IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-87,158-01

IN RE ANGELA MOORE, Relator

ON APPLICATION FOR A WRIT OF MANDAMUS
CAUSE NOS. 04-16-00630-CR & 04-16-00631-CR
IN THE FOURTH COURT OF APPEALS
BEXAR COUNTY

YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER, J., joined.

DISSENTING OPINION

The Court today holds that the Fourth Court of Appeals (and presumably also the Presiding Judge of the 198th District Court in Kerr County) lacked "any principled reason" for removing Relator as the appellant's counsel. Majority Opinion at 14. In essence, the Court holds that, because "there were other sanctions available" to the lower courts, and because "the appellate court had other means of enforcing its procedural rules," the lower courts lacked any discretion to remove Relator from the case. *Id*. at 8, 14. The facts of the case convince me that the Court is incorrect to draw that conclusion. In my view, both of the lower courts acted with an appropriate degree of patience and with the utmost regard for both

the appellant and his counsel, and their ultimate determination that counsel should have been removed from the appeal is entitled to respect and deference.

An indigent defendant (or appellant) does not have a Sixth Amendment right to choose his appointed counsel; nevertheless, once counsel has been appointed for him, and he has developed a rapport with that attorney, he has a constitutionally protected right to continue with that attorney's services, which may not be arbitrarily taken from him by the courts.[1] A judge may not remove that attorney on a "discretionary whim,"[2] or out of sheer "practice" or "preference."[3] The Court is thus correct today to insist that a court must have "some principled reason" for removing such an attorney against the wishes of her client. Majority Opinion at 11 (citing *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992)).

But what this means is that the Sixth Amendment right to retain appointed counsel for the duration is not absolute. It is subject to the reasonable discretion of the courts to maintain order and assure that the wheels of justice turn true, without intolerable hindrance:

> [T]he Sixth Amendment's right to choice of counsel merely informs judicial discretion[;] it does not displace it. Our inquiry, then, must focus on the trial court's exercise of its discretion. In each case, we must inquire whether, given

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[1] *See Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992) ("Although an indigent defendant does not have the right to counsel of his own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment.").

[2] *Stearnes v. Clinton*, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989).

[3] *Buntion v. Harmon*, 827 S.W.2d at 949; *Stotts v. Wisser*, 894 S.W.2d 366, 367 (Tex. Crim. App. 1995).

> the defendant's qualified right to choose his own counsel, the trial court's refusal to hear the defendant through his chosen counsel constituted an abuse of discretion.

United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976). Even while acknowledging that the presumption against the removal of counsel of choice "may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice[,]" Majority Opinion at 13 (internal citations and quotation marks omitted), the Court today determines that the court of appeals in this case lacked *any* "principled reason" to replace the appellant's court-appointed counsel on appeal. *See* Majority Opinion at 14 ("[T]he appellate court lacked any principled reason for ordering relator's removal as counsel[.]"). I could not disagree more emphatically.

Appellate counsel sought a first, and then a second, extension of time to file the appellate brief in appellant's case. In granting the second, and thereby increasing counsel's time to prepare and file the brief by a total of sixty days, the court of appeals issued an order in which it forthrightly warned counsel that it would not grant her another. Counsel nevertheless sought a third extension, for an additional thirty days. The court of appeals granted her a third thirty-day extension, until May 16, 2017, but it once again cautioned her to expect no more. It also advised counsel that if she failed to file the brief within the time allotted under this third and final extension, the court of appeals would abate the appeal and remand the cause to the convicting court for a determination of whether she had abandoned her client's appeal. But May 16th came and went without an appellate brief. On May 22nd—by

which time the brief was already six days late—the court of appeals, true to its word, abated the appeal and directed the convicting court to hold a hearing, and require counsel's attendance, to determine whether the appellant wanted to continue the appeal and whether appellate counsel had abandoned him.

Two events of note occurred the next day, May 23rd, a Tuesday. First, the convicting court issued an order setting a hearing date of June 1, 2017, and requiring counsel to appear. Second, counsel contacted the convicting court's coordinator, assuring her that she would be filing the appellant's brief no later than May 26th, the following Friday. But she did not. She did not file her brief until five days later, on May 31st, the day before the hearing.

The June 1st hearing was scheduled to commence at 1:00 p.m. The record shows that appellate counsel was at least eleven minutes late. Whatever efforts she may have expended to alert the convicting court that she was running behind schedule were unsuccessful; the convicting court judge had no good reason to expect that if he were to delay the hearing, she would eventually appear. In her absence, the convicting court conducted a brief hearing and subsequently made findings responsive to the court of appeals' remand order: 1) that the appellant still desired to pursue his appeal, and 2) that appellate counsel had "constructively" abandoned the appeal. Accordingly, it appointed new counsel to take over.

The parties now debate whether the convicting court judge was aware at the time of the hearing that counsel had (just the day before) finally filed an appellate brief in the case. In my mind, this dispute is essentially beside the point. By that time, the court of appeals had

(long before) already abated the appeal, with ample justification.

Under these circumstances, it simply cannot reasonably be maintained that the lower courts lacked a "principled reason" to remove counsel from the appeal. Majority Opinion at 14. Would the Court reach the same conclusion it does today had counsel finally filed her brief fifteen days after the deadline following *six* extensions of time? Or a dozen? At some point, it must fall within the legitimate discretion of the courts to take action to assure the orderly administration of justice, even if it means that an indigent defendant is deprived of his first choice of counsel. While other options may have been available, that does not definitively establish that the lower courts were unjustified in removing Relator from the appeal. That this Court might have been more charitable in granting extensions under the circumstances, or more forgiving of counsel for missing multiple appellate deadlines and then arriving late for a crucial in-court proceeding, does not mean that the court of appeals and the convicting court acted arbitrarily, without "principled reason," in replacing her.

In my view, Relator has not established that the lower courts abused their discretion, and I would deny relief. I respectfully dissent.

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