Affirmed and Opinion filed February 1, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00859-CR

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DARECK BERNARD LOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 806,379

O P I N I O N

Appellant entered a plea of *nolo contendere* to the felony offense of sexual assault of a child, without an agreed recommendation on punishment from the State. Following the return of a pre-sentence investigation report, the court found an enhancement allegation true, and assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for five years.

Appellant's appointed counsel filed an *Anders* brief in which he concludes that the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by presenting a professional

evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978). However, despite numerous requests from this court, appointed counsel on appeal has failed to file a motion to withdraw from representation of appellant.

The Court of Criminal Appeals, in *Stafford v. State*, stated that an *Anders* brief should be filed along with a request to withdraw from the case in the appeals court. See *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). The Court previously stated that only the appellate court, and not the trial court, can grant counsel's motion to withdraw filed in connection with an *Anders* brief. *See Moore v. State*, 466 S.W.2d 289, 293 (Tex. Crim. App. 1971). *See also Johnson v. State*, 885 S.W.2d 641, 645-46 (Tex. App.—Waco 1994, pet. ref'd). Once our jurisdiction is invoked, a motion to withdraw filed in the trial court "is neither appropriate nor sufficient to relieve counsel of the duties accepted on becoming a defendant's attorney of record on appeal." *See Johnson*, 885 S.W.2d at 645.

After appointed counsel concludes that an appeal is frivolous, he should request permission from *this* court to withdraw from the appeal. *See McCoy v. Court of Appeals of Wisconsin, Dist.1*, 486 U.S. 429, 437, 108 S.Ct. 1895, 1901, 100 L.Ed.2d 440 (1988); *Johnson*, 885 S.W.2d 641 at 645. The requirements for filing a motion to withdraw are explained in our opinion in *Nguyen v. State*, but bear repeating. *See Nguyen v. State*, 11 S.W.3d 376, 379 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The motion to withdraw must be accompanied by two exhibits: (1) a brief in support of the motion, now commonly called an *Anders* brief, which must be filed as a separate document from the motion to withdraw; and (2) documentation to satisfy us that the attorney has fulfilled his duty to inform the client by providing the defendant a copy of the *Anders* brief, informing him of his right to file a brief in his own behalf, and informing him of his right to review the trial record. *See id; Johnson*, 885 S.W.2d at 645-46. The filing of a motion to withdraw with this court is necessary to trigger our duties as a reviewing court. *See Nguyen*, 11 S.W.3d at 379; *Johnson*, 885 S.W.2d at 647.

In a recent case, *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court of the United States approved of the California procedure for filing frivolous appeals which did not require counsel to file a motion to withdraw in the appeals court. The Court held that the *Anders* procedure is merely one method of satisfying the constitutional requirements for affording adequate and effective appellate review for criminal indigents. *See Smith v. Robbins*, 120 S.Ct. at 759, 763. The Court concluded that each State may craft procedures that are as good as or superior to *Anders*. *See id.*

In this case, counsel failed to file a motion to withdraw with this court. "By not filing a motion to withdraw, appellate counsel exhibited a basic, and common, misunderstanding about *Anders* cases." *See Jeffery v. State*, 903 S.W.2d 776, 778 (Tex. App.—Dallas 1995, no pet.). While we prefer appointed counsel filing a frivolous appeal to strictly adhere to the procedures outlined above, according to *Smith v. Robbins*, counsel's failure to file a motion to withdraw does not prohibit us from deciding the appeal.

We agree with appellant's counsel that no arguable grounds of error are presented for review. A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. As of this date, no pro se response has been filed.

We have carefully reviewed the record and counsel's brief and agree that the appeal is wholly frivolous and without merit. Further, we find no reversible error in the record. A discussion of the brief would add nothing to the jurisprudence of the State.

PER CURIAM

Judgment rendered and Opinion filed February 1, 2001.
Panel consists of Chief Justice Murphy and Justices Hudson and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).