



IN THE
TENTH COURT OF APPEALS

No. 10-09-00295-CR

JAMES ROBERT VASQUEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. 32165-CR

SECOND SUPPLEMENTAL ABATEMENT ORDER

We have abated this cause twice for trial-court proceedings relating to alleged errors and omissions in the reporter's record. These alleged errors and omissions are set out in Appellant's "motion for new trial, alternatively, motion to require the court reporter to supplement reporter's record" ("Appellant's motion"). As explained below, we will abate this cause again.

After our second abatement, the trial court issued findings of fact and conclusions of law that are in a supplemental clerk's record filed on June 3, 2011. These

findings and conclusions reflect three areas that need to be addressed: (1) the absence of a transcription of the charge conference and the pretrial hearing on the Appellant's Motion to Quash the Indictment, and whether their transcription is necessary to the disposition of the appeal; (2) twelve remaining alleged errors in the reporter's record; and (3) whether it is technically or financially feasible to access Nancy Currie's computer disk.

I.

The trial court's findings and conclusions were based on the parties' "Agreed Stipulation as to the Record," which was attached to the trial court's findings and conclusions. The parties agreed in their stipulation that:

- There was a charge conference and a pretrial hearing on the Defendant's Motion to Quash the Indictment held in this case and both were or should have been recorded by Nancy Currie.
- The charge conference and the pretrial hearing on the Defendant's Motion to Quash the Indictment are necessary to the disposition of the appeal in this case.

The trial court made these findings:

1. Nancy Currie, (hereinafter "Currie"), the former official court reporter for the 13th District Court, filed an incomplete record in this case in that there is no transcription of the charge conference or the pretrial hearings held in this case.
2. A charge conference and a pretrial hearing on the Appellant's Motion to Quash the Indictment were held in this case and should have been recorded.
3. The charge conference and the pretrial hearing on the Appellant's Motion to Quash the Indictment are necessary to the disposition of the appeal in this case.

While this cause is abated for the proceedings set forth below, the Appellant is directed to file a response with this Court that explains why the charge conference and the pretrial hearing on the Appellant's Motion to Quash the Indictment are necessary to the disposition of the appeal in this case. For example, the reported charge conference would be necessary to the disposition of the appeal only if Appellant intends to allege charge error as an issue in this appeal, as the starting point in analyzing a jury-charge issue is first deciding whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If charge error is not alleged in this appeal, the Court fails to see how the charge conference is necessary to the disposition of the appeal.

Accordingly, within fourteen days of the date of this Order, Appellant shall file a response with this Court that explains why the charge conference and the pretrial hearing on the Appellant's Motion to Quash the Indictment are necessary to the disposition of the appeal in this case. The State may file a reply to Appellant's response within fourteen days of the date that Appellant's response is filed. Copies of Appellant's response and the State's reply, if any, shall also be sent to the trial court.

II.

The parties agreed to correct many of the alleged errors and omissions in the reporter's record, but they also stipulated:

7. Counsel have failed to agree to correct the record regarding the remaining alleged errors. These errors remain in dispute and could only be resolved through a review of the court reporter's notes and/or tapes to determine the correct wording. Specifically in dispute are:

- a. Page 58
- b. Page 60

- c. Page 66
- d. Page 67
- e. Page 69
- f. Page 93
- g. Page 103
- h. Page 124
- i. Page 128
- j. Page 131
- k. Page 163
- l. Page 176

These page numbers refer to the alleged errors and omissions identified in Appellant's motion by page-and-line references. In finding 7, the trial court found that counsel failed to agree to correct these twelve portions of the record regarding alleged errors. It is not enough for the parties to fail to agree; it is the trial court's duty to settle disputes about the reporter's record's alleged inaccuracies, if it is able to. *See* TEX. R. APP. P. 34.6(e)(2, 3). We thus will abate this appeal for an additional sixty days to allow the trial court an opportunity to settle these twelve disputes with the use of its discretion and any available means, including but not limited to further inquiry of Currie regarding her allegedly missing notes and tapes and the matter set forth below in Part III of this Order.¹ The Court recognizes that the trial court may not be able to settle any or all twelve of the disputes, so in the event that any of the disputes are not settled, the trial court shall explain why they were not settled in findings of fact.

III.

The trial court made these further findings:

13. A computer disk received from Currie in response to a

¹ Should Currie's involvement become necessary, the Clerk of this Court may have information to assist in locating Currie.

subpoena duces tecum is currently unintelligible and is unable to be used to resolve the disagreements and to transcribe the missing portions of the record.

14. The Court's current official court reporter, Leslie Kirk, is unable to correct or complete the record out of the computer disk provided by Currie due to Ms. Kirk's software being unable to read the computer disk.

In its response to Appellant's motion, the State responds:

The record exists, but in a format that the trial court is unable [to] utilize. If the trial court were able [to] utilize the current format, the record could be retrieved and the appeal could move forward. The State argues that the proper and most judicious action to be taken would be for the trial court to locate and utilize a data format that would make the record retrievable.

The Court largely agrees with the State, and if Currie's computer disk could be utilized, the matters in Part I of this Order may also be resolved. Accordingly, the Court directs the trial court, with the aid of its reporter, to investigate the technical and financial feasibility of utilizing a data format to access Currie's computer disk. If the trial court finds that it is not technically feasible to access Currie's computer disk or financially feasible considering the cost to access Currie's computer disk as opposed to the cost to retry the case, the trial court shall so state in its findings.

IV.

We abate this appeal for the trial court to hold one or more hearings:

- (1) to attempt to settle the twelve disputed matters identified in Part II of this Order (TEX. R. APP. P. 34.6(e)(2)); and
- (2) to investigate the technical and financial feasibility of utilizing a data format to access Currie's computer disk.

This appeal is abated for an additional period of sixty (60) days from the date of

this order for the trial court to determine the issues identified above. The trial court has discretion to schedule hearings during the abatement period as necessary. All hearings shall be attended by a certified court reporter, who shall prepare a transcription of such hearings and file that transcription or those transcriptions as a supplemental reporter's record or records in this appeal.

The trial court shall prepare written findings of fact and conclusions of law with regard to the issues identified in this abatement order. The district clerk shall prepare a supplemental clerk's record containing such findings of fact and conclusions of law as well as any pleadings, motions, responses, or objections filed with regard to this matter and any orders signed by the trial court.

The district clerk and the court reporter shall file their supplemental records with the Clerk of this Court within seventy-five (75) days after the date of this Order. If the trial court determines that additional time is required to resolve the issues identified, the trial court (or a party at the trial court's direction) shall file a written request for additional time explaining the reason(s) and the diligence that has been exercised in attempting to comply with the sixty-day deadline established by this Order.

PER CURIAM

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Appeal abated
Order issued and filed August 3, 2011
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