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

ALCALA, J., delivered the opinion of the Court in which RICHARDSON, NEWELL, KEEL, and WALKER, JJ., joined. YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER, J., joined. HERVEY, J., did not participate.

O P I N I O N

In this case, we compare, on the one hand, a defendant's constitutional right to be represented by the attorney with whom he has established an attorney-client relationship with, on the other hand, a court's need to enforce procedural rules for the timely administration of justice. Attorney Angela Moore, relator, has filed a petition for a writ of mandamus challenging an order by the court of appeals removing her as counsel for appellant, Cody Lon Smith, who desires that she remain as his appellate counsel in order to maintain their attorney-client relationship. The basis for relator's removal from the case was

the trial court's determination that relator had abandoned appellant by failing to file an appellate brief on his behalf. That determination, however, was mistaken due to a communication breakdown between the trial judge and his staff that failed to apprise the court that relator had filed the brief for appellant prior to the trial court's hearing on the abandonment issue. Because relator filed the appellate brief on appellant's behalf before she was removed as his counsel, the record conclusively shows that she did not abandon him. Furthermore, because appellant and relator had already established an attorney-client relationship, and because appellant desires for relator to continue representing him, any sanctions for relator's untimely brief under these circumstances must exclude the removal of relator as appellant's counsel. Although the trial court and court of appeals were understandably frustrated by the excessively late appellate brief, there were other sanctions available to address that problem that would not interfere with the established attorney-client relationship. We, therefore, conclude that the court of appeals erred by upholding the removal of relator as appellant's counsel as the sanction for relator's late-filed brief, and we grant conditional relief.

I. Background

In September 2016, the trial court appointed relator to represent appellant on appeal from his two convictions for aggravated assault. Relator filed three motions seeking extensions of time in which to file the appellate brief, each of which was granted by the Fourth Court of Appeals. When it granted the third motion in April 2017, permitting the

brief to be filed on or before May 16, 2017, the Fourth Court added the caveat that it would not grant any additional extensions of time, and it admonished relator about consequences that may occur if the brief was not timely filed in accordance with the new deadline. The court's order stated,

> If the brief is not filed by the date ordered, the court will abate this appeal and remand the case to the trial court for a hearing to determine whether appellant or counsel has abandoned the appeal. Counsel may also be ordered to appear before this court to show cause why she should not be held in contempt for failing to comply with the court's order.

Relator failed to comply with the due date.

In accordance with its admonishment, the Fourth Court abated the appeal and remanded the case to the trial court with instructions for that court to conduct a hearing to determine whether relator had abandoned the appeal, whether appellant desired to prosecute the appeal, and, if necessary, to appoint new counsel for appellant. The trial court set a hearing date for June 1, 2017, to address the Fourth Court's concerns, and it ordered relator to appear at the hearing. One day before that hearing was set to occur, on May 31, relator filed the appellate brief, which was by then fifteen days late from the extended due date of May 16. The appellate brief raised seven issues in sixty-five pages. On the same date that she filed the brief, relator notified the trial court that the brief had been filed, and she received an acknowledgment from the court administrator that the information had been received by that court and forwarded to the trial judge.[1] Along with the brief, relator also

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[1] The Fourth Court of Appeals's online docket search confirms that relator filed her appellate brief on May 31. According to relator, a few minutes after she filed her brief with the court of

filed a motion with the Fourth Court asking it to reconsider its remand to the trial court. In her motion, relator explained that arranging care for her elderly mother, who was a victim of elder abuse and neglect, had consumed much of her time leading up to the filing of the appellate brief. Given that she had eventually filed the appellate brief, albeit late, relator asked the court to reconsider its decision to remand the case to the trial court for a determination of whether she had abandoned appellant.

On June 1, the trial judge proceeded in conducting the hearing. Although she had been ordered to appear at the hearing, relator was not present in court when the hearing began two minutes prior to its scheduled start time, at 12:58 p.m. During the hearing which lasted two minutes in its entirety, the trial judge spoke with appellant via telephone and confirmed that appellant still wanted to pursue his appeal, determined that relator had constructively abandoned appellant, and appointed new counsel for him. In spite of relator's efforts to inform the trial court that the brief had been filed the previous day, the trial judge remained unaware of that fact, and thus he did not inform appellant that relator had already filed the appellate brief on his behalf.[2] Furthermore, the judge did not ask appellant if he

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appeals, she emailed the brief to the trial judge's court coordinator. The court coordinator replied approximately fifteen minutes later with an email stating that the brief had been "received, printed, [and] placed in the judge's box."

