IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0642-18, 0643-18, 0644-18

INTERNATIONAL FIDELITY INSURANCE CO.
(AGENT: GLENN STRICKLAND) DBA A-1 BONDING, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY

RICHARDSON, J., delivered the opinion of the Court in which KEASLER, NEWELL, KEEL, and SLAUGHTER , JJ., joined. KELLER, P.J., and HERVEY, J., concurred in the result. WALKER, J., filed a dissenting opinion, in which YEARY, J., joined.

OPINION

Texas Rule of Appellate Procedure 34.6(f) provides that an appellant is entitled to a new trial if the appellant "has timely requested a reporter's record[,]" and through no fault of the appellant,"a significant exhibit or a significant portion of the court reporter's notes and

records has been lost or destroyed[.]"[1] Here, Appellant timely requested the reporter's record, a court reporter was called to the courtroom and appeared to record the motion-for-new-trial hearing, evidence was offered, and the attorneys exchanged contact information with the court reporter. Based on the testimony of the court reporter, it certainly would appear that no reporter's record was created. The trial court found that the hearing "was not stenographically or otherwise recorded" and was "neither lost nor destroyed." The court of appeals affirmed the trial court's ruling, holding that the rule did not afford Appellant relief because Appellant could not show that the hearing had been recorded.[2] Despite the fact that the court reporter's failure to transcribe the hearing was not Appellant's fault, and because the rule does not contemplate a situation in which a record was never created, we affirm the holding of the court of appeals.

BACKGROUND

Appellant, International Fidelity Insurance Company (Agent: Glenn Strickland) DBA A-1 Bonding, appealed the trial court's denial of its motion for new trial in a bond forfeiture proceeding arising out of a criminal case.[3] Appellant posted three bonds, in the amount of

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[1] TEX. R. APP. P. 34.6(f).

[2] *Int'l Fidelity Ins. Co. DBA A-1 Bonding v. State*, Nos. 01-16-00627-CR, 01-16-00628-CR, 01-16-00629-CR, 2018 WL 542397, at * 2 (Tex. App.— Houston [1st Dist.] Jan. 25, 2018) (mem. op.).

[3] "It is well settled that an appeal from [a] bond forfeiture proceeding originating in a criminal case is a criminal matter, not a civil matter, with final state court jurisdiction vested in this Court." *Safety Nat'l Cas. Corp. v. State*, 305 S.W.3d 586, 588 (Tex. Crim. App. 2010); *Ex parte Burr*, 185 S.W.3d 451, 452-53 (Tex. Crim. App. 2006) (per curiam) (recognizing bond forfeiture proceeding is

$30,000 each, for Defendant Israel Fernando Rivera. When Mr. Rivera failed to appear for a court hearing, the trial court entered a final judgment against Mr. Rivera, and the clerk's office issued a bill of costs. Appellant timely filed a motion for new trial and a motion to retax costs. The trial court held a hearing on Appellant's motion for new trial, at which the parties announced that a court reporter was needed, a court reporter was called into the courtroom and appeared to transcribe the proceedings, evidence was offered, and, believing the hearing had been transcribed, the attorneys exchanged contact information with the court reporter.

After the trial court denied Appellant's motion, Appellant timely filed a notice of appeal and timely requested a reporter's record. But no reporter's record was filed. The court reporter filed an affidavit indicating that she did not have "a steno file nor audio file" for the date of that hearing. At the state's request, the court of appeals abated the appeal and remanded to the trial court to determine whether (1) a reporter's record was created, (2) that record was lost or destroyed, (3) that record was necessary to resolve the appeal, and (4) the parties could agree on a replacement of the lost or destroyed record.

At the abatement hearing, the court reporter testified that she was at work on the date of the motion-for-new-trial hearing and that she was the court reporter for the court in which the motion was heard, but also that she did not believe it was possible that a recording had been created. She noted that in her nearly thirty years as a court reporter, she had never

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criminal in nature).

recorded a hearing and been unable to find the record. When asked by State's counsel if it was possible that she made a recording that was subsequently lost, she conceded, "I guess anything is possible."

