Affirmed and Opinion filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00214-CR

FRANK VIRGIL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas-
Trial Court Cause No. 793,102

O P I N I O N

Appellant was charged by indictment with the third degree felony offense of "unlawfully, intentionally and knowingly [causing] bodily injury to William Foster, hereinafter styled the complainant, an individual who was at least sixty-five years of age, by striking the complainant with his hand." The indictment contained two enhancement paragraphs alleging two prior felony offenses. A jury found appellant guilty as charged in the indictment, found both enhancement paragraphs true, and assessed punishment at confinement for thirty years in the Institutional Division of the Texas Department of Criminal Justice.

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. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). 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 ninety-one page *pro se* response to the *Anders* brief. Appellant's raises a multitude of complaints, including ineffective assistance of appointed counsel at trial. After reviewing the matters raised by appellant *pro se*, we conclude that the appeal is not wholly frivolous and that appellant must be afforded the assistance of new counsel to continue this appeal.

Ineffective Assistance of Counsel at Trial

Appellant presents a laundry list of twenty-two complaints alleging his appointed counsel at trial rendered ineffective assistance. Among these complaints, appellant argues that his trial counsel improperly impeached his own client. We find appellant's complaint presents at least an arguable ground for review.

Appellant cites to a portion of the trial record wherein he testified in his own defense on direct examination at the guilt/innocence phase. Trial counsel questioned appellant as follows:

> Q. Mr. Virgil, you have been to the penitentiary in the State of Texas on two different occasions, have you not?
>
> A. Yes, sir.
>
> Q. Were you in the penitentiary from the 338th District Court here in Harris County, Texas for a drug case in 1989?
>
> A. Yes, sir.
>
> Q. Were you in the penitentiary for you breaking into a building in 1975?
>
> A. Yes, sir.
>
> Q. Okay. Have you ever been accused of lying at any time in these cases or in any other cases?
>
> A. No, sir.
>
> Q. Are you telling the truth today?
>
> A. Yes, sir.

Rule 609 of the Texas Rules of Evidence governs the admissibility of prior convictions used to impeach a witness. Rule 609(a) allows the admission of a prior conviction into evidence for the purposes of impeachment, if the prior conviction involved a felony or a crime of moral turpitude, and the court determines the probative value outweighs its prejudicial effect. *See* TEX. R. EVID. 609(a). In reviewing the trial court's decision admitting into evidence a prior conviction, we must accord the trial court wide discretion. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

In the case of a prior conviction and release that took place more than 10 years before being admitted at trial, the probative value must substantially outweigh the prejudicial effect. *See* TEX. R. EVID. 609(b). Under rule 609(b), if the prior conviction was more than 10 years before trial, the probative value of the prior conviction must *substantially* outweigh the prejudicial effect and not simply outweigh the prejudicial effect, as under rule 609(a). (Emphasis added). *See Hernandez v. State*, 976 S.W.2d 753, 755 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd). As the Court pointed out in *Hernandez*, however, an appellate court may find that, while a prior conviction is more than 10 years old, later convictions for felonies or misdemeanors involving moral turpitude remove the taint of remoteness from the prior convictions. *See id*. In that circumstance, the rule 609(a) "outweigh" standard is appropriate because the "tacking" of the intervening convictions renders a conviction older than 10 years not remote. *See Jackson v.. State*, 11 S.W.3d 336, 339 (Tex. App.–Houston [1st Dist.] 1999, pet. filed).

In light of Rule 609 and the cases cited above, trial counsel's questioning of appellant which raised a twenty-four year old prior conviction presents at least an arguable ground for review. *See Wilson v. State*, 955 S.W.2d 693, 698 (Tex. App.–Waco 1997, no pet.). Accordingly, we grant the motion to withdraw but abate the appeal and direct the trial court to appoint different appellate counsel. *See id*. The court's order appointing new appellate counsel shall be filed with this Court within thirty days of this order. Counsel's brief is due within thirty days of appointment. Any motions for extension of time shall be filed with the Fourteenth Court of Appeals.

PER CURIAM

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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