No. 14-24-00042-CR

IN THE
COURT OF APPEALS
FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

D'AVION KIRKWOOD,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM CAUSE NO. 22CR0894
212th JUDICIAL DISTRICT COURT
GALVESTON COUNTY, TEXAS
HONORABLE PATRICIA GRADY, JUDGE PRESIDING

BRIEF FOR THE APPELLANT

Dominic J. Merino
TBN: 00797069
403 Laurel Dr., Ste. D
Friendswood, Texas 77546
Phone: (281) 585-5654
Email: d.merinolaw@gmail.com
ATTORNEY FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

No. 14-24-00042-CR

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

D'AVION KIRKWOOD,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

BRIEF FOR THE APPELLANT

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

D'Avion Kirkwood, the Defendant in Cause Number 22CR0894 in the 212th District Court in and for Galveston County, Texas, respectfully submits this brief, and would respectfully show the Court the following:

PARTIES TO THE CASE

APPELLANT:
Attorney for Appellant at Trial:

Name: Greg Russell
SBN: 17411550
Address: 711 59th Street, Galveston, Texas 77551

Attorney for Appellant on Appeal:

Name: Dominic J. Merino
SBN: 00797069
Address: Dominic J. Merino, Attorney at Law
403 Laurel Dr., Ste. D, Friendswood, Texas 77546
Phone: (281) 585-5654
Email: d.merinolaw@gmail.com

APPELLEE:

Attorneys for the State at trial:

Name: Katelyn Oxenreiter (*nee* Willis)
SBN: 24123408
Name: Shannon Donnelly
SBN: 24095582
Address: Galveston County Criminal District Attorney's Office
600 59th St., Ste. 1001
Galveston, Texas 77551
Phone: (409) 766-2355
Fax: (409) 770-2290

Attorney for Appellant on Appeal:

Name: Jack Roady
SBN: 24027780
Address: Galveston County Criminal District Attorney's Office
600 59th St., Ste. 1001, Galveston, Texas 77551
Phone: (409) 766-2355
Fax: (409) 770-2290

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Texas Rules of Appellate Procedure ("T.R.A.P.") § 3.1 (g)

T.R.A.P. §§ 13.1. 13.2

T.R.A.P. § 34.6

Texas Supreme Court's adoption of Rules Governing the Procedure for Making a Record of Court Proceedings by Electronic Recording (see Misc. Docket No. 91-0017)

ATTORNEY GENERAL OPINIONS

The Honorable Dana Norris Young, Tex. Atty. Gen Op. KP-0318, 2020 WL 7237867, at *1 (Tex. A.G. June 29, 2020)

STATEMENT OF THE CASE

This is a direct appeal from a jury verdict finding Appellant guilty of capital murder. Appellant was charged by indictment with capital murder. Tex. Penal Code sec. 19.03 (a)(2). The state did not seek the death penalty. Indeed, because Appellant was seventeen (17) years-old at the time of the offense he was not subject to death as punishment. (Roper v. Simmons, 543 U.S. 551 2005).

The Court denied Appellant's Motion for Official Court Reporter (RR, Vol. 5, p.14). A court recorder was used to record the proceedings as they occurred in the courtroom. After the trial ended the Court used an official court reporter to transcribe the proceedings and produce a written record based on the recording.

A judgment was entered on December 18, 2024 sentencing Appellant to life in prison. The same day a Notice of Appeal was filed on behalf of Appellant. A Motion for New trial was filed on January 10, 2024. Said motion was overruled by operation of law.

ISSUE PRESENTED

1. Did the trial court abuse its discretion in denying Appellant's "Motion for Court Reporter", and, if so, was it harmful error; or, per se prejudicial with harm presumed requiring reversal?

SUMMARY OF ARGUMENT

The Court denied Appellant's Motion for Official Court Reporter (R.R., Vol. 5, p.14).

Because section 52.041(A) and 52.046(A) of the Texas Government Code and prevailing case law mandate an official court reporter upon request and do not confer discretion to deny such a request on the trial court. Here, the trial court abused its discretion by denying Appellant's "Motion for Court Reporter" at the pretrial conference.

Because case law and statutory law states that failure to appoint an official court reporter upon request is error that is *per se* prejudicial, and harm is presumed, Appellant is entitled to remand to the trial court for a proper trial.

