**Affirmed as Reformed and Opinion filed December 7, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-00304-CR**

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**JUAN MANUEL ORTIZ, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 185th District Court**
**Harris County, Texas**
**Trial Court Cause No. 94-22267**

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## O P I N I O N

Appellant was charged by indictment with the felony offense of aggravated robbery. Appellant entered a plea of guilty without an agreed recommendation on punishment from the State. The court deferred adjudication of guilt, placed appellant on probation for eight years, and assessed a fine of one thousand dollars. Subsequently, the State filed a motion to adjudicate guilt alleging appellant violated the terms and conditions of probation by committing the new offense of aggravated robbery and by committing technical violations. The

court adjudicated appellant's guilt and sentenced him to imprisonment for life in the Institutional Division of the Texas Department of Criminal Justice.

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).

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 several arguable points of error. Appellant's complaints may be divided into two categories: (1) complaints related to the original plea proceeding wherein he received deferred adjudication probation, and (2) complaints related to the revocation proceeding wherein his guilt was adjudicated. We find appellant's claims present no arguable grounds for appeal and affirm the judgment of the trial court, as corrected.

In the first category, arising from the original plea proceeding, appellant argues that the indictment charging him with aggravated robbery was defective. Appellant failed to attack the indictment through a motion to quash presented to the trial court. Defects in form or substance in an indictment must be objected to prior to the date the trial on the merits commences or the right to object is waived on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2000). Further, the indictment in appellant's case tracks the language of the appropriate penal statute. *See* TEX. PENAL CODE ANN. § 29.03 (Vernon 1994).

Also stemming from the original proceeding is appellant's complaint that his guilty plea was involuntary. We need not address this allegation. 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*, No. 1612-99, 2000 WL 1506200 (Tex. Crim. App. Oct. 11, 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's complaint arises from his original plea and appellant failed to raise the issue of voluntariness of his plea during the thirty day time limit, he has forfeited his right to appeal. *See Manuel*, 994 S.W.2d at 658.

Appellant's second group of complaints concerns the trial court's determination to proceed with an adjudication of guilt. Appellant argues that the trial court abused its discretion in revoking his probation because the evidence adduced at the revocation hearing was insufficient to prove the allegations in the State's motion to revoke. Additionally, appellant complains he received ineffective assistance of counsel at the proceeding to adjudicate guilt. Appellant's complaints attack the trial court's determination to proceed with 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); *Cooper v. State*, 2 S.W.3d 500, 504 (Tex. App.—Texarkana 1999, pet. ref'd). Sufficiency of the evidence to support the trial court's adjudication of guilt may not be appealed. *See Williams v. State*, 592 S.W.2d 931, 932-933 (Tex. Crim. App. 1979) (holding that sufficiency of the evidence to support adjudication is not reviewable); *Tillman v. State*, 919 S.W.2d 836, 838 (Tex. App.—Fort Worth 1996, pet. ref'd) (holding that court of appeals had no jurisdiction to

address appellant's complaints regarding sufficiency of the evidence to support the adjudication). Appellant's complaint of insufficient evidence is not reviewable.

Similarly, appellant's complaint regarding counsel's effectiveness in the hearing in which the trial court proceeded to adjudicate guilt cannot be raised on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2000); *Phynes v. State*, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992) (holding that defendant could not appeal the determination to adjudicate guilt even though his counsel was not present at the adjudication hearing); *Gareau v. State*, 923 S.W.2d 252, 252-53 (Tex. App.—Fort Worth 1996, no pet.) (court dismissed defendant's point of error for want of jurisdiction, refusing to allowappeal of appellant's claim that his plea of true was rendered involuntary as a result of ineffective assistance of counsel at the proceeding to adjudicate guilt). Appellant's complaint of ineffective assistance of counsel is not reviewable.

We will address appellant's contention that the sentence of life imprisonment constitutes cruel and unusual punishment. Article 42.12 § 5(b) expressly allows an appeal of all proceedings after the adjudication of guilt on the original charge. *See* TEX. CODE CRIM. PROC ANN. art. 42.12 § 5(b) (Vernon Supp.2000); *Olowosuko v. State*, 826 S.W.2d 940, 941-42 (Tex. Crim. App. 1992). Examples of proceedings after adjudication that may be appealed include the assessment of punishment and the pronouncement of sentence. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2000); *Rodriquez v. State*, 972 S.W.2d 135, 138 (Tex. App.—Texarkana 1998), *aff'd on other grounds*, 992 S.W.2d 483 (Tex. Crim. App. 1999). Appellant asserts that the trial court was not authorized to assess his punishment at life imprisonment following adjudication of guilt because the maximum punishment for a second degree felony is twenty years in prison. While appellant is correct in his statement that twenty years imprisonment is the maximum for a second degree felony, appellant was convicted of the first degree felony offense of aggravated robbery, which has a range of punishment from five to ninety-nine years or life imprisonment. *See* TEX. PENAL CODE ANN. §§ 12.32, 29.03(b) (Vernon 1994). A defendant given deferred adjudication who violates the conditions of his

probation can be sentenced to the maximum term provided for the offense to which he pled guilty. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 8(a) (Vernon Supp. 2000); *Reed v. State*, 644 S.W.2d 479, 484 (Tex. Crim. App. 1983). Once appellant violated the terms of his community supervision, the trial court was free to assess punishment within the parameters of the law. *See Watson v. State*, 924 S.W.2d 711, 714 (Tex. Crim. App. 1996). Life imprisonment was within the parameters of the offense as witnessed by both the written plea admonishments signed by appellant as well as the oral admonishment given by the court during the plea hearing. *See Anthony v. State*, 962 S.W.2d 242, 245 (Tex. App.—Fort Worth 1998, no pet.). No arguable ground of error is presented for review.

Finally, appellant complains the trial court failed to make a finding of fact on the failure of appellant to submit a urine sample, so that this violation of probation should not be used to support the adjudication order. The State's Motion to Adjudicate Guilt alleged that appellant violated the terms and conditions of probation by: (1) committing the new offense of aggravated robbery; (2) failing to avoid injurious or vicious habits, as evidenced by the presence of cocaine metabolite in a urine sample; (3) failing to avoid injurious or vicious habits as evidenced by appellant's admission to a probation officer that he used alcohol on one occasion; (4) failing to report to his probation officer on several occasions; and (5) failing to submit a weekly urine specimen on one occasion. Appellant pled not true to alleged violations one and five, and entered pleas of true to the remaining three allegations. After a hearing, the court stated that it found each of the five allegations in the motion to adjudicate to be true. However, the judgment reflects a finding of true to only three of the allegations, omitting findings regarding appellant's failure to submit to urinalysis as well as his use of alcohol.

When there is a variation between the oral pronouncement of sentence and the written memorialization of the sentence, the oral pronouncement controls. *See Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998). All of the record evidence demonstrates the court found the allegations regarding use of alcohol and failure to submit a urine sample to be true. When the court of appeals has the necessary data and evidence before it for reformation, an

erroneous judgment may be reformed on appeal. *See Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993). We will reform the judgment to add findings of true regarding violations number three (use of alcohol) and five (appellant's failure to submit a urine sample). Once reformed, the judgment will truly reflect the findings and holding of the court.

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

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 7, 2000.

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

Do Not Publish — TEX. R. APP. P. 47.3(b).