IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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

INTERNATIONAL FIDELITY INSURANCE CO., AGENT GLENN STRICKLAND D/B/A A-1 BONDING, Appellant

v.

THE STATE OF TEXAS

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

WALKER, J., filed a dissenting opinion, in which YEARY, J., joined.

DISSENTING OPINION

Today, this Court holds that it was not an abuse of discretion for a trial judge to find that a hearing "was not stenographically or otherwise recorded" and therefore was "neither lost nor destroyed," even though the court reporter was called into the hearing, took her position, appeared to record the proceedings, and received the contact information from both parties after the hearing. I do not believe that a reasonable view of the record can support the trial court's ruling. Accordingly, I respectfully dissent.

An appellant is entitled to a new trial, according to Texas Rule of Appellate Procedure 34.6(f), if he "has timely requested a reporter's record[,]" and "if, without the appellant's fault, a . . . significant portion of the court reporter's notes and records has been lost or destroyed."[1] We review "a trial court's denial of a motion for new trial for an abuse of discretion."[2] A trial court's denial of a motion for new trial will be reversed "if no reasonable view of the record could support the trial court's ruling."[3] This standard requires us to "view the evidence in the light most favorable to the trial court's ruling."[4]

I do not disagree with the majority that, based on the court reporter's testimony, no actual reporter's record was created, as long as the term "reporter's record" is defined as a final transcription of the previously recorded hearing. However, I take issue with the trial court's finding that the hearing "was not stenographically or otherwise recorded" and was "neither lost nor destroyed." A reporter's record is a final copy that is transcribed by a court reporter based on her stenographic notes or audio recordings of the hearing or trial. I agree that the court reporter here never transcribed her notes or recordings. That being said, I do not think one could take a reasonable view of the record and find that the hearing "was not stenographically or otherwise recorded."

According to the testimony of both attorneys, at the hearing on Appellant's motion for new trial, a court reporter was called in and took her position. It also appeared that she was recording the proceedings. Both parties had agreed that they wanted a court reporter, so she was specifically

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

[2] *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017).

[3] *Id*.

[4] *Id*.

requested to come in and make a recording of the hearing. The attorneys for both sides testified to such. Further, at the end of the hearing, once the evidence was offered, both of the attorneys exchanged contact information with the court reporter. Later, at the abatement hearing, the court reporter testified that she indeed was at work that day and that she was the court reporter for the court that heard the hearing. Additionally, in response to defense counsel's question: "If you were in your office and you were told there was a hearing that was fixing to start and they needed a court reporter, would you come out and not transcribe that hearing?" the court reporter answered "No." Lastly, she stated that in her nearly thirty years of doing this job she had never been unable to find a recording, but she conceded that "anything is possible."

Viewing this evidence, even in the light most favorable to the trial court's ruling, it is unreasonable to support the finding that the hearing was not recorded in some way. To start, why would a court reporter come to a hearing after being specifically requested to make a recording, take her position, appear to make a recording, and then not record the hearing? That is not a reasonable finding based on how the reporter and both attorneys testified. The court reporter actually testified that she would not respond to a request for a reporter and then not record the hearing. Most importantly, after the hearing, both parties exchanged contact information with the court reporter. The entire purpose of this, according to the reporter herself, is "because [] they're wanting [the reporter's] information in case they are wanting a copy of the transcript later." There would have been no exchange of contact information at the end of the hearing had the reporter not been recording. What would be the point?

The rule in question here is not limited to whether the final, transcribed reporter's record was lost or destroyed. Rather, it discusses the reporter's notes and records, which would include

stenographic recordings, audio recordings, and the final transcribed reporter's record.[5] I agree that a final, transcribed record was not made and therefore could not be lost or destroyed. However, I believe the evidence is overwhelming that the reporter did make a stenographic and audio recording that was lost or destroyed some time after the hearing. The fact that both parties testified that she appeared to be making a recording, the reporter testified that she would not have come to the hearing after being requested and then not make a recording, and the parties all exchanged contact information at the end as though a record had just been made makes it wholly unreasonable to then find that no recording was ever made. Accordingly, I believe Appellant showed that a recording was made and the court of appeals erred in holding that the trial court did not abuse its discretion. Therefore, I dissent.

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