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Court of Appeals No. 01-18-00930-CR
Trial Court Cause No. B15-684

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IN THE FIRST SUPREME JUDICIAL DISTRICT

COURT OF APPEALS

HOUSTON, TEXAS

KYLE DEAN KUYKENDALL

v.

THE STATE OF TEXAS

APPEALED FROM THE 198TH JUDICIAL DISTRICT COURT,
KERR COUNTY, TEXAS
Honorable M. Rex Emerson, Presiding

APPELLANT'S BRIEF

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Court of Appeals No. 01-18-00930-CR
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IN THE FIRST SUPREME JUDICIAL DISTRICT

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KYLE DEAN KUYKENDALL

v.

THE STATE OF TEXAS

IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Kyle Dean Kuykendall
Appellee:	The State of Texas
Attorney for Appellant:	M. Patrick Maguire M. Patrick Maguire, P.C. 945 Barnett Street Kerrville, Texas 78028
Attorney for Appellee:	Hon. Scott Monroe 198th Judicial District Attorney 402 Clearwater Paseo, Suite 500 Kerrville, Texas 78028

Trial Judge:	Hon. M. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028

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STATEMENT OF THE CASE

On May 30, 2018, Appellant entered a guilty plea to two counts of bail jumping/failure to appear, both third degree felony offenses. RR 2, 11-12. The trial court ordered a presentence investigation and reset the case for sentencing. RR 2, 12. The trial court held the sentencing hearing on August 1, 2018. RR 3, 1. After hearing the evidence, the trial court sentenced Appellant to 10 years imprisonment on each count, to run concurrently. RR 3, 23. Appellant timely filed his notice of appeal from this judgment. CR, 32. This brief is timely filed by being electronically filed with the First Court of Appeals on March 6, 2019.

APPELLANT'S ISSUES PRESENTED FOR REVIEW

I. Undersigned counsel files this "Anders" Brief after a thorough review of the appellate record in this case and no meritorious issues were found to being forward for review warranting reversal.

II. The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.

****** For purposes of reference in the Appellant's Brief the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)."

SUMMARY OF THE ARGUMENTS

I. After a thorough review of both the Clerk's Record and the Reporter's Record no meritorious issues were found to bring forward for review warranting reversal.

II. Article 26.05(g) of the Texas Code of Criminal Procedure allows the trial court to order a defendant reimburse the costs of court-appointed legal counsel that the court finds the defendant is able to pay. However, a defendant who is determined by the trial court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. Appellant was originally found to be indigent and the trial court appointed counsel to represent Appellant. The trial court's judgment ordered Appellant to pay $225.00 in court-appointed attorney's fees. This order is improper because Appellant was presumed to be indigent and that presumption remained throughout Appellant's case. Therefore, the judgment should be modified to remove the order to pay court-appointed attorney's fees.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 2,815 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

STATEMENT OF FACTS

On May 30, 2018, Appellant entered a guilty plea to two counts of bail jumping/failure to appear, both third degree felony offenses. RR 2, 11-12. The trial court ordered a presentence investigation and reset the case for sentencing. RR 2, 12. The trial court held the sentencing hearing on August 1, 2018. RR 3, 1. After hearing the evidence, the trial court sentenced Appellant to 10 years imprisonment on each count, to run concurrently. RR 3, 23.

ARGUMENTS & AUTHORITIES

I.
Undersigned counsel files this "Anders" Brief after a thorough review of both the Clerk's Record and the Reporter's Record in this case and no meritorious issues were found to bring forward for review warranting reversal.

A. Standard of Review

If, after a thorough review of the record and careful investigation, appellate counsel concludes that an appeal is frivolous and without merit, counsel may submit a brief which presents a professional evaluation showing why there is no basis to advance an appeal. *See Anders v. California*, 386 U.S. 738, 744 (1967); *See Stafford v. State*, 813 S.W.2d 503, 509-10, 510 n.3 (Tex. Crim. App. 1991). Appellate counsel should also inform the appellant that he has a right to file a pro se appellate brief and review the record. *See McMahon v. State*, 529 S.W.2d 771, 771 (Tex. Crim. App. 1975). Finally, appellate counsel must take steps to ensure that the appellant has access to the appellate record to exercise his right to file a pro se brief, if appellant desires. *Kelly v. State*, 436 S.W.3d 212 (Tex. Crim. App. 2014).

B. Analysis

Undersigned counsel for Appellant has conducted a thorough review of the clerk's record and reporter's record and has determined that there are no issues warranting reversal of the trial court's judgment.

Sufficiency of the Evidence

Undersigned counsel first reviewed the sufficiency of the evidence to support Appellant's conviction.

In a sufficiency challenge, the appellate court considers all evidence in the light most favorable to the verdict to determine whether a rational fact finder could have found the essential elements of a crime beyond a reasonable doubt based on the evidence and the reasonable inferences from that evidence. *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 898-99 (Tex. Crim. App. 2010).

Appellant entered a plea of guilty to the underlying offenses. Article 1.15 of the Texas Code of Criminal Procedure requires that the State "introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." *Tex. Code Crim. Proc. art. 1.15*; *see Menefee v. State*, 287 S.W.3d 9, 13-14 (Tex. Crim. App. 2009).

The evidence supporting a guilty plea may take several forms. *Menefee*, 287 S.W.3d at 13. Article 1.15 provides that "the evidence may be stipulated if the defendant in such a case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court." *Tex. Code Crim. Proc. art. 1.15*. When a defendant pleads guilty, article 1.15 does not require him to admit the truth of the evidence to which he stipulates, but if he does so, the stipulation will be considered a judicial confession. *Stone v. State*, 919 S.W.2d 424, 426-27 (Tex. Crim. App. 1996). Evidence presented during a sentencing hearing may also substantiate a guilty plea. *Menefee*, 287 S.W.3d at 18-19.

