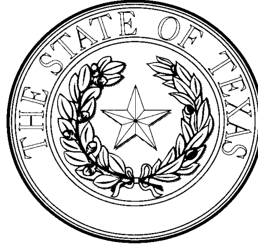
Opinion issued September 21, 2017



In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00556-CV

CEDRIC D. BROWN, Appellant

V.

SHIRLEY J. PRESTON, Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Case No. 2014-62252

MEMORANDUM OPINION

Cedric Brown, a prison inmate acting pro se, appeals the trial court's dismissal for want of prosecution of his suit against Shirley J. Preston.[1] Raising two issues,

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[1] Preston has not filed a brief in this appeal.

Brown contends that the trial court abused its discretion when it dismissed his suit and when it did not grant his motion for new trial. Because Brown does not show that the trial court abused its discretion, we affirm.

Background

In October 2014, Brown filed suit against his aunt, Shirley J. Preston.[2] In his petition, Brown stated that he was incarcerated in an Angleton, Texas prison. Brown alleged that Preston had prevented him from receiving his share of his deceased grandfather's estate. He sought a judgment awarding him "his distributive share."

Preston answered the suit, denying Brown's allegations. The trial court signed a docket control order, setting trial for the two-week period beginning October 15, 2015. The case was not reached for trial in October, and trial was reset for the period beginning March 7, 2016. However, the case did not go to trial in March. The trial court ordered the case reset for the two-week period beginning May 2, 2016.

On April 15, 2016, Brown filed "Plaintiff's Announcement [of] Ready for Trial and Request for Bench Warrant." Brown informed the trial court that he was "ready to proceed to trial." He stated that, "[b]ecause of his incarceration," he was "unable to personally appear before the court and give testimony." Brown requested the trial court to issue a bench warrant to permit him to attend trial "scheduled to

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[2] Brown also named Willie Preston and Lacey Preston as defendants in his petition but later nonsuited them.

commence on May 2, 2016, so that [he] may give testimony." He asserted that his "case depends in large part on his own testimony." Brown did not request to appear at trial by alternate means, such as by telephone, videoconference, or affidavit. The trial court did not rule on Brown's request for a bench warrant.

On April 25, 2016, the trial court sent notice to the parties, informing them that the case was "assigned to trial on Wednesday, May 11, 2016, at 1:00 p.m." The trial court warned that "failure to appear for this trial date will result in a default or dismissal of this cause." The notice provided the name and telephone number of the court coordinator, stating that "[s]hould you have any questions concerning this notice please contact [the court coordinator]."

On May 16, 2016, the trial court signed an order of dismissal. The order states, "On May 11, 2016 at 1:00 p.m., came to be heard the above-referenced cause and the Court called the matter to Trial. Defendant [Preston] appeared through counsel of record[.] Plaintiff [Brown] did not appear. IT IS THEREFORE ORDERED that this case is hereby dismissed."[3]

Brown then filed "Plaintiff's Motion for New Trial and/or Request for Reconsideration." In the motion, Brown acknowledged that the case was dismissed because he failed to appear at trial. He asserted, however, "that failure to appear was

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[3] Because the order does not expressly state that the case is dismissed with prejudice, we presume that the dismissal is without prejudice. *See Barnes v. Deadrick*, 464 S.W.3d 48, 54 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

no fault of his own." He pointed out that, before trial, he had requested the trial court to "issue a warrant from the bench ordering [the sheriff's department] and/or [the prison system] to transport him to [the trial court] for the scheduled docket call and the trial that was scheduled." He pointed out that, because he is an inmate in the Texas prison system, he could not "attend any type of judicial proceeding held by this Court unless he is brought there by an agency [such as the sheriff's department] after the issuance of a bench warrant." At the end of the motion, Brown requested the trial court to reinstate the case on the court's docket. The trial court did not rule on the motion, resulting in it being overruled by operation of law.

Dismissal for Failure to Appear at Trial

In his first issue, Brown contends that the trial court abused its discretion when it dismissed his suit. "A trial court's authority to dismiss for want of prosecution derives from the express provisions of Rule 165a of the Rules of Civil Procedure and from the trial court's inherent power." *Graves v. Atkins*, No. 01-04-00423-CV, 2006 WL 3751612, at *1 (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.) (mem. op.). Subsection (1) of Rule 165a, subtitled "Failure to Appear," authorizes a trial court to dismiss a pending cause for want of prosecution when a "party seeking affirmative relief" does not "to appear for any hearing or trial of which the party had notice." TEX. R. CIV. P. 165a(1). Here, Brown filed a petition seeking the affirmative relief from the trial court. And, in his brief, Brown acknowledges that

the trial court sent him notice on April 25, 2016, indicating that trial was set for May 11, 2016. The notice also informed him that the case would be dismissed if he did not appear.

