Opinion issued January 19, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00128-CR

TIMOTHY DYNELL GEORGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1431234

MEMORANDUM OPINION

Appellant, Timothy Dynell George, pleaded guilty to the offense of unlawful possession of a firearm by a felon.[1] Based on the State's punishment

[1] *See* TEX. PENAL CODE ANN. § 46.04(a), (e) (Vernon 2011).

recommendation, the trial court sentenced Appellant to two years in prison. The trial court certified Appellant's right to appeal the judgment of conviction, permitting Appellant to challenge the trial court's earlier denial of his motion to suppress.[2]

We affirm.

Background

A grand jury indicted Appellant for the third-degree felony offense of unlawful possession of a firearm by a felon. The indictment alleged,

> TIMOTHY DYNELL GEORGE, hereafter styled the Defendant, . . . on or about June 6, 2014, did then and there unlawfully[,] intentionally and knowingly possess a firearm at a location other than the premises at which the Defendant lived, after being convicted of the felony offense of POSSESSION OF CONTROLLED SUBSTANCE on JULY 8,1996[.]

Appellant later filed a motion to suppress. He asserted that the firearm he was charged with possessing had been seized by police without a warrant and as a result of an "illegal search." Appellant claimed that the firearm's admission into evidence at trial would violate his "rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, [and] Article 1, Section 10 of the Texas Constitution[.]" Appellant requested that evidence of the firearm be

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[2] *See* TEX. R. APP. P. 25.2(a)(2)(A) (providing that, in a plea bargain case, a defendant may appeal "those matters that were raised by written motion filed and ruled on before trial").

suppressed. Following a hearing, the trial court denied Appellant's motion on January 7, 2015. That same day, Appellant pleaded guilty to the charged offense. The trial court followed the State's punishment recommendation and sentenced Appellant to two years in prison.

On February 6, 2015, Appellant's retained counsel filed a notice of appeal on Appellant's behalf. The notice indicated that Appellant sought to appeal the trial court's denial of his motion to suppress. The trial court certified Appellant's right to appeal the ruling on the motion.

On March 9, 2015, the clerk's record was filed with this Court; however, no reporter's record was filed. The Clerk of this Court notified Appellant's retained counsel that the reporter's record had not been filed "because (1) [Appellant] failed to request a reporter's record or (2) you have not paid for the record or made arrangements to pay the reporter's fee to prepare it. . . . My records also indicate that you are not entitled to proceed without payment of costs." Despite the notice, Appellant did not make arrangements for the filing of the reporter's record or otherwise contact this Court.

On June 23, 2015, our clerk's office notified the parties that, even though Appellant had not made arrangements for the filing of the reporter's record, the Court may set a briefing schedule and consider the appellate issues that do not require a reporter's record for their disposition. On August 11, 2015, we notified

the parties that Appellant's brief was due September 10, 2015. A late-brief notice was sent to Appellant's retained counsel on September 21, 2015. The notice informed counsel that, unless Appellant filed his brief or a motion for extension of time within 10 days, we would abate the appeal for the trial court to determine whether Appellant still wished to prosecute the appeal.

Appellant never filed a brief or requested additional time to file his brief. On October 27, 2015, we abated the appeal for the trial court to conduct a hearing to determine, inter alia, whether Appellant still desired to pursue the appeal. We ordered the trial court to make written findings of fact and conclusions of law regarding its determinations.

The trial court conducted the hearing on March 10, 2016. On the record, the trial court stated that it had made "numerous attempts" by telephone and by letter to contact retained counsel, but counsel never responded. The trial court also stated on the record that it had attempted to have Appellant appear at the hearing by teleconference. The trial court had believed Appellant was in prison but, upon inquiry, had learned that Appellant had been released. The trial court stated that it had sent a certified letter to Appellant's last known address, but it had been returned as undeliverable. The trial court stated that it had no way of contacting Appellant and that its "repeated attempts to contact [retained counsel] have been in vain." The trial court's coordinator stated on the record that she had sent

Appellant's counsel two letters and had been emailing him since August 2015. The trial court had received no response to either the letters or the emails.

After receiving the trial court's transcript from the hearing, we reinstated the appeal. However, because the trial court had not made written findings regarding whether Appellant had abandoned his appeal, we again abated the appeal and ordered the trial court to hold a hearing regarding whether Appellant wished to pursue the appeal.

The trial court held another hearing on November 8, 2016. The trial court again, as it had in the earlier hearing, described the efforts that it had made to contact both Appellant and retained counsel. The trial court expressly found on the record that Appellant and his retained counsel had abandoned the appeal. After receiving the hearing transcript from the trial court, we reinstated the appeal.

Consideration without Briefs

Based on the transcript from the trial court's November 8, 2016 hearing, we ordered the appeal to be considered without the benefit of briefs. *See* TEX. R. APP. P. 38.8(b)(4) (providing that appellate court may consider an appeal without briefs when trial court has found that appellant no longer desires to prosecute appeal, as justice may require). When we determine an appeal in a criminal case without the benefit of an appellant's brief, our review of the record is limited to fundamental errors. *See Lott v. State*, 874 S.W.2d 687, 688 (Tex. Crim. App. 1994); *see also*

Burton v. State, 267 S.W.3d 101, 103 (Tex. App.—Corpus Christi 2008, no pet.) (discussing process of considering criminal appeal when defendant does not file brief). Fundamental errors include the following: (1) errors recognized by the legislature as fundamental; (2) the violation of rights that are waivable only; and (3) the denial of absolute, systemic requirements. *Burton*, 267 S.W.3d at 103 (citing *Saldano v. State*, 70 S.W.3d 873, 887–88 (Tex. Crim. App. 2002)). The Court of Criminal Appeals has identified the following "fundamental errors": (1) denial of the right to counsel; (2) denial of the right to a jury trial; (3) denial of ten days' preparation before trial for appointed counsel; (4) absence of jurisdiction over the defendant; (5) absence of subject-matter jurisdiction; (6) prosecution under a penal statute that does not comply with the Separation of Powers Section of the state constitution; (7) jury charge errors resulting in egregious harm; (8) holding trials at a location other than the county seat; (9) prosecution under an ex post facto law; and (10) comments by a trial judge which taint the presumption of innocence. *Saldano*, 70 S.W.3d at 888–89; *Burton*, 267 S.W.3d at 103.

Appellant did not pay, or make arrangements to pay, for the reporter's record in this case. Therefore, only the clerk's record is presented for our review. We have reviewed the clerk's record for fundamental error and found none. *See Alakhras v. State*, 73 S.W.3d 434, 436 (Tex. App.—Houston [1st Dist.] 2002, no

pet.) (reviewing only clerk's record for fundamental error when appellant had not made arrangements to pay for reporter's record).

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).