Affirmed and Memorandum Opinion filed February 25, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00149-CR
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JULIO TORRES CORTEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause Nos. 715518 & 715520

MEMORANDUM OPINION

Appellant Julio Torres Cortez was convicted for twice committing the offense of aggravated sexual assault of a child. This court affirmed those convictions in 1999. *See Cortez v. State*, 14-97-00907-CR, 1999 WL 394809 (Tex. App.—Houston [14th Dist.] June 17, 1999, no pet.) (not designated for publication) and *Cortez v. State*, 14-96-01196-CR (Tex. App.—Houston [14th Dist.] May 27, 1999, pet. ref'd) (not designated for publication). On January 10, 2007, appellant filed pro se motions for

post-conviction DNA testing in both cases and requested appointment of counsel. On January 18, 2007, the trial court appointed counsel to represent appellant for the purpose of post-conviction DNA testing. On December 12, 2008, the trial court denied appellant's motion for DNA testing. On January 9, 2009, appellant filed a pro se notice of appeal from the trial court's order denying DNA testing.

In two issues, appellant contends the trial court erred in (1) failing to appoint new counsel on appeal, and (2) failing to hold a hearing to determine why no reporter's record was filed on appeal.

In his first issue, appellant argues that the trial court should have *sua sponte* appointed counsel to represent him in an appeal from the trial court's denial of DNA testing. Appellant is correct in that he is entitled to counsel to assist with an appeal under Chapter 64 of the Texas Code of Criminal Procedure. *See Gray v State*, 69 S.W.3d 835, 837 (Tex. App.—Waco 2002, no pet.). The record reflects, however, that appellant was represented by counsel at the time he filed his pro se notice of appeal. Although appellant claims his counsel withdrew prior to the filing of his notice of appeal, there is no evidence of appellant's counsel's withdrawal in the record. Therefore, we presume that appellant's appointed counsel represented him at the time he filed his notice of appeal. *See Smallwood v. State*, 296 S.W.3d 729, 733 (Tex. App.—Houston [14th Dist.] 2009, no pet.); Tex. Code Crim. Proc. Ann. art. 26.04(j)(2) (Vernon 2009) (appointed counsel shall represent defendant until appeals are exhausted or until the court relieves her of her duties); *see also Birdwell v. State*, No. 10-04-00059-CR, 2005 WL 1480199 (Tex. App.—Waco 2005, pet. ref'd) (mem. op.) (holding that trial court did not abuse its discretion in failing to appoint counsel even though counsel filed motion to withdraw prior to appeal of motion for DNA testing because counsel was presumed to represent defendant until trial court ruled on motion to withdraw). Appellant's first issue is overruled.

In his second issue, appellant argues that the trial court abused its discretion in failing to hold a hearing ordered by this court. On April 9, 2009, this court issued an order pursuant to Texas Rule of Appellate Procedure 37.3(a)(2) abating the appeal and ordering the trial court to hold a hearing to determine if a reporter's record had been taken, and, if so, the reason for failure to file the record. On April 14, 2009, the court reporter filed a letter with this court stating that no record had been taken. Therefore, the case was reinstated on this court's docket with no need for a hearing. Because the court reporter informed the court that no record was taken, the trial court did not abuse its discretion in failing to hold the hearing. Appellant's second issue is overruled.

PER CURIAM

Panel consists of Justices Yates, Seymore, and Brown.
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