STATEMENT OF FACTS

On December 16, 2021 Abraham Zapata (Zapata) was found dead on the side of his home in the early hours of the morning. (R.R., as transcribed from Court Recorder's record, Vol. 8, p.56) He died of a single gunshot wound to his upper left back. (R.R., as transcribed from Court Recorder's record, Vol. 9, p.21). The wound was through and through and a bullet was never recovered. Texas City Police Department Detective Brian Berg ("Berg") was assigned the case and immediately commenced his investigation.

During the course of his investigation Berg explored social media accounts assigned to Zapata. Berg discovered that Zapata had been messaging someone on Instagram up until 12:13 a.m. on December 16, 2024. That person's Instagram handle was "One Shot D." Through Instagram records One Shot D was identified by Berg as Appellant. Appellant and Zapata grew up in the same neighborhood and were childhood friends.

Zapata had been having some issues with another young man at his school. Threats had been made against him by another young man. Zapata contacted Appellant and asked him if he would sell him a firearm. Appellant agreed to do so. After further investigation Berg began to suspect that Appellant did not intend to sell the gun to Zapata, but to rob him.

Appellant was interrogated by Berg. He admitted to setting up the buy on behalf of someone else, but disavowed any intent to harm or rob Zapata. Appellant implicated a man named Terry Rojas ("Rojas"). Appellant contended that the gun was owned by Rojas; that Rojas went to Zapata's house that night, and Rojas is who shot and killed Zapata.

STANDARD OF REVIEW

Like most pretrial rulings in a criminal case, a trial court's ruling on a Motion for Court Reporter is reviewed for abuse of discretion. Cartwright v. State, 527 S.W. 2d 535; (Tex. Crim. App. 1975); Soto v. State, 671 S.W. 2d 43 (Tex. Crim. App. 1984). An abuse of discretion occurs when the trial court rules "without reference to any guiding rules and principles" or is "arbitrary or unreasonable." Downer v. Aquamarine Operators, Inc., 701 S.W. 2d 238, 241-42 (Tex. 1985); Wheelis v. First City Texas – Northeast, 853 S.W. 2d 81, 82 (Tex-App. Hou. [14th] Dist. 1993). The Appellant must present a record sufficient to demonstrate an abuse of discretion. Id. An abuse of discretion also exists where there is "a clear failure by the trial court to analyze or apply the law correctly." In re HEB Grocery Co., L.P., 492 S.W. 3d 300, 302 (Tex. 2016) (orig. proceeding). The courts will not reverse a trial court ruling that is within the zone of reasonable disagreement. Montgomery v. State, 810 S.W. 2d 372, 390 (Tex. Crim. App. 1991).

ANALYSIS

On December 7, 2023 Appellant filed and presented to the trial court a "Motion for Court Reporter." (R.R., as transcribed from Court Recorder's record, Vol. 5, p. 13). Said motion was denied. (R.R., as transcribed from Court Recorder's record, Vol. 5, p.14). Appellant's counsel specifically stated that he was requesting a certified court reporter to "actually stenographically (sic) transcribe" for the "whole trial." (R.R., as transcribed from Court Recorder's record, Vol. 5, p.15).

Because Tex. Gov't Code §§ 52.041 and 52.046 and prevailing case law (*See,* Cartwright v. State, 527 S.W. 2d 535; (Tex. Crim. App. 1975); Soto v. State, 671 S.W. 2d 43 (Tex. Crim. App. 1984)) require an official court reporter to be in the courtroom recording the proceedings as they occur upon request the trial judge erred in failing to use an official court reporter to record and compile the record of trial in this case.

The Tex. Gov't Code requires that "each judge of a court of record *shall* appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court." Tex. Gov't Code § 52.041(a). "Official court reporter" means the shorthand reporter appointed by a judge of a court of record as that court's official court reporter. Tex. Gov't Code § 52.001(3). Both "shorthand reporter" and "court reporter" mean a person who is certified as a court reporter, apprentice court reporter, or provisional court reporter under Chapter 154 to engage in shorthand reporting. Tex. Gov't Code § 52.001(4). Both "shorthand court reporting and "court reporting" mean the practice of shorthand reporting for use in litigation in

the courts of this state by making a verbatim record of an oral court proceeding, deposition, or proceeding before a grand jury, referee, or court commissioner using written symbols in shorthand, machine shorthand, or oral stenography. Tex. Gov't Code § 52.001(5). The term "court recorder" is not defined nor mentioned anywhere in Chapter 52. "Court recorder" is found only in the Texas Rules of Appellate Procedure ("T.R.A.P."). See, T.R.A.P. § 3.1 (g) (defining "reporter or court reporter" as "the court reporter or court recorder); See also, T.R.A.P. §§ 13.1. 13.2 (listing duties of a court recorder).

