PD-0748-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/26/2018 4:07 PM
Accepted 1/26/2018 5:11 PM
DEANA WILLIAMSON
CLERK

No. PD-748-17

FILED
COURT OF CRIMINAL APPEALS
1/26/2018
DEANA WILLIAMSON, CLERK

KELSEY JO LACKEY	§	**IN THE COURT OF**
	§	
v.	§	**CRIMINAL APPEALS**
	§	
THE STATE OF TEXAS	§	**OF TEXAS**

MOTION TO SUPPLEMENT APPELLATE RECORD AND RESPONSE TO STATE'S MOTION TO STRIKE

COMES NOW Kelsey Jo Lackey, Appellant in the above-styled and numbered cause, and makes and files this Motion to Supplement the Appellate Record by requiring the filing of the reporter's record and Response to the State's Motion to Strike and Objection to the Filing of Any Reporter's Record, and in support thereof shows the Court as follows:

I.

The Court granted Appellant's petition for discretionary review on November 1, 2017. The parties have now filed their briefs. Appellant referred in his brief to 3 volumes of the reporter's record that were never filed in an appellate court because the Waco Court majority dismissed the appeal before they could be filed. Appellant included these volumes in the appendix to the appellant's brief. *Cf.* TEX. R. APP. P. 52.7 (providing for filing of record in mandamus proceeding).

II.

The issue before the Court is the enforceability of Appellant's boilerplate waivers of appeal. This Court and other appellate courts have regularly considered statements made on the record in determining whether a waiver of appeal should be enforced. *See Ex parte De Leon*, 400 S.W.3d 83, 90 (Tex. Crim. App. 2013); *Alzarka v. State*, 90 S.W.3d 321, 323 (Tex. Crim. App. 2002); *Grice v. State*, 162 S.W.3d 641, 643-45 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *Iles v. State*, 127 S.W.3d 347, 349 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Garcia v. State*, 95 S.W.3d 522, 523-25 (Tex. App.—Houston [1st Dist.] 2002, no pet.). For a full and fair adjudication of the issue presented, the Court must consider the reporter's record as well as the documents contained in the clerk's record.

III.

The Waco majority did not consider the reporter's record, but they should have. Instead, the Waco majority dismissed the appeal solely because the "1st amended" trial court certification states that this was a plea bargain case and Appellant waived his right of appeal. (CR149) *Lackey v. State*, No. 10-17-00016-CR, 2017 WL 1148239, at *1 (Tex. App.—Waco Mar. 20, 2017,

pet. granted) (mem. op., not designated for publication). Chief Justice Gray included a dissenting note.

> Chief Justice Gray dissents. A separate opinion will not issue. He notes, however, that he believes the certificate of the right to appeal that indicates that the defendant waived the right to appeal is not supported by the record. He would direct the trial court to correct the certificate of the right to appeal to reflect that the defendant did not waive the right to appeal adverse decisions on pretrial motions, as part of the plea bargain agreement and because the internal inconsistency in the admonition and plea papers should yield in favor of preserving the right to appeal if it is not clearly and unambiguously waived. Because the majority dismisses these appeals Chief Justice Gray respectfully dissents.

Id., 2017 WL 1148239, at *1 n.* (Gray, C.J., dissenting).

In a motion for rehearing, Appellant expressly urged the Waco majority to consider "the entirety of the records already before it in this appeal . . . along with all transcripts and records included in Appellant's associated writ of mandamus."[1] Appellant's Motion for Rehearing at 4, *Lackey v. State*, No. 10-17-00016-CR (Tex. App.—Waco Apr. 4, 2017).

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[1] In a separate mandamus proceeding, Appellant sought mandamus relief to require the trial court to provide a hearing on his motion to remain on bond pending appeal and stay his probated sentence pending appeal. The Waco majority summarily denied the mandamus petition on the same date it dismissed the appeal with Chief Justice Gray dissenting. *See In re Lackey*, No. 10-17-00076-CR, 2017 WL 1148426 (Tex. App.—Waco Mar. 20, 2017, orig. proceeding) (mem. op., not designated for publication). Appellant attached the volumes of the reporter's record from the trial proceedings as part of the mandamus record. The Waco majority could certainly have taken judicial notice of

But the Waco majority summarily denied Appellant's motion for rehearing without considering the entirety of the trial record. Chief Justice Gray dissented from the denial of rehearing.

IV.

From a procedural standpoint, Appellant requested that a complete reporter's record be prepared and filed on March 6, 2017. Because this request does not appear in the clerk's record that was filed with the Waco Court on February 7, 2017 and transmitted to this Court, Appellant is contemporaneously asking the district clerk to file with this Court a supplemental clerk's record containing this pleading.

V.

This Court has held on more than one occasion that the rules relating to the perfection of an appeal must not be construed in a manner that elevates form over substance.

> A person's right to appeal a civil or criminal judgment should not depend upon tracking through a trail of technicalities. In former days, this Court was sometimes accused of elevating form over substance in demanding technical perfection in the notice of appeal.

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the mandamus record but declined to do so. *See Davis v. State*, 293 S.W.3d 794, 798 (Tex. App.—Waco 2009, no pet.) (citing *Salinas v. State*, 542 S.W.2d 864, 867 (Tex. Crim. App. 1976)).

Few v. State, 230 S.W.3d 184, 190 (Tex. Crim. App. 2007); *accord Gonzales v. State*, 421 S.W.3d 674, 675 (Tex. Crim. App. 2014).

Here, the Court should not countenance deciding this appeal without a complete record. Otherwise, the Court will have essentially permitted its decision to rest on a "trail of technicalities" rather than a full and fair consideration of all relevant facts necessary to decide the enforceability of the boilerplate waivers of appeal.

VI.

The State wants to hide part of the record from this Court. Part of the State's argument rests on the fact that the Waco majority did not consider the reporter's record when they issued their opinion. But that ignores the fact that Appellant expressly asked the Waco Court to consider the reporter's record in his motion for rehearing.[2] Appellant believes the reporter's record undercuts the State's position in the matter and helps to demonstrate that his boilerplate waivers are not enforceable. Accordingly, that record should be considered by this Court to fully and fairly address the issue presented.

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[2] Appellant does not dispute the State's contention that appellate courts ordinarily do not consider documents attached to briefs.

To do otherwise would be to decide the issue without all relevant information. There is no valid reason to oppose this Court having a full and complete record of the proceedings below.

Appellant's Brief before this Court sets out the framework that Appellant contends appellate courts should apply whenever evaluating the voluntariness/enforceability of a waiver of appeal. As part of this framework, Appellant advocates for consideration of statements made on the record, which is consistent with a number of decisions by this Court and other appellate courts. *See DeLeon*, 400 S.W.3d at 90; *Alzarka*, 90 S.W.3d at 323; *Grice*, 162 S.W.3d at 643-45; *Iles*, 127 S.W.3d at, 349; *Garcia*, 95 S.W.3d at 523-25.

VII.

For each of the reasons stated, this Court should grant Appellant's Motion to Supplement the Record and direct the court reporter to file the reporter's record for this appeal. The record has already been prepared and could be filed quite expeditiously. To rule otherwise would be to deny Appellant due process on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when a state chooses to confer a right not constitutionally required [like the

right of appeal], "it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause").

WHEREFORE, PREMISES CONSIDERED, Appellant requests that the Court grant this motion and such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of this document has been served electronically on January 26, 2018 to: (1) counsel for the State, Douglas Howell, III, dhowell@brazoscountytx.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett