



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

No. 07-17-00122-CR

BRIAN DAVID BENSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 46th District Court
Wilbarger County, Texas
Trial Court No. 12,059; Honorable Dan Mike Bird, Presiding

September 14, 2017

ABATEMENT AND REMAND

Before **CAMPBELL** and **PIRTLE** and **PARKER, JJ.**

Appellant, Brian David Benson, appeals his conviction of unlawful possession of a firearm by a felon.¹ He was sentenced to ten years imprisonment and assessed a fine of \$2,000. The clerk's record and reporter's record have been filed. Appellant's brief

¹ TEX. PENAL CODE ANN. § 46.04(a) (West 2011).

was originally due on June 12, 2017, but we granted Appellant's appointed counsel, Mr. Scott Stillson, four extensions of time to file a brief. By letter dated August 29, 2017, we admonished Appellant's counsel that failure to file a brief by September 5th could result in the appeal being abated and the cause remanded to the trial court for further proceedings without further notice. See TEX. R. APP. P. 38.8(b)(2), (3). On September 5th, Appellant's counsel filed a fifth motion for extension requesting until September 12th to file a brief. Counsel has failed to file Appellant's brief to date. Accordingly, his fifth motion for extension is denied.

Because counsel has not complied with our request of August 29th, we deem it appropriate to abate the appeal and remand the cause to the trial court for further proceedings. Upon remand, the trial court shall determine why counsel has failed to file Appellant's brief and take such action as is necessary to ensure that the brief is filed in accordance with this opinion.

Should counsel file Appellant's brief on or before September 29, 2017, he is directed to immediately notify the trial court, in writing, of the filing, whereupon the trial court shall not be required to take further action. If, however, the brief is not filed by that date, pursuant to Rule 38.8(b)(2) and (3) of the Texas Rules of Appellate Procedure, the trial court is directed to conduct a hearing on or before October 27, 2017, to determine the following:

1. whether Appellant still desires to prosecute the appeal;
2. whether Appellant's present counsel has abandoned the appeal entitling Appellant to new counsel; and

3. whether Appellant is indigent and entitled to the appointment of counsel.

See *Guillory v. State*, 557 S.W.2d 118, 121 (Tex. Crim. App. 1977).²

Should it be determined that Appellant wants to continue the appeal, is indigent, and entitled to newly appointed counsel, the name, address, email address, telephone number, and State Bar of Texas identification number of new counsel shall be provided to the clerk of this court. 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 November 13, 2017. New counsel, if any, shall file Appellant's brief thirty days after the date of engagement or appointment; however, should Mr. Stillson be allowed to remain as counsel, he is hereby ordered to file Appellant's brief instanter.

It is so ordered.

Per Curiam

Do not publish.

² The trial court has a duty under the Texas and federal Constitutions to provide an indigent defendant with the effective assistance of counsel on appeal. *Guillory*, 557 S.W.2d at 120 (citing *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)). Effective assistance cannot be afforded without requiring that counsel file a brief on an appellant's behalf. *Guillory*, 557 S.W.2d at 121. The trial judge has the authority to require appointed counsel to file a brief on behalf of an appellant. *Id.*