Affirmed and Opinion filed October 12, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00857-CR

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ROBERT LEE BROWN, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 779,196

O P I N I O N

Appellant was charged by indictment with the felony offense of aggravated sexual assault of a child. Appellant entered a plea of guilty with an agreed recommendation on punishment from the State. In accordance with the plea bargain agreement, the court deferred adjudication of guilt, placed appellant on probation for a term of six years and assessed a fine of two hundred dollars. Subsequently, the State file a motion to adjudicate guilt, alleging that appellant violated the terms and conditions of probation by committing technical violations. Following appellant's plea of not true, the court found the allegations true,

and assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for fifteen years.

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

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. Appellant has filed a *pro se* response to the *Anders* brief raising two arguable points of error. We find appellant's claims present no arguable grounds for appeal and affirm the judgment of the trial court.

Appellant's first point of error complains that the trial court should have become aware that a question existed as to appellant's competence to stand trial at both the original plea hearing and the hearing on punishment during the motion to adjudicate guilt. Thus, appellant argues that the trial court erred by failing to *sua sponte* conduct a competency hearing. Appellant cites two portions of the record to support his argument: (1) after the court accepted appellant's guilty plea during the plea proceeding, appellant's counsel, in an attempt to convince the court to waive supervisory fees, notified the court that appellant had financial problems, was on disability and was not employed; and (2) after the court found the allegations in the motion to adjudicate true and proceeded to hear evidence on punishment, appellant's father testified for the defense that appellant was "slow to learn."

We need not address appellant's first allegation concerning his competence to stand trial during the guilty plea proceeding. 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's complaint regarding the failure of the trial court to *sua sponte* conduct a competency hearing during the plea proceeding should have been raised in an appeal taken when the trial court first imposed deferred

adjudication community supervision. Because he waited until after his community supervision had been revoked and his adjudication of guilt formally made, we are without jurisdiction to consider his complaint. *See id.*

We will address appellant's contention that the court erred in failing, *sua sponte,* to hold a competency hearing during the proceeding to adjudicate guilt once the court heard testimony that appellant was a slow learner. Although generally an appellant cannot appeal a trial court's decision to adjudicate guilt following deferred adjudication probation, we do not view appellant's assertion of trial court error as an appeal from the trial court's determination to proceed with an adjudication of guilt. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, sec. 5(b) (Vernon Supp. 2000). Rather, because we view appellant's argument as addressing possible error of constitutional magnitude on the part of the trial court in failing to hold a hearing on the issue of appellant's competency to stand trial, we will address this complaint.

Without question, conviction of an accused who is legally incompetent to stand trial violates due process of law. *See Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 839, 15 L.Ed.2d 815 (1966); *Rice v. State*, 991 S.W.2d 953, 956 (Tex. App.–Fort Worth 1999, pet. ref'd). Article 46.02, section 2(b) of the Code of Criminal Procedure provides that if during trial, evidence of defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, sec. 2(b) (Vernon 1979). If, after conducting a section 2 hearing, the court determines there is evidence to support a finding of incompetency, then under section 4(a) the court is required to empanel a jury to determine the defendant's competency to stand trial.

A section 2 hearing before the court is required only if the evidence brought to the judge's attention is such as to raise a bona fide doubt in the judge's mind as to the defendant's competency to stand trial. *See Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997); *Pipkin v. State*, 997 S.W.2d 710, 712-713 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). In general, a bona fide doubt is raised, so as to require a section 2 hearing, only if the evidence indicates recent severe mental illness, at least

moderate mental retardation, or truly bizarre acts by the defendant. *See Pipkin*, at 712-713. Evidence of mental impairment alone does not require that a special jury be empaneled where no evidence indicates that a defendant is incapable of consulting with counsel or understanding the proceedings against him. *See Moore v. State*, 999 S.W.2d 385, 395-396 (Tex. Crim. App. 1999). The courts of this State have consistently maintained that the test is not whether the accused labored under some mental, behavioral or psychological impairment; rather, the critical inquiry is whether the accused had the ability to consult with his attorney with a reasonable degree of rational understanding and had a rational as well as factual understanding of the proceedings against him. *See Porter v. State*, 623 S.W.2d 374, 380 (Tex. Crim. App. 1981), cert. denied, 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982) (evidence of earlier psychological problems not enough to show defendant incompetent to stand trial); *Leyva v. State*, 552 S.W.2d 158, 160 (Tex. Crim. App. 1977) (even judicial determination that a person is mentally ill is not determination of mental incompetency); *Culley v. State*, 505 S.W.2d 567, 569 (Tex. Crim. App. 1974) (testimony that defendant had learning disabilities and was in special education classes did not raise issue of competency to stand trial); *Rice*, at 955-959 (testimony that defendant was one hundred per cent disabled due to neurological disorders caused by exposure to toxic chemicals did not raise bona fide doubt as to competency).

The testimony cited by appellant in support of his claim of incompetence, that he was a slow learner, does not constitute evidence of his inability to communicate with counsel, or factually appreciate the proceedings against him. *See Rice*, at 958-959. On the contrary, appellant's testimony at the revocation proceeding was clear and lucid, and he made intelligent responses to the questions propounded to him. Based on a complete review of the record, nothing in appellant's responses raised a bona fide doubt as to his competence to stand trial. Accordingly, the trial court was not required to hold a section 2 hearing, much less submit the question of appellant's competency to a jury. Appellant's first point of error raises no arguable ground for review.

Appellant's second point of error alleges his plea was involuntary due to the failure of the trial court to properly admonish him regarding the consequences of deferred adjudication. In addition, appellant argues that counsel at the original plea proceeding rendered ineffective assistance for the following reasons:

(1) counsel failed to advise appellant that he could not appeal from the adjudication of guilt or that upon adjudication, the judge would not be limited to the six year probationary term, but could assess punishment at any term within the entire range of punishment for the offense to which appellant pled guilty; (2) counsel failed to interview two witnesses; and (3) failure to file pre-trial motions. We find that each of appellant's allegations in his second ground of error should have been raised on appeal at the time he was placed on deferred adjudication and cannot be considered now that appellant's guilt has been adjudicated.

Appellant could have appealed the order placing him on deferred adjudication probation and could have argued at that time that his plea was not voluntary because he did not receive proper admonishments. Similarly, appellant's complaints regarding his trial counsel arise from his original plea and should have been appealed directly therefrom. A defendant who is placed on deferred adjudication probation may raises challenges such as those now raised by appellant only in appeals taken when deferred adjudication community supervision is first imposed. *See Manuel,* at 661-662. Because appellant's complaints arise from his original plea and not from the adjudication of his guilt, these issues may not be raised in this appeal, which follows his adjudication. *See id.* We have no jurisdiction over these complaints. *See id.,* 992 S.W.2d at 660; *Hanson v. State*, 11 S.W.3d 285, 287-288 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Clark v. State*, 997 S.W.2d 365, 368-369 (Tex. App.–Dallas 1999, no pet.). Accordingly, appellant's second issue presents no arguable ground for review.

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

PER CURIAM

Judgment rendered and Opinion filed October 12, 2000.
Panel consists of Justices Anderson, Fowler and Edelman.
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