



[U]McDuffy v. State

1997 | Cited 0 times | Court of Appeals of Texas | February 26, 1997

Dismissed and Opinion Filed February 26, 1997

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OPINION

The trial court convicted Anthony McDuffy of evading arrest. McDuffy pleaded guilty in exchange for the State's recommendation on punishment. The court sentenced him to five years imprisonment and a \$300 fine in accordance with the plea bargain agreement. McDuffy's appellate counsel has filed a brief in which he concludes the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), by presenting a professional evaluation of the record demonstrating why, in effect, there are no meritorious grounds to be advanced on appeal. *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969); see *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978); *Jackson v. State*, 485 S.W.2d 553 (Tex. Crim. App. 1972). Counsel delivered a copy of the brief to McDuffy and advised him that he had a right to file a pro se brief. McDuffy did not file a pro se brief.

The State responds that the rule of law announced in *Anders* and the procedure recommended in *Gainous* appear to have been followed. Moreover, the State contends this Court is without jurisdiction to consider McDuffy's appeal.

JURISDICTION

Rule 40(b)(1) of the rules of appellate procedure requires a defendant in an appeal from a plea bargain conviction to obtain the trial court's permission to appeal any matter in the case except those matters raised by written motion and ruled on before trial. *Penny v. State*, 880 S.W.2d 59, 61 (citing *Davis v. State*, 870 S.W.2d 43, 45-46 (Tex. Crim. App. 1994) and *Lyon v. State*, 872 S.W.2d 732, 735-36 (Tex. Crim. App. 1994)). A general notice of appeal does not confer jurisdiction on a court of appeals to consider non-jurisdictional defects or errors that occur before or after the entry of a negotiated plea. *Penny*, 880 S.W.2d at 61. A defendant's notice of appeal must comply with the provisions of rule 40(b)(1) to confer jurisdiction on a court of appeals to consider non-jurisdictional defects or trial errors. *Id.* A general notice of appeal confers jurisdiction on a court of appeals to consider only jurisdictional issues. *Id.*

When the notice of appeal complies with rule 40(b)(1), the statements in the notice of appeal must be



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true to confer jurisdiction to consider non-jurisdictional issues. *Solis v. State*, 890 S.W.2d 518, 520 (Tex. App.--Dallas 1994, no pet.). Mere allegations in a notice of appeal are not enough to support a claim. An appellant must develop a record to substantiate his claims. *Id.*

The record in this case reflects that McDuffy entered a plea of guilty and was sentenced in accordance with a plea bargain agreement. McDuffy's notice of appeal contains the following statement: "In compliance with Texas Rule of Appellate Procedure 40(b)(1), the Defendant states that either the trial court granted him permission to appeal, or the non-jurisdictional matters to be urged on appeal were raised by written motion and ruled on before trial." This notice contains the recitals required by rule 40(b)(1). However, the record before us contradicts the recitals in McDuffy's notice of appeal. McDuffy does not bring forth an error complaining of a ruling on a pretrial motion. And, the record does not affirmatively reflect that the trial judge granted McDuffy permission to appeal. Consequently, we are without jurisdiction to consider McDuffy's appeal.

We dismiss this appeal for want of jurisdiction.

JOHN OVARD, JUSTICE

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