[2] The trial judge later submitted affidavits to this Court explaining the basis for his removal of relator from the case. He explained, "At the time that I entered the Order, [relator] had not appeared for the hearing which I had scheduled . . . . I did not know that [relator] had filed a brief, and I had actually checked the Court of Appeals on-line docket sheet that morning and ascertained that nothing had been filed." Because it was clear that appellant still wanted to pursue his appeal and relator had failed to appear for the hearing, the trial judge explained that, "based on the facts as [he]

wished to proceed with relator as counsel.[3] At the conclusion of the hearing, the judge

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understood them," he removed relator and appointed another attorney to represent appellant on appeal. The judge's affidavits thus acknowledge that, at the time of the hearing, he was under the erroneous impression that relator had not yet filed the appellate brief.

[3] The record of the entire hearing, which lasted approximately two minutes, is reproduced below:

[Court]: [Appellant], I believe you are appearing by telephone; is that correct?

[Appellant]: Yes.

[Court]: Will you please raise your right hand and let me know when it's raised.

[Appellant]: Yes.

(The witness was sworn)

[Court]: Thank you. I have a question for you, and my question for you is: Do you still desire to prosecute your appeal of your initial case?

[Appellant]: Yes.

[Court]: Present in the courtroom are Mr. Scott Monroe with the 198th District Attorney's Office. Appellant's attorney, [relator], is not present.

At this time, based upon a review of the pleadings and the filings in this case, as well as the communications from [relator], Court is going to find that [Appellant] does desire to prosecute his case, that the case for all practical purposes, although maybe not by intent, has been abandoned by the appellate attorney, [relator], and as such it has performed — it has obstructed the administration of the Court, the timely opportunity for all the parties to seek a final remedy and justice, and frankly, it's caused undue stress on [appellant], who has been waiting for his appeal.

Pursuant to that, the Court is going to appoint [new counsel] to finish the balance of this case and will recommend to the Fourth Court of Appeals that the Fourth Court issue sanctions as deemed appropriate by the Fourth Court.

Thank you, [appellant].

[Appellant]: Thank you.

observed that sanctions would be appropriate in this case. The trial judge made written findings of fact and conclusions of law that are consistent with his statements on the record during the hearing.[4] The judge also signed an order removing relator as counsel and appointing substitute counsel to represent appellant on appeal.

When relator arrived at the courthouse around fifteen minutes after the hearing's scheduled start time, she discovered that the hearing had already been conducted in her absence. In her application, relator explains that her delayed appearance for the hearing was due to unusually heavy traffic congestion on Interstate 10.[5] Approximately ten minutes prior to the scheduled start time of the hearing, relator called her paralegal and asked her to contact the trial court to inform the judge that relator would be approximately ten minutes late for the hearing. The information, however, did not reach the judge before the hearing commenced, and the hearing was held in her absence. Relator, therefore, was unable to correct the trial court's mistaken impression that an appellate brief had not been filed for

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[4] The trial court's complete conclusions of law state,

> 1. Appellant desires to prosecute his appeal;
> 2. Appellant's attorney has constructively abandoned the appeal;
> 3. In the interests of justice and to provide effective assistance to appellant, new [appellate] counsel was appointed to fulfill the appeal process;
> 4. The trial Court respectfully recommends that sanctions are appropriate in this case.

[5] Relator explains that she departed San Antonio for Kerrville at 11:30 a.m., which ordinarily would have provided her with adequate time to make the approximately 66-mile journey, but unusual traffic conditions caused her to be late. Specifically, relator has explained that her late arrival at the courthouse was caused by a slow-moving 18-wheeler truck transporting an oversized load that straddled two traffic lanes, causing traffic on Interstate 10 to merge into a single lane and resulting in a back-up that stretched for miles.

appellant. Additionally, the unsuccessful attempt by relator to inform the court that she was en route but running late appears to have further contributed to the perception that relator had abandoned appellant. Upon her arrival at the courthouse, relator located the trial judge and attempted to explain the situation to him. The judge indicated that he was unable to reconsider the matter, explaining to relator that appellant was no longer on the telephone line and that counsel for the State and the court reporter had left. The trial judge declined to modify his ruling.

The Fourth Court denied relator's motion for reconsideration of its remand order. Additionally, several weeks after the hearing, the Fourth Court issued an order adopting the trial court's finding that relator had abandoned appellant and the decision to appoint substitute counsel, but it declined the trial judge's invitation to impose sanctions against relator. *See Smith v. State*, Nos. 04-16-00630-CR, 04-16-00631-CR (Tex. App.—San Antonio June 23, 2017) (order). In upholding the order appointing new counsel, the Fourth Court indicated that new counsel would have the option of prosecuting the appeal by adopting relator's appellate brief or by filing a new brief. New counsel later informed the court that he intended to file his own brief on appellant's behalf.

