



**IN THE
TENTH COURT OF APPEALS**

No. 10-16-00222-CR

JEREMY WAYNE NORRIS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 413th District Court
Johnson County, Texas
Trial Court No. F49365**

MEMORANDUM OPINION

The jury convicted Jeremy Wayne Norris of the offense of injury to a child-serious bodily injury, found the enhancement paragraph to be true, and assessed punishment at 75 years confinement and a \$10,000 fine. In three issues Norris complains that (1) he was denied his Sixth Amendment right to counsel of his choice; (2) the trial court erred in unreasonably holding his bond insufficient; and (3) the trial court denied his counsel of choice's request for funds for doctors and experts. We affirm.

Background Facts

Norris is the father of twin boys, M.D.N. and M.W.N., who were born on September 15, 2014. On February 6, 2015, Norris called 911 to report that one of the babies, M.W.N., was having trouble breathing. M.W.N. was transported to Cook Children's Medical Center where the emergency room staff treated M.W.N.'s condition as a trauma. M.W.N. had bruising on his forehead and eyelids, and CAT scans and a MRI revealed both new and old injuries in the brain. M.W.N. had hemorrhaging and swelling in the brain as well as extensive retinal hemorrhaging that caused a loss of the ability to control the directional movement of the eyes. Norris was arrested for injury to a child.

Counsel of Choice

In the first issue, Norris complains that the trial court erred in denying him his right to counsel of choice. In the third issue, Norris argues that the trial court erred in denying his counsel of choice's request for funds for doctors and experts.

After his arrest, Norris retained Ben Hill Turner to bond him out of jail and to represent him on the charges against him. On January 25, 2016, Turner filed a motion to withdraw as counsel, and the trial court held a hearing on the motion. At the hearing, Turner stated:

Judge, I'm not going to pursue that at this time. I'm waiting for some other facts to come in. I think what I can tell the Court is Mr. Norris is indigent. There's a lot of expert stuff coming up. And his mother passed away. He doesn't have the funds to hire. And this case can't be

tried without them. It's put me in an untenable situation because he's paid a bond fee. I made his bond. I'm on a \$250,000 bond. It's just that the finances, I've talked to all the doctors and experts and I've gotten their costs, and as a matter of fact - -

The trial court responded:

Mr. Turner, you can either withdraw and I'll appoint Mr. Mason to represent him, or you can proceed to be the attorney in charge and bear the expense.

Turner stated that he would pursue his motion to withdraw and asked the trial court to allow him to withdraw. There was no objection, and the trial court granted the motion to withdraw. The trial court also released Mr. Turner from any obligation on the bond and ordered Norris into custody until he could post a \$250,000 bond. The trial court then appointed Mr. Mason to represent Norris and instructed Mason to inform him if he needed a second chair appointed and if he needed any funds for experts.

Norris argues in his first issue that the trial court denied him his counsel of choice by not providing funds for experts for his retained lawyer which required his retained lawyer to withdraw. Norris states that in *Ex parte Briggs*, the Texas Court of Criminal Appeals made clear that retained counsel is entitled to the appointment of experts and investigators for an indigent client. *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005). In *Ex parte Briggs*, the defendant was charged with injury to a child after the death of her infant son. *Id.* at 463. The defendant retained counsel and paid him \$10,400 of his \$15,000 fee. *Id.* The retained attorney informed the defendant in a letter that he would probably file a motion to withdraw because the defendant had not paid the remainder of

his fee. *Id.* The retained attorney also stated in the letter he could not hire experts unless he was paid additional money for their expenses and for coming to court. *Id.* The retained attorney did not withdraw, and the defendant pled guilty to the offense. *Id.*

The defendant filed an application for writ of habeas corpus claiming that she received ineffective assistance of counsel because her attorney failed to adequately investigate the case. *Ex parte Briggs*, 187 S.W.3d at 460. The Court of Criminal Appeals found that the retained attorney made a decision not to fully investigate the case until he received additional money for the experts. *Id.* at 467. The Court noted that when it became clear that the defendant could not "come up with" the remainder of the fee or additional money for medical experts, a reasonably competent attorney would have several options:

1. Subpoena all of the doctors who had treated [the infant] during the two months of his life to testify at trial. Introduce the medical records through the treating doctors and elicit their expert opinions;
2. If counsel was convinced that [the defendant] could not pay for experts to assist him in preparation for trial or to provide expert testimony, withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency (as was done in the writ proceeding), and request appointment of new counsel;
3. Remain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to *Ake v. Oklahoma*¹.

Id. at 468.

¹ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The record shows that retained counsel used an option set out in *Ex parte Briggs*. Retained counsel informed the trial court that Norris is now indigent. Retained counsel filed a motion to withdraw, and the trial court granted the motion and appointed new counsel. The trial court told appointed counsel to request funds as necessary for experts. We note that Norris had no right to an appointed counsel of his choice. *Thomas v. State*, 550 S.W.2d 64, 68 (Tex.Crim.App.1977); *Watkins v. State*, 333 S.W.3d 771, 775 (Tex.App.-Waco 2010, pet. ref'd). We overrule the first issue.

In the third issue, Norris complains that the trial court erred in failing to grant his counsel of choice's request for funds for doctors and experts. The appointment of an expert witness under Article 26.05 rests within the sound discretion of the trial court. *Stoker v. State*, 788 S.W.2d 1, 16 (Tex.Crim.App.1989), *cert. denied*, 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990); *Moore v. State*, 836 S.W.2d 255, 261 (Tex.App.-Texarkana 1992, pet. ref'd). In order to obtain prior approval for reasonable expenses connected with expert testimony, a defendant must demonstrate to the trial court a specific need for the testimony. *Moore v. State*, 836 S.W.2d at 261. In order to preserve error when approval is denied, the defendant must make some offer of proof in the form of a concise statement. *Id.*

On October 16, 2015, Norris's retained counsel, Turner, filed two motions for expert assistance seeking State funds to hire experts. Those motions were never ruled upon by the trial court. On January 25, 2016, Turner filed his motion to withdraw. At the

hearing on the motion to withdraw, Turner did not argue his motions for expert assistance or seek a ruling on the motions. *See* TEX.R.APP.P. 33.1 (a). Turner did not make an offer of proof to preserve any error. *Moore v. State*, 836 S.W.2d at 261. The trial court granted the motion to withdraw and appointed counsel. According to the disclosure of experts, Norris's appointed counsel, Mason, received State funds to hire three expert witnesses. Norris did not preserve his complaint for appellate review. We overrule the third issue.

Recorded Phone Calls

In the second issue, Norris complains that the trial court erred in unreasonably holding his bond insufficient and causing him to be subject to having his phone calls recorded and later used against him. When the trial court granted Turner's motion to withdraw, Turner was also released from any obligation on the bond. The trial court ordered Norris into custody until he could post a \$250,000 bond. Norris contends that when he was back in jail, his phone calls were recorded and used against him at trial. Norris argues that the phone calls are "fruit of the poisonous tree and should be considered as part of the structural error in denying him the continued services of his counsel of choice."

Norris was in jail after his arrest in February 2015. The phone calls that were played for the jury were recorded from phone calls made on February 10 through February 18, 2015. The trial court released Turner from the bond in January 2016 and

placed Norris back in jail at that time. The phone calls played before the jury were not the result of the trial court releasing Turner from the bond. We overrule the second issue.

Conclusion

We affirm the trial court's judgment.

REX DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins

Affirmed

Opinion delivered and filed May 17, 2017

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