

NO. 12-16-00099-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***BYRON J. HAWKINS,
APPELLANT***

§ ***APPEAL FROM THE 145TH***

V.

§ ***JUDICIAL DISTRICT COURT***

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

§ ***NACOGDOCHES COUNTY, TEXAS***

***MEMORANDUM OPINION
PER CURIAM***

Byron J. Hawkins appeals his conviction for aggravated robbery. 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 and affirm as modified.

BACKGROUND

Appellant was charged by indictment with aggravated robbery and pleaded “not guilty.” The jury found Appellant “guilty” as charged. Appellant pleaded “true” to two felony enhancement allegations, and the jury assessed his punishment at imprisonment for life. 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 diligently reviewed and evaluated the appellate record and found no error for our review. In compliance with *High v. State*, 573 S.W.2d 807,

812 (Tex. Crim. App. [Panel Op.] 1978), counsel’s brief contains a thorough professional evaluation of the record demonstrating why there are no arguable grounds to be advanced.¹

We have considered counsel’s brief and conducted our own independent review of the record. *Id.* at 811. We have found no reversible error.

JUDGMENT MODIFICATION

In reviewing the record, we found several errors in the written judgment. We have the authority to correct a trial court’s judgment to make the record speak the truth when we have the necessary data and information. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d). In this case, the judgment states, “Findings on Deadly Weapon: YES, A FIREARM.” However, the record shows that the indictment alleged Appellant used or exhibited “a gun” during the robbery. The evidence at trial shows that the weapon Appellant used or exhibited was a pellet gun, not a “firearm.”² The application paragraph of the charge required the jury to find beyond a reasonable doubt that Appellant “used or exhibited a deadly weapon, specifically a gun” in order to find him guilty of aggravated robbery. Therefore, when the jury found Appellant guilty of aggravated robbery, it expressly found that he used or exhibited a deadly weapon, specifically a gun. *See Lafleur v. State*, 106 S.W.3d 91, 99 (Tex. Crim. App. 2003). Having the necessary data and information to correct the trial court’s judgment to make the record speak the truth, we conclude that the judgment should be modified to reflect that the deadly weapon involved was a gun rather than a firearm. *See Asberry*, 813 S.W.2d at 529.

Additionally, the judgment in this case has spaces for Appellant’s pleas to the two enhancement allegations and the jury’s findings on them. Each of these spaces contains the response “N/A.” However, Appellant pleaded “true” to the enhancement allegations, and the jury expressly found them true. Therefore, having the necessary data and information to correct the trial court’s judgment to make the record speak the truth, we conclude that the judgment

¹ In compliance with *Kelly v. State*, Appellant’s counsel provided Appellant with a copy of the brief, notified Appellant of his motion to withdraw as counsel, informed Appellant of his right to file a pro se response, and took concrete measures to facilitate Appellant’s review of the appellate record. 436 S.W.3d 313, 319 (Tex. Crim. App. 2014). Appellant was given time to file his own brief. The time for filing such a brief has expired and no pro se brief has been filed.

² Detective Robert Killingsworth testified that the pellet gun expelled projectiles by means of a spring combined with a shot of carbon dioxide. In contrast, a “firearm” is defined as “any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.” TEX. PENAL CODE ANN. § 46.01(3) (West Supp. 2016).

should be modified to reflect that Appellant's pleas to the enhancement allegations were "true" and the jury's findings on the allegations were "true." *See id.*

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 carried the motion for consideration with the merits. Having done so, we agree with Appellant's counsel that the appeal is wholly frivolous. Accordingly, we **grant** counsel's motion for leave to withdraw. We **modify** the trial court's judgment to reflect a deadly weapon finding of a "gun," enhancement pleas of "true," and jury enhancement findings of "true." We **affirm** the judgment as modified.

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 June 14, 2017.

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

JUNE 14, 2017

NO. 12-16-00099-CR

BYRON J. HAWKINS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 145th District Court
of Nacogdoches County, Texas (Tr.Ct.No. F1521841)

THIS CAUSE came on to be heard on the appellate record and the brief 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 reflect a deadly weapon finding of a "gun," enhancement pleas of "true," and jury enhancement findings of "true"; **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.