

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-14-00462-CR**

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**Leonard Mike Penley, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE DISTRICT COURT OF BELL COUNTY, 27TH JUDICIAL DISTRICT  
NO. 67031, HONORABLE FANCY H. JEZEK, JUDGE PRESIDING**

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**ORDER AND MEMORANDUM OPINION**

**PER CURIAM**

Retained counsel for appellant Leonard Mike Penley has filed with this Court a motion to withdraw as appellate counsel for Penley. Counsel represents that Penley has not employed counsel to represent him on appeal and requests that this Court “appoint an attorney to represent Defendant in his appeal in this case, because he is indigent and cannot afford to employ counsel.” Counsel further represents that Penley “does not have an Affidavit of Indigence on file.”

If Penley is indeed indigent, he is entitled to the appointment of counsel on appeal.<sup>1</sup> But only the trial court is authorized to make a determination of indigency and appoint counsel for appellant under these circumstances.<sup>2</sup> Therefore, we refer counsel’s motion to withdraw to the

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<sup>1</sup> See *Douglas v. California*, 372 U.S. 353, 355-58 (1963); *Cooks v. State*, 240 S.W.3d 906, 910 (Tex. Crim. App. 2007).

<sup>2</sup> See Tex. Code Crim. Proc. art. 26.04.

district court, abate the appeal, and remand the cause to the district court to hold a hearing in accordance with rule 38.8 of the rules of appellate procedure.<sup>3</sup> If Penley is indigent, the district court shall make appropriate orders to ensure that Penley is adequately represented on appeal.<sup>4</sup> Following the hearing, the district court shall order the appropriate supplemental clerk's and reporter's records to be prepared and forwarded to this Court no later than December 1, 2014.<sup>5</sup>

It is ordered October 29, 2014.

Before Justices Puryear, Pemberton, and Field

Abated and Remanded

Filed: October 29, 2014

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<sup>3</sup> See Tex. R. App. P. 38.8(b)(2), (3).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* Contemporaneous with his motion to withdraw, counsel has also filed a motion for extension of time to file appellant's brief. We dismiss that motion as moot. Appellant's brief shall be due thirty days after the appeal is reinstated in this Court.