punished by imprisonment for any term of not more than twenty years or less than two years and, in addition, a fine not to exceed \$10,000. TEX. PENAL CODE ANN. § 12.33 (West 2011).

App.1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex.App.–Dallas 1991, pet. ref'd). Appellant pleaded “not true” to the State's motion. Therefore, the trial court's judgment should be modified to reflect that Appellant pleaded “not true” to the allegations contained in the State's motion to proceed with an adjudication of guilt.

CONCLUSION

As required, Appellant’s counsel has moved for leave to withdraw. *See In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (orig. proceeding); *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We are in agreement with Appellant’s counsel that the appeal is wholly frivolous. Accordingly, his motion for leave to withdraw is hereby *granted*. We *modify* the trial court’s judgment to reflect that Appellant pleaded “not true” to the State’s motion to proceed with an adjudication of guilt. We *affirm* as *modified*. *See* TEX. R. APP. P. 43.2; *Bray v. State*, 179 S.W.3d 725, 726 (Tex. App.—Fort Worth 2005, no pet.) (en banc) (holding that an appellate court has the authority to reform a judgment in an *Anders* appeal and to affirm that judgment as reformed).

Counsel has a duty to, within five days of the date of this opinion, send a copy of the opinion and judgment to Appellant and advise him of his right to file a petition for discretionary review. *See* TEX. R. APP. P. 48.4; *In re Schulman*, 252 S.W.3d at 411 n.35. Should Appellant wish to seek further review of this case by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or he must file a pro se petition for discretionary review. *See In re Schulman*, 252 S.W.3d at 408 n.22. 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 the Texas Court of Criminal Appeals. *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; *In re Schulman*, 252 S.W.3d at 408 n.22.

Opinion delivered July 31, 2012.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)



**COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT**

JULY 31, 2012

NO. 12-11-00216-CR

STEVEN JAMES DAVIS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 123rd Judicial District Court
of Shelby County, Texas. (Tr.Ct.No. 11CR18,219)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that the judgment of the trial court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED by this court that the trial court's judgment adjudicating guilt dated June 24, 2011, should be modified to reflect that Appellant pleaded "not true" to the allegations contained in the State's motion to proceed with an adjudication of guilt, and as **modified**, the judgment of the trial court is **affirmed**; Appellant's counsel's motion to withdraw is **granted**; and that this decision be certified to the court below for observance.

By *per curiam* opinion.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.