Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01316-CR

NATHANIEL CARL SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 646,816

O P I N I O N

Appellant pled guilty to the felony offense of aggravated sexual assault of a child, without an agreed recommendation on punishment from the State. The court deferred adjudication of guilt, placed appellant on probation for five years, and assessed a fine of two thousand five hundred dollars. Subsequently, appellant entered a plea of true to the allegations in the State's motion to adjudicate guilt. The court assessed punishment in accordance with a plea bargain agreement at confinement in the Institutional Division of the Texas Department of Criminal Justice for twelve years and a fine of two thousand five

hundred dollars.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which she 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).

In her *Anders* brief, counsel raises, then rejects, an argument that counsel at trial rendered ineffective assistance by failing to properly handle the filing of a motion for new trial, thereby preventing appellant from appealing the issue of involuntariness of his original guilty plea. Trial counsel filed a motion for new trial alleging the verdict was contrary to the law and the evidence. However, there is no evidence in the record that it was ever presented to the trial court and no hearing was held on the motion.

A defendant placed on deferred adjudication probation may raise issues relating to the original plea proceeding only in appeals taken when deferred adjudication probation is first imposed. *See Manuel v. State*, 994 S.W.2d 658, 661-662 (Tex. Crim. App. 1999). Appellant cannot now appeal any issues relating to the original deferred adjudication proceeding, including voluntariness of his plea. *See Daniels v. State,* 30 S.W.3d 407, 408 (Tex. Crim. App. 2000); *Hanson v. State*, 11 S.W.3d 285, 287-288 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). A defendant placed on deferred adjudication community supervision must appeal all issues relating to the original deferred adjudication proceeding, including the voluntariness of the plea, within thirty days of the order placing him on deferred adjudication, as required by Rule 26.2 of the rules of appellate procedure, or forfeit review. *See* TEX. R. APP. P. 26.2; *Hanson*, 11 S.W.3d at 287-88; *Clark v. State*, 997 S.W.2d 365, 368 (Tex. App.–Dallas 1999, no pet.) (op. on reh'g en banc). Because appellant failed to raise the issue of voluntariness of his plea during the thirty day time limit, he forfeited his

right to appeal this issue. *See Manuel,* 994 S.W.2d at 658.

Similarly, we have no jurisdiction over any complaints attacking the trial court's determination to proceed with an adjudication of guilt. The trial court's decision to proceed with an adjudication of guilt is one of absolute discretion and is not reviewable. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2000); *Connolly v. State*, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999). In light of the above, complaints by trial counsel in a motion for new trial of involuntariness of the original guilty plea or complaints arising from the court's decision to adjudicate guilt would have been fruitless.

We agree with appellate counsel that the record is insufficient to support a claim that counsel ineffectively handled the motion for new trial. If it is true that appellant wanted to pursue a motion for new trial, and had appealable complaints, regarding proceedings after the adjudication of guilt, such as the assessment of punishment or the pronouncement of sentence[1], but was frustrated by counsel's incompetence or inability, he may develop a record by way of a post-conviction writ of habeas corpus. *See Hagens v. State*, 979 S.W.2d 788, 792 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). We have carefully reviewed the appellate record and counsel's brief and agree that the appeal is wholly frivolous and without merit. We find no reversible error in the record.

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.

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[1] Article 42.12, section 5(b) expressly allows an appeal of proceedings after the adjudication of guilt on the original charge. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2000). Examples of proceedings after adjudication that may be appealed include the assessment of punishment and the pronouncement of sentence. *See id.*

Accordingly, the judgment of the trial court is affirmed and the motion to withdraw is granted.

PER CURIAM

Judgment rendered and Opinion filed March 15, 2001.
Panel consists of Justices Yates, Fowler and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).