NO. 12-16-00162-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JAMES BARRY SANDERS, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION
PER CURIAM

James Barry Sanders appeals his conviction for driving while intoxicated (DWI). 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 affirm.

BACKGROUND

In 2015, Appellant was charged by information with the offense of driving while intoxicated, a Class A Misdemeanor as alleged.[1] At the time of the alleged DWI, Appellant was on parole from a life sentence of imprisonment for first degree murder. Appellant was also on community supervision for a prior DWI conviction in 2014. Appellant pleaded not guilty and the matter proceeded to a jury trial.

At trial, the evidence showed that an eyewitness called 9-1-1 to report a dark Chevrolet Silverado truck driving erratically in Nacogdoches, Texas. The witness was unable to read the truck's license plate, but she told the dispatcher that she observed the truck turn into the parking lot of a local business. The owner of that business observed Appellant's truck enter the parking

[1] *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(a) (West Supp. 2016).

lot at that time. The business owner personally knew Appellant because he performed monthly service work on Appellant's truck.[2] The owner testified that Appellant appeared to be intoxicated in that he had slurred speech and very poor balance, which had not occurred in his prior interactions with Appellant. Shortly thereafter, Nacogdoches police officers arrived and made similar observations while interacting with Appellant. Specifically, they observed Appellant's slurred speech and inability to stand without supporting himself on a wall or his truck. They also saw Appellant walk to the rear of his truck, retrieve water from a cooler, and splash it on his face. Appellant stated that he could not perform field sobriety tests and refused to provide a blood sample.[3] The police officers testified that they believed Appellant was intoxicated. The officers arrested Appellant, transported him to the medical center, and obtained a search warrant. A phlebotomist took Appellant's blood pursuant to the warrant. During an inventory search of Appellant's vehicle, the officers discovered prescription bottles of Hydrocodone (opioid pain reliever), Carisoprodol (muscle relaxer), and Diazepam (anti-anxiety medication). The medications were prescribed to Appellant.

The results of the blood test later showed that Appellant had 0.39 milligrams per liter of Diazepam in his blood, which was above the therapeutic range for the treatment of anxiety, but within the therapeutic range for the treatment of seizures. The State's toxicologist testified that the intoxicating effect could occur above or below the therapeutic range, and varies among individuals. Appellant also had 2.1 milligrams per liter of Carisoprodol and 12 milligrams per liter of its metabolite, for a combined total of 14.1 milligrams per liter. The toxicologist testified that a combination of these above 10 milligrams per liter will render driving unsafe. Finally, Appellant also had 0.06 milligrams per liter of Hydrocodone in his blood, which is above the therapeutic range of 0.02 to 0.04 milligrams per liter. The toxicologist testified that all three drugs act as central nervous system depressants and cause impairment when used at intoxicating levels, with symptoms such as slurred speech, stumbling, poor balance, and delayed reaction time. She also testified that taking the drugs together in combination can have an additive effect.

---

[2] Appellant was at the business having his interlock ignition device serviced as part of his community supervision. The jury did not hear this evidence during trial.

[3] Appellant offered to provide a breath sample, but the officers did not believe he was under the influence of alcohol, so they requested a blood sample instead.

Appellant called his own expert toxicologist who testified there are several studies identifying when the drugs used by Appellant reach "toxic levels" indicating intoxication in DWI cases. He acknowledged that the studies differed in identifying the level at which the drugs in this case would reach toxic levels, and that the data supporting the studies was not completely reliable. Appellant's expert initially testified that none of the substances individually reached toxic levels based on Appellant's blood test results. However, he clarified that some of the drugs or their metabolites were above minimum toxic levels according to some of the studies. But most of the results were, according to Appellant's expert, "just at the borderline or below" toxic levels. He also acknowledged that these drugs, when combined, can have an additive effect increasing their side effects. Ultimately, Appellant's expert testified that he could not conclude whether Appellant was intoxicated because of the variations between individuals and "his levels were barely at the bottom of those [toxic] levels." Appellant also attempted to create doubt that the medications caused intoxication, and that his symptoms were part of a medical condition. He offered evidence that he had hypertension, but did not seek medical attention at the scene of his arrest or while at the medical center providing his blood sample. Moreover, Appellant denied having diabetes, low blood sugar, a stroke, or other conditions that might cause similar symptoms.

The jury found Appellant guilty of driving while intoxicated. After a trial on punishment, the jury found that the information's enhancement allegation was true, sentenced Appellant to one year of confinement in the county jail, and assessed a $4,000.00 fine. 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 she has reviewed the record, is well acquainted with the facts of this case, and found no error to present for our review. In compliance with ***Anders***, ***Gainous***, and ***High v. State***, 573 S.W.2d 807 (Tex. Crim. App. [Panel Op.] 1978), Appellant's brief presents a chronological summation of the procedural history of the case and further states that Appellant's counsel is unable to raise any arguable issues for appeal.[4]

[4] In compliance with ***Kelly v. State***, Appellant's counsel provided Appellant with a copy of the brief, notified Appellant of her 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).

Thereafter, Appellant filed a pro se brief in which he challenged the sufficiency of the evidence to support his conviction. Specifically, Appellant challenged the evidence to support the conclusions that his prescribed medications interfered with the normal use of his mental or physical faculties and that he operated a motor vehicle in a public place while intoxicated. The State filed a response brief to Appellant's pro se brief. 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).

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 and ***affirm*** the judgment of the trial court.

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 September 13, 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

SEPTEMBER 13, 2017

NO. 12-16-00162-CR

JAMES BARRY SANDERS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the County Court at Law
of Nacogdoches County, Texas (Tr.Ct.No. CF1501964)

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 there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

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