The trial court entered findings of fact that a hearing occurred on Appellant's motion for new trial, the hearing "was not stenographically or otherwise recorded," the record was "neither lost nor destroyed[,]" and the fact that the record was not made was through no fault of Appellant. The court of appeals agreed with the trial court's conclusion, holding that Rule 34.6(f) did not afford Appellant relief in the form of a new trial under these facts. We granted Appellant's petition for review to address this situation that the current Rules of Appellate Procedure do not contemplate.

ANALYSIS

We review a trial judge's ruling on a motion for new trial for an abuse of discretion.[4] "This is a deferential standard of review that requires appellate courts to view the evidence in the light most favorable to the trial court's ruling."[5] A trial court abuses its discretion only when no reasonable view of the record could support its ruling.[6]

Appellant asserts it is entitled to a new trial because the record is missing through no fault of its own. But, as the court of appeals noted, the plain language of Rule 34.6(f) makes

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[4] *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017); *State v. Herndon*, 215 S.W.3d 901, 906-07 (Tex. Crim. App. 2007).

[5] *Burch*, 541 S.W.3d at 820.

[6] *Id.*

clear that the rule applies only to situations in which a portion of the proceedings was recorded but was later lost or destroyed.[7] Specifically, under Rule 34.6(f), an appellant is entitled to a new trial in the following situations:

> (1) if the appellant has timely requested a reporter's record;
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> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or – if the proceedings were electronically recorded – a significant portion of the recording has been lost or destroyed or is inaudible;
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> (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
>
> (4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.[8]

The rule, however, does not contemplate a situation in which a record was never created. As we have explained, and the court of appeals reiterated: "[w]hen the complaining party cannot show that the court reporter ever *recorded* the missing proceedings, he is not entitled to a new trial[.]"[9] So it is here. Appellant failed to show that the hearing was recorded and thus did not prove that the trial court abused its discretion in denying Appellant's motion for new trial under rule 34.6(f).

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[7] *Int'l Fidelity Ins. Co.*, 2018 WL 542397, at * 2 (citing *Williams v. State*, 937 S.W.2d 479, 486 (Tex. Crim. App. 1996)).

[8] TEX. R. APP. P. 34.6(f).

[9] *Int'l Fidelity Ins. Co.*, 2018 WL 542397, at * 2 (quoting *Williams*, 937 S.W.2d at 486) (emphasis in original).

While the Texas Rules of Appellate Procedure set out the requirements entitling an appellant to a new trial when a record is lost or destroyed, the rules offer no guidance to parties in cases in which a record was never created. Rule 34.6(f) places a burden on Appellant to *prove* that a record existed in the first place. If asking for a court reporter, seeing a court reporter enter the courtroom, putting on evidence during a hearing, and exchanging contact information with the court reporter based on one's belief that she transcribed a hearing are not enough, what circumstances would satisfy the rule? Currently, litigants have no way of knowing how to meet the hefty burden this rule places on them. Where litigants have taken all reasonable steps to ensure the creation of a record, their right to appeal should be protected. Yet, as the court of appeals noted in its opinion, the rule in its current form offers no remedy when, through no fault of the appellant, a record was never created.

The Rules of Appellate Procedure are intended to provide certainty and legitimacy to the appellate process. Yet Appellant seems to have experienced neither of those. The result in this case makes evident a flaw in our rules that the Court Rules Committee should address through our legislatively-endowed rulemaking authority.[10]

CONCLUSION

Texas Rule of Appellate Procedure 34.6(f) offers a remedy when a record was created and later lost or destroyed but no remedy when a record was never created in the

[10] Tex Gov't Code § 22.108(a).

first place. In this case, the trial court found that a record was not created and was thus neither lost nor destroyed. Appellant has failed to show that the trial court abused its discretion in denying its motion for new trial. Accordingly, we affirm the holding of the court of appeals.

DELIVERED: October 30, 2019

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