

NO. 12-11-00389-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

KENYON WYNCHAIL SMITH, § *APPEAL FROM THE 7TH*
APPELLANT

V. § *JUDICIAL DISTRICT COURT*

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

MEMORANDUM OPINION
PER CURIAM

Kenyon Wyncheil Smith appeals his conviction for delivery of a controlled substance (heroin) in an amount of four grams or more but less than 200 grams. 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 the judgment of the trial court, and affirm as modified.

BACKGROUND

Appellant was indicted for delivery of a controlled substance in an amount of four grams or more but less than 200 grams, enhanced by a prior burglary of a habitation felony conviction. Appellant made an open plea of “guilty” without the benefit of an agreed punishment recommendation. After admonishing Appellant of his rights, the trial court accepted his plea, and after a brief hearing on punishment, sentenced Appellant to forty-five years of imprisonment. This appeal followed.

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.¹ 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).

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 note, however, that during the sentencing hearing, no mention of restitution was made, the trial court did not orally order that restitution be paid, and the written judgment reflects that \$0.00 was required to be paid by Appellant as restitution. Yet, the written judgment also reflects that restitution is to be paid to the "Smith County Collections Department."

As a general rule, when an oral pronouncement of sentence and a written judgment differ, the oral pronouncement controls. *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). Further, when it has the necessary information before it, an appellate court may correct a trial court's written judgment to reflect its oral pronouncement. *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); *Ingram v. State*, 261 S.W.3d 749, 754 (Tex. App.—Tyler 2008, no pet.). The Texas Rules of Appellate Procedure expressly authorize us to modify the judgment of the trial court. TEX. R. APP. P. 43.2. We conclude that we have the necessary information to correct the error in the trial court's judgment and can modify the judgment so that it speaks the truth. See *id.* Accordingly, we *modify* the trial court's judgment to delete the provisions that

¹ 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.

restitution is “payable to Smith County Collections Department,” and *affirm as modified*. See TEX. R. APP. P. 43.2.

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. 12-11-00389-CR

KENYON WYNCHAIL SMITH,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 007-0754-11)

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 Appellant's motion to withdraw is **granted**, the judgment of the court below be **modified** by deleting the provisions that restitution is "payable to Smith County Collections Department," and as modified, the judgment of the trial court is **affirmed**; 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.