



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00246-CR
No. 07-16-00247-CR
No. 07-16-00248-CR
No. 07-16-00249-CR
No. 07-16-00250-CR

ALLEN ODONALD NASH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

**On Appeal from the 9th District Court
Montgomery County, Texas
Trial Court No. 14-12-13270-CR (Counts I, II, III, IV & V);
Honorable Suzanne Stovall, Presiding**

December 9, 2016

ABATEMENT AND REMAND

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

Appellant, Allen ODonald Nash, was convicted of five counts of aggravated sexual assault of a child,¹ and sentenced to life imprisonment for each count. Following his convictions, Appellant's appointed trial counsel was allowed to withdraw and Robert

¹ TEX. PENAL CODE ANN. § 22.021(a)(1)(B) (West Supp. 2016).

S. Bartlett was appointed as appellate counsel. However, despite Appellant's expressed desire to appeal, Bartlett never filed a notice of appeal.

Appellant later filed an application for a writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure seeking an out-of-time appeal for his convictions. On May 31, 2016, the Court of Criminal Appeals granted Appellant an out-of-time appeal and ordered the trial court to determine, within ten days, whether he was indigent and desired to be represented by counsel. If so, the trial court was to immediately appoint an attorney to represent Appellant on appeal. The record before us is silent on whether the trial court made these determinations, but it does not reflect appointment of new appellate counsel.

On June 13, 2016, Appellant filed, *pro se*, a notice of appeal in which he requested he be allowed to represent himself on appeal. Appellant further requested a copy of the appellate record. Because the trial court entered separate judgments as to each count, the Ninth Court of Appeals docketed Appellant's appeal as five separate causes. Even though Appellant filed his notice of appeal *pro se*, the docket sheet showed Bartlett as Appellant's counsel of record.

On June 23, 2016, these appeals were transferred from the Ninth Court of Appeals to this court pursuant to an order of the Texas Supreme Court.² The clerk's record and reporter's record were filed and Appellant's brief was due on November 9, 2016. Appellant has not filed a brief and we have received no further communication from him.³

² See TEX. GOV'T CODE ANN. § 73.001 (West 2013).

³ When the Supreme Court transferred these appeals from the Ninth Court of Appeals to this

APPLICABLE LAW

An accused is entitled to the assistance of counsel at trial and through the conclusion of his direct appeal. *Buntion v. Harmon*, 827 S.W.2d 945, 948 (Tex. Crim. App. 1992). While criminal defendants have a constitutional right to conduct their own defense at trial, if they voluntarily and intelligently elect to do so, the Sixth Amendment right to self-representation at trial does not extend to the appeal stage, nor does the Texas Constitution provide such a right on appeal. See *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (holding that a criminal defendant has a federal constitutional right of self-representation at trial when he voluntarily and intelligently elects to do so); *Martinez v. California*, 528 U.S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (finding no constitutional right of self-representation on direct appeal from a criminal conviction because the government's interest in the fair administration of justice outweighs any invasion of appellant's self-representation interest); *Hadnot v. State*, 14 S.W.3d 348, 350 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (stating “[n]o Texas court has recognized a state constitutional right to self-representation on direct appeal”).

Notwithstanding this lack of a constitutional right to self-representation on appeal, this court does have discretion to permit an appellant to represent himself on appeal if he can do so without interfering with the administration of the appellate process. See *Bibbs v. State*, No. 07-10-0300-CR, 2011 Tex. App. LEXIS 9490 at *4 (Tex. App.—Amarillo Dec. 2, 2011, order) (per curiam) (not designated for publication). Our exercise of that discretion depends on a case-by-case analysis of the best interest of the

court, Bartlett was incorrectly designated as Appellant's appointed counsel. Thus, this court inadvertently sent all future notices and correspondence concerning these appeals, including notice that Appellant's brief was overdue, to Bartlett instead of Appellant. However, because Bartlett was not appointed counsel and did not file the notice of appeal, he is not Appellant's attorney of record. See TEX. R. APP. P. 6.1(a).

appellant and the State and in furtherance of the proper administration of justice. *Id.* In the exercise of that discretion, we are guided by the principle that an appellant cannot use his desire for self-representation as a means of manipulating or obstructing the orderly procedure of the court or interfering with the fair administration of justice. *Martinez v. State*, 163 S.W.3d 88, 90 (Tex. App.—Amarillo 2006, order).

ANALYSIS

Because the failure to file an Appellant's brief does interfere with the orderly procedure of this court and the fair administration of justice, we abate these appeals and remand the causes to the trial court for further proceedings. See TEX. R. APP. P. 38.8(b)(2). On remand, the trial court shall use whatever means necessary, which may include noticing and conducting a hearing, to determine the following:

1. whether Appellant still desires to prosecute these appeals;
2. whether Appellant is indigent and entitled to the appointment of appellate counsel;
3. whether Appellant still desires to represent himself on appeal;
4. if Appellant wishes to represent himself, whether his decision to do so is competently, voluntarily, and intelligently made, including whether he is aware of the dangers and disadvantages of self-representation on appeal, see *Hubbard v. State*, 739 S.W.2d 341, 345 (Tex. Crim. App. 1987); and
5. if Appellant wishes to represent himself, whether allowing him to do so is in his best interest and the State's best interest and is in the furtherance of the proper administration of justice.

Should the trial court determine that Appellant wants to continue these appeals, is indigent, and entitled to appointed counsel, and if the trial court determines that Appellant does not desire to continue to represent himself on appeal, OR determines that his doing so is not in the best interest of Appellant and the State and in furtherance

of proper administration of justice, the trial court shall appoint counsel to represent Appellant in these appeals. In that event, counsel's name, address, email address, telephone number, and State Bar of Texas identification number shall be provided to the clerk of this court. Newly-appointed counsel shall file an appellate brief within thirty days of the date of appointment.

If the trial court does not appoint counsel for Appellant but instead recommends that this court permit him to represent himself on appeal, it shall determine, and express as a finding, when this court reasonably can expect to receive an appellate brief from Appellant. If the trial court recommends that we permit Appellant to represent himself on appeal, we will review that recommendation and issue further orders on reinstatement of these appeals.

Regardless of whether the trial court appoints counsel for Appellant, the trial court shall issue findings and recommendations expressing its determinations on the issues listed above. The trial court shall execute findings of fact and conclusions of law and shall cause its findings, conclusions, and any necessary orders to be included in a supplemental clerk's record to be filed with the clerk of this court by January 17, 2017. All current briefing deadlines are suspended.

It is so ordered.

Per Curiam

Do not publish.