Affirmed and Opinion filed May 11, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01115-CR

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MARIO ALBERTO MELENDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 810,043

O P I N I O N

Appellant was charged by indictment with the felony offense of possession of more than one and less than four grams of cocaine, enhanced with two prior felony convictions. Appellant entered a plea of guilty without an agreed recommendation from the State. The case was reset until a pre-sentence investigation could be conducted. After appellant entered a plea of true to each enhancement allegation, the court found the enhancement paragraphs true, and assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for twenty-five years.

Appellant's court-appointed attorney 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). The brief presents a professional evaluation of the record demonstrating why there are no arguable points of error to be advanced. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of his right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response to the *Anders* brief. Appellant's complaints can be summarized as follows: (1) the trial court erred in failing to order an alcohol and drug evaluation; and (2) counsel was ineffective because he failed to file a motion for new trial. We find that appellant's complaints do not raise any arguable grounds for appeal and affirm the judgment of the trial court.

Failure To Order Drug and Alcohol Evaluation

The Texas Code of Criminal Procedure provides as follows:

> On a determination by the judge that alcohol or drug abuse may have contributed to the commission of the offense, the judge shall direct a supervision officer approved by the community supervision and corrections department or the judge or a person, program, or other agency approved by the Texas Commission on Alcohol and Drug Abuse, to conduct an evaluation to determine the appropriateness of, and a course of conduct necessary for, alcohol or drug rehabilitation for a defendant and to report that evaluation to the judge.

See TEX. CODE CRIM. PROC. ANN. art. 42.12 § 9(h) (Vernon Supp. 2000). Contrary to appellant's assertion, the pre-sentence investigation report in the instant case contains an indication that such an evaluation was conducted.

In compliance with the trial court's order, the Harris County Community Supervision and Corrections Department prepared and submitted to the judge a pre-sentence investigation report. In a section entitled "Evaluation," the supervision officer indicated that "the defendant

admitted to ongoing and long-term addictions to alcohol, marijuana, cocaine, and heroin." The preparer of the PSI further noted that "[Appellant] blames his criminal history on these addictions, stating that he was 'high' every time he committed an offense," and "[appellant] would like to be sentenced to the Substance Abuse Felony Punishment Facility." The PSI next contains the notation, "THE FOLLOWING TOPIC HEADING HAS BEEN ADDRESSED TO COMPLY WITH ARTICLE 42.12, SECTION 9 AND SHOULD NOT BE INTERPRETED AS A RECOMMENDATION FOR SENTENCING." The PSI then lists six supervision plans or sentencing options.

We find that the PSI sufficiently includes an alcohol and drug evaluation as prescribed by article 42.12, section 9(h). *See Ruffin v. State,* 3 S.W.3d 140, 145, (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). Thus, appellant's first complaint presents no arguable ground for review.

Ineffective Assistance of Counsel

Regarding appellant's second arguable ground of error, the fact that appellant's attorney did not file a motion for new trial on his behalf does not mean that appellant was denied effective assistance of counsel. *See Ortega v. State*, 837 S.W.2d 831, 832 (Tex. App.–San Antonio 1992, no pet.). There is nothing in the record to suggest that the attorney did not discuss the merits of a motion for new trial with appellant, which appellant rejected. When a motion for new trial is not filed in a case, the rebuttable presumption is that it was considered by the appellant and rejected. *See Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998). Additionally, in this case, the fact that appellant filed a *pro se* notice of appeal is evidence that he must have been informed of at least some of his appellate rights, and we presume he was adequately counseled unless the record affirmatively demonstrates otherwise. *See id.*

Further, appellant fails to show, but for counsel's failure to file a motion for new trial, how the outcome of his trial or his appeal would have been different. *See Dewberry v. State,*

4 S.W.3d 735, 757 (Tex. Crim. App. 1999). In the absence of proof of prejudice, we cannot hold that the attorney's failure to file a motion for new trial was ineffective assistance of counsel. *See Bryant v. State*, 974 S.W.2d 395, 400 (Tex. App.–San Antonio 1998, pet. ref'd), *cf. Yuhl v. State*, 784 S.W.2d 714, 717 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd) (unless defendant can show unfiled motion to suppress would have been meritorious, he cannot show ineffective assistance of counsel). Absent from the record is any legally competent evidence that such filing was prudent. *See Bryant v. State*, 974 S.W.2d at 400. Appellant presents no arguable error which would support the appeal.

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

PER CURIAM

Judgment rendered and Opinion filed May 11, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
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