

NO. 12-11-00327-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***GARY MAURICE WELLS,
APPELLANT***

§

APPEAL FROM THE 2ND

V.

§

JUDICIAL DISTRICT COURT

***THE STATE OF TEXAS,
APPELLEE***

§

CHEROKEE COUNTY, TEXAS

***MEMORANDUM OPINION
PER CURIAM***

Gary Maurice Wells appeals his conviction for burglary of a habitation. Appellant's counsel has filed a brief asserting 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 and affirm as modified.

BACKGROUND

In 2010, Appellant was indicted for burglary of a habitation and burglary of a building. The indictment also contained two enhancement paragraphs for prior felonies alleged to have been committed by Appellant. Appellant waived his right to a jury and elected to have a bench trial. At trial, the evidence showed that the victim's neighbor saw Appellant exit the victim's home with objects in his hands. The neighbor called the police, and officers quickly arrived and apprehended Appellant.

The owner testified that the home was her residence and that she did not give Appellant permission to enter her property or to remove any items located inside the home. She identified the items that were taken as her possessions. The victim's neighbor who called police testified

she knew Appellant from prior encounters. She stated that she saw Appellant exit the victim's home carrying objects from the home covered in a sheet so that he could carry them. The neighbor testified that she confronted Appellant and called the police. She stated that Appellant placed the objects back inside the victim's home and jumped the fence in an attempt to escape. The responding police officers testified that they arrived immediately and apprehended Appellant in a neighbor's garage, where he was hiding behind a washing machine. They also testified that a subsequent investigation of the crime showed signs of forced entry into the home.

The trial court found Appellant guilty on the burglary of a habitation count, and not guilty on the burglary of a building count. The trial court sentenced Appellant to thirty-seven years of imprisonment on count one, and acquitted him on count two. This appeal followed.¹

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant's counsel has filed a brief in compliance with *Anders* and *Gainous*. Counsel states that he has diligently reviewed the appellate record and that he is well acquainted with the facts of this case. In compliance with *Anders*, *Gainous*, and *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978), counsel's brief presents a thorough chronological summary of the procedural history of the case and further states that counsel is unable to present any arguable issues for appeal.² See *Anders*, 386 U.S. at 745, 87 S. Ct. at 1400; see also *Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 350, 102 L. Ed. 2d 300 (1988). We have considered counsel's brief and have conducted our own independent review of the record. We have found no reversible error. See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

Restitution

We note, however, that the record shows the trial court did not include restitution in its oral pronouncement of Appellant's sentence at trial. The trial court's written judgment, under the heading "Restitution," states "\$ N/A." Yet, the written judgment also reflects that restitution is payable to the "DPS Lab," even though no amount is provided, and that \$1,000.00 is payable to "Cherokee County for Court Appointed Attorney fees."

¹ The Texas Court of Criminal Appeals allowed Appellant to file an out-of-time appeal. See *Ex parte Wells*, No. AP-76,626, 2011 WL 4067679, at *1 (Tex. Crim. App. Sept. 14, 2011) (per curiam).

² Counsel for Appellant certified that he provided Appellant with a copy of his brief and informed Appellant that he had the right to file his own brief. Appellant was given time to file his own brief, but the time for filing such a brief has expired and we have received no pro se brief.

A trial court's pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, §1(a) (West Supp. 2011) (providing that "sentence shall be pronounced in the defendant's presence"). When the oral pronouncement of sentence and the written judgment vary, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998).

Restitution is punishment. *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009); *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006) (orig. proceeding). Therefore, it must be included in the oral pronouncement of sentence to be valid. *Sauceda v. State*, 309 S.W.3d 767, 769 (Tex. App.—Amarillo 2010, pet. ref'd); *Alexander v. State*, 301 S.W.3d 361, 364 (Tex. App.—Fort Worth 2009, no pet.). Because the trial court did not include restitution in its oral pronouncement of Appellant's sentence, the court could not assess restitution in its written judgment. *See Saucedo*, 309 S.W.3d at 769; *Alexander*, 301 S.W.3d at 364. Therefore, the designation of the "DPS Lab" and "Cherokee County for Court Appointed Attorney fees" as the recipients of restitution should be deleted. The language regarding the payment of \$1,000.00 as restitution should also be deleted.

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 delete the restitution award of \$1,000.00, and delete the designation of the "DPS Lab" and the "Cherokee County for Court Appointed Attorney fees" as the recipients of restitution. 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 clerk of the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 68.3(a). 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 September 19, 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**

SEPTEMBER 19, 2012

NO. 12-11-00327-CR

GARY MAURICE WELLS,

Appellant

V.

THE STATE OF TEXAS,

Appellee

Appeal from the 2nd Judicial District Court
of Cherokee County, Texas. (Tr.Ct.No. 17,873-A)

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 judgment of the court below be **modified by deleting** the designation of the “DPS Lab” and “Cherokee County for Court Appointed Attorney fees” as the recipients of restitution, and by deleting the language regarding the payment of \$1,000.00 as restitution. It is further ORDERED, ADJUDGED and DECREED that Appellant’s counsel’s motion to withdraw is **granted**; that, the judgment of the trial court is **affirmed as modified**; and that this decision be certified to the trial court below for observance.

By per curiam opinion.

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