Appellant executed a document styled "Defendant's Plea of Guilty, Waivers and Admonishments." CR, 14. In this document, Appellant waived his rights as set out in the document. CR, 15. Appellant further judicially confessed to all the allegations set out in the attached indictment and entered a guilty plea to the offense. CR, 16.

Based upon the representations made by Appellant in "Defendant's Plea of Guilty, Waivers and Admonishments" and based upon the evidence

introduced at the sentencing hearing, it does not appear that a sufficiency challenge in this case is viable.

Sentencing Hearing

There were no objections lodged to the evidence at the sentencing hearing. The trial court sentenced Appellant to 10 years on each count (to run concurrently), which is within the permissible punishment range for a third degree felony. Therefore, there does not appear to be error in this regard.

Indictment

There was no challenge or objection to the amended indictment in the trial court and there does not appear to be any error in the indictments. Therefore, there does not appear to be any error in this regard. *See Lemell v. State*, 915 S.W.2d 486, 489 (Tex. Crim. App. 1995).

Double Jeopardy Violation

Undersigned counsel investigated the possibility of a double jeopardy claim based upon the fact that the two-count indictment alleged two distinct bail jumping/failure to appear charges that occurred on the same date and in the same court.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against:

(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Ex parte Marascio*, 471 S.W.3d 832, 847 (Tex. Crim. App. 2015). The correct double jeopardy analysis in a case such as this is a "units inquiry." *Id*. The "analysis of an allowable unit of prosecution involves a situation in which two offenses from the same statutory section are charged." *Id*.

In *Marascio*, the court of criminal appeals addressed a double jeopardy claim arising from multiple bail jumping/failure to appear cases in the context of an application for writ of habeas corpus. *Id*. at 832. The defendant argued that his double jeopardy rights were violated because he failed to appear one time on multiple cases that were set at the same time. *Id*. at 848. In one of the concurring opinions, Judge Yeary addressed the viability of a double jeopardy claim in such a case.

Judge Yeary noted that the "allowable unit of prosecution under Section 38.10 for Bail Jumping and Failure to Appear depends upon the number of cases and separate bail contracts involved." *Id*. at 849. As a result, Judge Yeary reasoned that because there were multiple distinct and separate bail contracts that defendant violated, there was no double jeopardy violation. *Id*.

Appellant's cases in this appeal are each the subject of a distinct and separate bail contract that formed the basis of the charges. Undersigned counsel, after reviewing and analyzing the authority cited by Judge Yeary in his concurring opinion, determined that a double jeopardy claim is not viable in this case.

Conclusion

After reviewing the entire record in this case, undersigned counsel has found no meritorious issues warranting reversal to bring forward for review. By copy of this brief, undersigned counsel is advising Appellant that he has the right to review the record and to file a pro se brief. Additionally, undersigned counsel certifies that he will promptly forward to Appellant a motion for pro se access to the appellate record.

II.
The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.

A. <u>Standard of Review</u>

Code of Criminal Procedure Article 26.05(g) allows the trial court to order a defendant to re-pay costs of court-appointed legal counsel that the court finds the defendant is able to pay. *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013). Under Article 26.05(g), "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's

determination of the propriety of ordering reimbursement of costs and fees." *Id*. However, a defendant who is determined by the trial court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. *Tex. Code Crim. Proc. art. 26.04(p)*.

Article 26.05 of the code of criminal procedure governs the assessment of court-appointed attorneys' fees. *Gordon v. State*, 2010 Tex. App. LEXIS 6355, 4 (Tex. App.—Austin 2010, no pet.) (unpublished op.). According to the court of criminal appeals in *Mayer v. State*, a trial court order to reimburse court-appointed attorneys' fees can be challenged for sufficiency of the evidence to support it and, therefore, such challenge can be raised for the first time on appeal. 309 S.W.3d 552, 554-56 (Tex. Crim. App. 2010). The *Mayer* court also held that if the evidence is found to be insufficient, the preferred remedy is not remand to the trial court, but reformation of the judgment to delete the order for payment of attorneys' fees. *Id*.

B. <u>Analysis</u>

Appellant was initially found to be indigent on April 18, 2018 and the trial court appointed counsel to represent him. CR, 8. Appellant's sentencing hearing was held on August 1, 2018. RR 3, 1. At no time in the

interim was there any finding made that Appellant's financial status changed. The trial court's judgment reflects that Appellant is liable for $225.00 in court-appointed attorney's fees. CR, 21. On August 28, 2018, the trial court made a second finding that Appellant was indigent and wished to prosecute this appeal. CR, 29.

In the absence of a present finding that Appellant had the financial resources to pay court-appointed attorneys' fees, the trial court's order violates Article 26.05 of the code of criminal procedure. *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013). A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occur. *Id*. The only findings in the record were that Appellant was indigent and unable to pay attorneys' fees. Therefore, the evidence is insufficient to support the trial court's order assessing attorneys' fees against Appellant. Appellant prays that this honorable Court reform the trial court's judgment and delete the order for court-appointed attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court permit undersigned counsel to withdraw from further representation of Appellant in this case and permit Appellant the necessary time to review the record and file a pro se brief. Appellant further prays that this Honorable Court reform the trial court's judgment to delete the award of court-appointed attorney's fees.

Respectfully submitted,

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ATTORNEY FOR APPELLANT,
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Appellant's Brief to counsel for the State, Hon. Scott Monroe, via electronic transmission at scottm@198da.com, and whose address is 402 Clearwater Paseo, Suite 500, Kerrville, Texas 78028 on this the 6th day of March, 2019.

/s/ M. Patrick Maguire
M. Patrick Maguire