

NO. 07-12-0435-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
JANUARY 16, 2013

NICOLE HICKS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 364TH DISTRICT COURT OF LUBBOCK COUNTY;
NO. 2012-435-125; HONORABLE BRAD UNDERWOOD, JUDGE

Order

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant, Nicole Hicks, appealed her conviction for theft. So too did she move the trial court to appoint her legal counsel to represent her on appeal and provide her a free appellate record because she claimed to be indigent. The trial court conducted a hearing on the matter, found her not to be indigent, and denied her request. Hicks appealed the denial, and we affirm.

The Court of Criminal Appeals recently explained that:

A defendant is indigent for purposes of the appointment of appellate counsel if he is not financially able to employ counsel. For purposes of qualifying as an indigent in order to receive a copy of the record furnished without charge, a defendant must be unable to pay or give security for the appellate record. Indigency determinations are made at the time the issue is raised and are decided on a case-by-case basis. Determining indigency for purposes of appointing counsel and indigency for purposes of obtaining a free record are discrete inquiries, but the factors to be considered are the same. A defendant can be found indigent for one purpose without being found indigent for the other. Relevant to both indigency determinations are the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant.

McFtridge v. State, 309 S.W.3d 1, 5-6 (Tex. Crim. App. 2010) (internal quotation marks and footnotes omitted); *Ham v. State*, 313 S.W.3d 450, 452-53 (Tex. App.—Amarillo 2010, pet. ref'd) quoting, *McFtridge v. State*, supra. Furthermore, the appellant has the burden to make a *prima facie* showing of indigency. *Ham*, 313 S.W.3d at 453. Once that is done, the State becomes obligated to show non-indigence, and unless there is some basis in the record illustrating the *prima facie* showing inaccurate or untrue, the claimant should be deemed indigent. *Id.* Should the trial court conclude otherwise, we may affirm the decision only if the record contains evidence supporting the decision. *Id.*

Next, a trial court may consider any admissible evidence relevant to the issue of indigence. *Gonzalez v. State*, 8 S.W.3d 679, 680 (Tex. App.—Amarillo 1999, no pet.). Statute also itemizes various relevant indicia. They include the claimant's "income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents," and available spousal income. TEX. CODE CRIM. PROC. ANN. art. 26.04(m) (West Supp. 2012). We also note that an

individual's dependence upon the charity of the public afforded through welfare programs is, by itself, *prima facie* evidence of indigence. *In the Interest of J.H.M.*, No. 07-07-0109-CV, (Tex. App.–Amarillo October 10, 2007); *citing, In the Interest of J.W.*, 52 S.W.3d 730 (Tex. 2001). Having said this, we turn to the circumstances at bar.

Appearing of record is evidence that appellant owns a home valued at \$300,000 and having an \$80,000 equity. So too does she own a 2008 Chevy Suburban and approximately \$46,000 worth of farm equipment, and evidence also appears of record that she holds an account receivable or like debt due her from a third party of \$27,000. Income for her and her husband include approximately \$20,000 a year in government crop payments, rental income of approximately \$600 a month, and approximately \$5100 in monthly wages. Upon removing monthly payroll deductions of \$376, her net annual income approximates \$82,500. Her community debts (other than a home mortgage) apparently consist of approximately \$73,000 owed in attorney's fees incurred in defending her against the criminal prosecution at issue, a car payment, and payment on checks written against an account having insufficient funds. The sum representing attorney's fees is net of approximately \$53,000 having already been paid legal counsel. Where appellant obtained that \$53,000 was not explained.

Other evidence suggests that the family's monthly expenses exceed \$8800. That sum includes a \$175 payment on the outstanding attorney's fees and sums for “cable TV,” “entertainment,” “hair care,” and eating outside the home.

Appellant further testified that six of her seven dependents receive Medicaid. Yet, those six are apparently foster children assigned to live with her by the State. And, while appellant considered them “dependents,” nothing of record suggests that the

State relinquished its conservatorship over them or financial responsibility for them. Nor is there any testimony that either appellant or her husband have any legal relationship with the foster children other than that temporarily granted by the State. Given this, her argument that she established a *prima facie* case of indigence because her “dependents” receive government assistance is rather specious; instead, one could suggest that she is using those foster children and an obligation due them from the State of Texas to try and obtain a benefit to which she would not be entitled.

Simply put, appellant’s monthly expenses may exceed her monthly income. Yet, she has a substantial monthly income. Furthermore, living beyond one’s means does not *ipso facto* make one indigent for purposes of obtaining a free appellate record and appointed legal counsel. Again, the test is whether she is able to employ legal counsel and pay for an appellate record. We can see where the trial court could reasonably deduce from the evidence that her positive and non-inconsequential net worth, coupled with effective income and expense management, would enable her to hire counsel and buy an appellate record should she need to.

We affirm the trial court’s order denying appellant appointed counsel on appeal and a free appellate record.

Per Curiam

Do not publish.