After learning that new counsel had been appointed to replace relator, appellant sent a letter to new appointed counsel indicating that he did not want new counsel to represent him and that new appointed counsel was "fired." As a result of appellant's letter, new counsel filed a motion to withdraw as counsel. The Fourth Court denied new counsel's

motion to withdraw, explaining that appellant was not entitled to the counsel of his choice. The Fourth Court set a new deadline for replacement counsel to file an appellate brief for appellant.

Relator filed the instant petition for a writ of mandamus asserting that the Fourth Court lacked any principled reason for removing her as appellant's attorney and that relator has no adequate remedy at law. This Court stayed the underlying appellate proceedings and invited responses from the parties. In her petition, relator contends that the appellate court's action in upholding her removal as counsel for her mere procedural violation in untimely filing the appellate brief unduly interfered with the established attorney-client relationship between her and appellant. In support of her request for mandamus relief, relator has included an affidavit from appellant, who states that he was unaware at the time of the trial court's hearing that relator had already filed an appellate brief on his behalf and that, now being aware of that fact, he wishes for relator to continue representing him on appeal. Appellant definitively states, "I want Angela Moore to stay on as my attorney."

II. Analysis

Because the record conclusively shows that there were other sanctions available to address relator's untimely filing of the appellate brief, the court of appeals erred by removing relator as appellant's counsel and interfering with their established attorney-client relationship. Furthermore, because there is no adequate remedy by appeal to address relator's complaint, mandamus relief is appropriate. We explain this conclusion by reviewing the

applicable law before applying that law to the facts of this case.

A. Applicable Law

A court may grant mandamus relief when two matters are demonstrated by the record: (1) a relator has no adequate remedy at law to redress the alleged complaint, and (2) the action sought to be compelled is a ministerial act rather than one involving a discretionary or judicial decision. *Bowen v. Carnes*, 343 S.W.3d 805, 810 (Tex. Crim. App. 2011) (citing *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007)). A relator demonstrates that the action sought to be compelled is a ministerial act by showing that "'he has a clear right to the relief sought—that is to say, when the facts and circumstances dictate but one rational decision under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.'" *Id*. (quoting *Young*, 236 S.W.3d at 210). "[T]he essential question in deciding if the act is ministerial 'is whether the respondent had the authority . . .' to do what is the subject of the complaint." *Stearnes v. Clinton*, 780 S.W.2d 216, 219 (Tex. Crim. App. 1989) (quoting *State ex rel. Thomas v. Banner*, 724 S.W.2d 81, 83 (Tex. Crim. App. 1987)). If the respondent lacked authority to take a particular action, then "'it [is] his ministerial duty to vacate the orders.'" *Id*. at 220 (quoting *Banner*, 724 S.W.2d at 83).

Although he has no right to choose appointed counsel, a defendant who has been appointed counsel by the trial court and who has established an attorney-client relationship with that counsel does have a constitutional right to proceed with that counsel without the

trial court's unreasonable interference with their relationship. *Stearnes*, 780 S.W.2d at 225 ("While we acknowledge that an indigent defendant has no right under the Federal or State Constitutions to have counsel of his choosing, the right-to-counsel provisions of the respective constitutions prevents [sic] the trial court from unreasonably interfering with the counsel duly appointed."). A trial judge does not have discretion to replace appointed counsel over the objections of both counsel and the defendant based only on the trial judge's "personal practice, experience, feelings, or preference." *Stotts v. Wisser*, 894 S.W.2d 366, 367 (Tex. Crim. App. 1995); *see also Stearnes*, 780 S.W.2d at 223 (noting that the power to appoint counsel does not vest a trial court with the "inherent power to validly remove appointed counsel" at its discretion).

A trial court may overcome the presumption against the removal of appointed counsel after an attorney-client relationship has been established when the record shows some "principled reason" for the removal. *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992) (there must be "some principled reason, apparent from the record," to justify a trial judge's replacement of appointed counsel in contravention of the defendant's wishes); *see also Ex parte McFarland*, 163 S.W.3d 743, 759 (Tex. Crim. App. 2005) (noting that a trial judge may not unilaterally remove a defendant's attorney "without extraordinarily good cause"); *Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex. Crim. App. 2003) ("there is a strong presumption in favor of a defendant's right to retain counsel of choice"). Because a trial court's unreasonable or arbitrary interference with a defendant's right to the counsel of his

choice rises to the level of a constitutional violation, courts "'must exercise caution in disqualifying defense attorneys, especially if less serious means would adequately protect the government's interests.'" *Bowen*, 343 S.W.3d at 812-13 (quoting *Gonzalez*, 117 S.W.3d at 837). For example, it may be proper for a court to remove counsel against a client's wishes where the integrity of the judicial process or the fairness and orderly administration of justice is impeded. *Gonzalez*, 117 S.W.3d at 837 ("this presumption [against the removal of counsel] may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice").