The use of the term shall impose a duty on the trial court. (Tex. Gov't Code § 311.016(2). The Texas Attorney General has recognized that the use of the word shall in section 52.041 creates a mandatory duty on the trial court. Finding that "a court would likely construe section 52.041to impose a mandatory duty on the judge of a court of record to appoint an official court reporter." See, The Honorable Dana Norris Young, Tex. Atty. Gen Op. KP-0318, 2020 WL 7237867, at *1 (Tex. A.G. June 29, 2020). The First Court of Appeals has also held that a trial court lacks discretion to deny a request for a court reporter to record its proceedings. In re Larkin, 516 S.W. 3d 583, 585 (Tex. App. Hou. [1st Dist.] 2017), orig., proceeding. In Larkin the Court held that "Larkin specifically requested that the court reporter record all pretrial and trial proceedings. Once the request was made, the trial court had no discretion to deny it. Accordingly, we hold that the trial court abused its discretion by denying Larkin's request that the pretrial and trial proceedings be properly recorded." Id., at 585, citing

(Tex. Gov't Code § 52.046 (a) (1)-(3); T.R.A.P. 13.1(a)). The First Court of Appeals has consistently held that Rule 13.1(a) is void because it is in direct conflict with Article 52.046 of the Texas Government Code. Polosek v. State, 16 S.W. 3d 82, 88-89 (Tex. App. [1st Dist.] 2000, no pet.); Washington v. State, 127 S.W. 3d 111, 113-115 (Tex. App. Hou. [1st Dist.] 2003, no pet.) As demonstrated by the holdings of Polosek and Washington, the Texas Rules of Appellate Procedure do not – and cannot – abridge a party's right to an official court reporter upon request.

While the Texas Rules of Appellate Procedure do contemplate the use of a "court recorder" (See, e.g. T.R.A.P. §§ 13, 34.6), the plain language of Section 52.041 of the Texas Government Code makes it clear that such a method cannot be forced on the parties in lieu of an official court reporter using shorthand reporting when requested. Either the rule conflicts with the statute or the rule is limited to permitting the use of a court recorder where a party has not made a request for a court reporter.

In Young the Attorney General found that "Rule 13.1 [of the Texas Rules of Appellate Procedure] does not authorize the designation of an official court recorder in lieu of an official court reporter." Young, 2020 WL 7237867, at *1. The Texas Rules of Appellate Procedure do not – and cannot – abridge a party's right to an official court reporter upon request and the Texas Supreme Court's adoption of Rules Governing the Procedure for Making a Record of Court Proceedings by Electronic Recording (see Misc. Docket No. 91-0017) does not relieve the trial court of its statutory duty to appoint an official court reporter to compile via shorthand reporting a record of

proceedings upon request of party.

There is no authority, whether statutory or rule-based, to permit a trial court ignore a party's request for an official court reporter and proceed with a court recorder. There is, however, both statutory authority and case law NOT PERMITTING a trial judge of a court of record to ignore a party's request for an official court reporter. Tex. Gov't Code §§ 52.041 & 52.046; (*See,* Cartwright v. State, 527 S.W. 2d 535; (Tex. Crim. App. 1975); Soto v. State, 671 S.W. 2d 43 (Tex. Crim. App. 1984)).

Texas Government Code section 52.041 requires every court of record to appoint an official court reporter. And section 52.046 requires that court reporter, upon request, to:

1. attend all sessions of the court;
2. take full shorthand notes of oral testimony offered before the court, including objections made to the admissibility of evidence, court rulings, and remarks on objections, and exceptions to the rulings;
3. take full shorthand notes of closing arguments if requested to do so by the attorney of a party to the case, including objections to the arguments, court rulings and remarks on the objections, and exceptions to the rulings;
4. preserve the notes for future reference for three years from the date on which they were taken, and
5. furnish a transcript of the reported evidence or other proceedings, in whole or in part, as provided by this chapter. Tex. Gov't Code § 52.046(a).

