

NO. 12-13-00391-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***WILLIS HENRY GREEN,
APPELLANT***

§ ***APPEAL FROM THE 2ND***

V.

§ ***JUDICIAL DISTRICT COURT***

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

§ ***CHEROKEE COUNTY, TEXAS***

***MEMORANDUM OPINION
PER CURIAM***

Willis Henry Green appeals his convictions for two counts of burglary of a habitation. 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). Appellant filed a pro se response. We modify the trial court’s judgment, and as modified, affirm.

BACKGROUND

Appellant was charged by indictment with two counts of burglary of a habitation and pleaded “not guilty.” The jury found Appellant “guilty” as charged, and the matter proceeded to a trial on punishment. The trial court assessed Appellant’s punishment at imprisonment for ten years in each count and suspended the sentence for ten years in one of them. The court further assessed court costs, attorney’s fees, and restitution. This appeal followed.

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant’s counsel filed a brief in compliance with *Anders v. California* and *Gainous v. State*. Appellant’s counsel relates that he has reviewed the record of the pretrial proceedings, the trial, and the judgment and found no error to present for our review. In compliance with *High v.*

State, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978), Appellant’s brief contains a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced.

Appellant contends in his pro se response that he is entitled to an acquittal or a new trial because (1) certain witnesses gave false testimony, (2) his trial counsel’s assistance was ineffective, (3) his appellate counsel’s assistance was ineffective, (4) he was not indicted for and convicted of the same offense, (5) the State played only a portion of his videotaped interview with the police, and (6) the State withheld pictures of other people taken by the game camera that captured his image on the victim’s property.

When faced with an *Anders* brief and a pro se response by an appellant, an appellate court can either (1) determine that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error or (2) determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues. *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005). After conducting an independent examination of the record, we find no reversible error and conclude that the appeal is wholly frivolous with the exception of the issue of attorney’s fees.

Attorney’s Fees

We have the authority to reform a judgment in an *Anders* appeal and to affirm that judgment as reformed. See TEX. R. APP. P. 43.2(b); *Bray v. State*, 179 S.W.3d 725, 726 (Tex. App.—Fort Worth 2005, no pet.) (en banc).

A trial court has the authority to assess attorney’s fees against a criminal defendant who received court-appointed counsel. TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2014). But once a criminal defendant has been determined to be indigent, he “is presumed to remain indigent for the remainder of the proceedings unless a material change in his financial circumstances occurs.” TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West Supp. 2014). Before attorney’s fees may be imposed, the trial court must make a determination supported by some factual basis in the record that the defendant has the financial resources to enable him to offset in part or in whole the costs of the legal services provided. See *Johnson v. State*, 405 S.W.3d 350, 354 (Tex. App.—Tyler 2013, no pet.). If the record does not show that the defendant’s financial circumstances materially changed, there is no basis for the imposition of attorney’s fees. See TEX. CODE CRIM. PROC. ANN. art. 26.04(p); *Mayer v. State*, 309 S.W.3d 552, 553, 557 (Tex. Crim. App. 2010); *Johnson*, 405 S.W.3d at 354.

In this case, the judgment of conviction assesses \$1,250.00 as attorney's fees. The record contains an order appointing counsel, showing that the trial court determined Appellant was indigent. The record does not show that the trial court ever made a finding that Appellant's financial circumstances had materially changed. Thus, there is no basis in the record to support the imposition of attorney's fees. *See Johnson*, 405 S.W.3d at 355. Accordingly, the order assessing attorney's fees should be deleted from the judgment.

Conclusion

As required by *Anders* and *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991), Appellant's counsel has moved for leave to withdraw. *See also In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (orig. proceeding). 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 judgments in Counts I and II to delete the assessment of attorney's fees. *See* TEX. R. APP. P. 43.2(b); *Bray*, 179 S.W.3d at 726. We **affirm** the judgment **as modified**. *See id.*

Appellant's 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 review of these cases by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review on his behalf or he 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 court's judgment or the date the last timely motion for rehearing was overruled by this court. *See* TEX. R. APP. P. 68.2(a). Any petition for discretionary review must be filed with 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 In re Schulman*, 252 S.W.3d at 408 n.22.

Opinion delivered March 18, 2015.

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

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 18, 2015

NO. 12-13-00391-CR

WILLIS HENRY GREEN,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 2nd District Court
of Cherokee County, Texas (Tr.Ct.No. 18971)

THIS CAUSE came on to be heard on the appellate record and the briefs filed herein; and the same being inspected, it is the opinion of the Court that the trial court's judgment below should be **modified and, as modified, affirmed**.

It is therefore ORDERED, ADJUDGED and DECREED that the trial court's judgment below be **modified** to delete the assessment of attorney's fees in Counts I and II; **and as modified**, the trial court's judgment 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., Hoyle, J., and Neeley, J.