Furthermore, when a defendant is improperly deprived of the assistance of his chosen counsel, the usual appellate process is an inadequate remedy. *Stearnes*, 780 S.W.2d at 225. "The utilization of the appellate process in this situation to correct this particular ill would be too burdensome and would only aggravate the harm and most likely would result in a new trial compelling relator to again endure a trip through the system, creating in turn needless additional cost to the taxpayers of this state." *Id.*; *see also Buntion*, 827 S.W.2d at 948 (applying this same rationale to situation involving counsel who had been improperly replaced on direct appeal). Thus, when the record demonstrates that counsel was improperly removed as counsel for his client, mandamus is the proper remedy.

B. Application of the Law

The Fourth Court had no discretion to remove relator as appellant's counsel under these circumstances in which relator had an established attorney-client relationship with

appellant, she had filed the appellate brief on his behalf by the time of the hearing at which her removal was ordered, and appellant has indicated that he desires for relator to remain as his attorney.

Although relator was late in filing the appellate brief, she did file it prior to being removed as appellate counsel, and she also notified the trial court and the Fourth Court that it had been filed. The Fourth Court was understandably frustrated at relator's untimeliness in filing the brief, but it had other available remedies to address that problem without interfering with appellant's constitutional right to counsel with the person with whom he had an established attorney-client relationship. Because the Fourth Court had other available remedies to address the late filing of the brief, these circumstances, as a matter of law, do not rise to the level of constituting a principled reason for requiring the removal of counsel to protect the integrity of the judicial process or the fair and orderly administration of justice. The integrity of the judicial process can be secured through other forms of sanctions such as reporting relator to the State Bar of Texas. And the removal of relator as counsel would delay rather than secure the fair and orderly administration of justice because a different attorney would likely need to prepare and file another appellate brief for appellant.

Additionally, we do not defer to the trial court's assessment of the instant case because that court's understanding of the events was factually inaccurate. At the time of the trial court's hearing at which the judge determined that relator had abandoned appellant, the judge was unaware that relator had already filed the appellate brief and did not inform appellant

of that fact, even though the judge's staff had received a copy of the brief and forwarded it to the judge prior to the hearing. The trial judge's removal of relator from the case was thus based on a mistaken understanding of the relevant facts.

Furthermore, although at the time of the trial court's hearing, appellant did not voice his objection to the removal of relator as his counsel, appellant was unaware that relator had already filed the appellate brief for him, and the trial judge did not ask him whether he desired for relator to remain as his counsel. At no point did the trial judge ask appellant whether he wished to discontinue his attorney-client relationship with relator. Instead, the trial judge asked whether appellant wished to pursue his appeal before summarily concluding, erroneously, that relator had abandoned her representation of him. The record now conclusively shows that appellant desires for relator to remain as his attorney.

The trial court's mistaken impression that relator had not filed the appellate brief would have been corrected by relator had she timely appeared for the hearing, but the brief hearing was concluded before her late arrival. Relator did undertake efforts to notify the trial court that she was on her way to the hearing and was running late. She asked her paralegal to inform the court about her difficulties in arriving timely, and she did arrive shortly after the time the hearing was scheduled, at which point she sought, unsuccessfully, to rectify the situation by asking the trial judge to reconsider the matter. Although relator should have made better efforts to arrive timely at the hearing before the trial court, her tardiness in arriving cannot be fairly characterized as abandonment of her client given that she had filed

the appellate brief prior to the hearing and notified the trial court that she was on her way to the hearing but running late.

Under the totality of these circumstances described above, we conclude that there is no evidence to support the conclusion that relator had abandoned her representation of appellant. And, absent evidence to show abandonment or some other type of serious misconduct by relator, the appellate court lacked any principled reason for ordering relator's removal as counsel because, under the circumstances, that action unreasonably interfered with appellant's attorney-client relationship with relator. *See Stearnes*, 780 S.W.2d at 225. Here, although it is true that relator missed a filing deadline, the appellate court had other means of enforcing its procedural rules, and we conclude that the court was required to employ those other means before utilizing the more severe option of removing relator from the case against appellant's wishes. *See id.*; *Bowen*, 343 S.W.3d at 813.

We hold that, under these particular circumstances, mandamus relief is appropriate. There is no adequate remedy by appeal because the Fourth Court will require appellant to prosecute his appeal with new counsel if this Court does not issue the instant mandamus. *See Stearnes*, 780 S.W.2d at 225; *Buntion*, 827 S.W.2d at 948. We hold that relator has demonstrated that she has a clear right to relief and that she does not have an adequate remedy by appeal to require the Fourth Court to permit her to continue to represent appellant.

III. Conclusion

We conditionally grant the petition for a writ of mandamus but withhold issuing the

order at this time to allow respondent the opportunity to conform its orders with this opinion. Only in the event that respondent fails to comply will the writ of mandamus issue.

Delivered: June 6, 2018

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