Thus, the stature requires reporting rather than recording when a request is made under § 52.046. Since the Texas Rules of Appellate Procedure cannot prevail in a conflict with a statute the Texas Supreme Courts' rule-making authority is limited to "… rules consistent with the relevant statutes to provide for the duties and fees of official court reporters in all civil judicial proceedings." Tex. Gov't Code § 52.046 (c).

The trial court had a mandatory, ministerial duty imposed by statute to provide an official court reporter who, by definition, will perform shorthand reporting (i.e. making a verbatim record using written symbols in shorthand, machine shorthand, or oral stenography) rather than relying on a court recorder's electronic recording to create the official record at trial in the face of written request for a court reporter at trial. See Tex. Gov't Code. § 52.046(a). The trial court's refusal to allow appellant a court reporter, despite his written request, was "arbitrary or unreasonable, and without reference to guiding rules and principles." Downer, 701 S.W. 2d, at 241-42 (Tex. 1985). In fact, the trial court's action in denying Appellant's request for a court reporter is *contrary to* guiding rules and principles in this case. In addition, because Tex. Gov't Code §52.041 is mandatory upon proper request of the defendant at trial, and Appellant made a proper request, which the Court denied, there is obviously "a clear failure by the trial court to analyze or apply the law correctly." In re HEB Grocery Co., L.P., at 302.

Thus, the trial court abused its discretion by denying Appellant's written request for an official court reporter.

Harm Analysis

In a harm analysis in a criminal proceeding where the issue presented is the failure to provide a certified court reporter following a proper request by the defendant at trial, the controlling case is Soto v. State, 671 S.W. 2d 43 (Tex. Crim. App. 1984).

In Soto the trial court denied appellant's motion for court reporter and proceeded to trial after ordering the county clerk to record the proceedings. The county clerk's office did so, and after the trial transcribed the audio recordings to cobble together a record of proceedings. Id, at 44. Basically the same method as the one used in this case.

The state argued that appellant was required to show harm due to the alternate method used to record and transcribe the proceedings. The Court expressly rejected that argument and held that Article 40.09(4) V.A.C.C.P. (the predecessor statute to Texas Government Code §52.041); required the trial court to provide a certified court reporter upon proper request of the defendant; that failure to do so is error; and in that case since "any refusal to furnish a court reporter is per se prejudicial," and that "the defendant need not show harm." (Soto, at 45-46; *quoting* Cartwright v. State, 527 S.W. 2d 535 (Tex. Crim. App. 1975), entailing a reversal of the trial court and a remand for a new – and properly recorded - trial.

CONCLUSION

In the face of contrary statutory and case law the trial court forced Appellant to trial in a capital murder case without the benefit of a certified court reporter, despite the written request of his trial counsel. A trial judge is not free to ignore the law and forge ahead merely to keep the docket moving. It may be more efficient for the trial court, but justice is not about efficiency; but, fairness.

It may be inefficient or inconvenient to apply the rule of law at times, but isn't that why all of us take oaths?

In this case the trial court ignored the controlling statutes and prevailing case law and did what they wanted to do. That is not acceptable. And in a case like this the error committed is per se prejudicial, thus no harm need be shown, and Appellant is entitled to have his conviction reversed and this case remanded to the trial court for a new – proper - trial.

PRAYER

Wherefore, premises considered, Appellant prays that this Court find for Appellant and reverse and remand for a new trial, and for any and all relief to which Appellant may be entitled.

Respectfully submitted,

/s/ Dominic J. Merino
Dominic J. Merino
Counsel for Appellant
TBN: 00797069

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Appellant's Brief has been served on counsel for the State on September 16, 2024, via email.

/s/Dominic J. Merino
Dominic J. Merino
TBN: 00797069

CERTIFICATE OF WORD COUNT

I do hereby certify that the total word count for this document is 3230 words excluding those parts specifically excluded in Texas Rule of Appellate Procedure 9.4(i)(1) which is less than 15,000 words allowed per Texas Rule of Appellate Procedure 9.4.

/s/Dominic J. Merino
Dominic J. Merino
TBN: 00797069