On appeal, Brown asserts that the trial court abused its discretion in dismissing his case because he had requested a bench warrant to appear at trial, and the trial court did not granted the request. Courts may not deny a prison inmate access to the courts based solely on their status as an inmate; however, an inmate does not have an absolute right to appear in person. *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003). When determining whether an inmate has a right to be present at trial, Texas courts weigh the prisoner's right of access against protecting the integrity of the correctional system, based on several factors. *Id.* These factors include (1) the cost and convenience of transporting the inmate to the courtroom; (2) the security risk the inmate poses to the court and the public; (3) whether the inmate's claims are substantial; (4) whether the matter's resolution can reasonably be delayed until the inmate's release; (5) whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone or some other means; (6) whether the inmate's presence is important in judging his demeanor and credibility; (7) whether the trial is to the court or a jury; and (8) the inmate's probability of success on the merits. *Id.* at 165–66. Here, the only information Brown provided to the trial court in connection with his bench

warrant request was the fact of his incarceration and inability to appear at the hearing.

On appeal, Brown further claims that the trial court abused its discretion in dismissing his case because the "trial court's failure to grant the requests for bench warrant not only prevented Brown from attending the trial in person but also from attending the trial through teleconference, telephone or some other means." Courts may permit hearings at a jail or at a prison facility through alternate means, such as by video communications technology. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.008(a) (West 2017) (providing that hearing may be conducted at prison facility by video communications). "Among the factors that a trial court weighs in assessing a prison inmate's right to appear in person is whether the inmate 'can and will offer admissible, noncumulative testimony that cannot effectively be presented by deposition, telephone, or some other means.'" *Graves*, 2006 WL 3751612, at *2 (quoting *In re Z.L.T.*, 124 S.W.3d at 165–66).

However, to be entitled to appear in person or through alternate means, such as video communications technology, "the burden rests squarely on the prisoner-inmate to request access to the court through these alternate means and to demonstrate why a trial court should authorize them." *Id.* at *3 (citing *In re Z.L.T.*, 124 S.W.3d at 166 (holding that trial court did not err by impliedly denying inmate's request for bench warrant, because inmate did not adequately demonstrate right to

be present)); *see also* TEX. R. APP. P. 33.1(a)(1)(A). "Trial courts have no independent duty, when a litigant is a pro se prison inmate, to inquire into relevant facts not provided by the prison-inmate seeking affirmative relief." *Graves*, 2006 WL 3751612, at *3 (citing *In re. Z.L.T.*, 124 S.W.3d at 166). This precept is consistent with settled law holding that pro se litigants are held to the same standards as licensed attorneys, including the requirement that they must comply with procedural rules. *Id.* (citing *Shull v. United Parcel Serv.*, 4 S.W.3d 46, 52–53 (Tex. App.—San Antonio 1999, pet. denied); *Chandler v. Chandler*, 991 S.W.2d 367, 378-89 (Tex. App.—El Paso 1999, pet. denied) (both cited with approval in *In re Z.L.T.*, 124 S.W.3d at 166)).

Here, although he was notified of the May 11, 2016 trial date, Brown did not provide the trial court with adequate information for it to assess whether to grant his request for a bench warrant. *See In re. Z.L.T.*, 124 S.W.3d at 166. The record also does not reflect that Brown requested alternative means of appearance, such as by telephone, videoconference, or affidavit. Thus, he did not preserve the right to appear by alternate means. *See Graves*, 2006 WL 3751612, at *3.

Brown acknowledges, and the record reflects, that he was aware of the trial date. Nonetheless, he did not appear and did not meet his burden of providing the trial court with the information necessary for it to issue a bench warrant. Nor did he preserve his right to appear by alternate means. Under these circumstances, the trial

court did not abuse its discretion by dismissing Brown's case for failure to appear. *See id.*; *see also* TEX. R. CIV. P. 165a(1).

We overrule Brown's first issue.

Post-Judgment Motion

In his second issue, Brown contends that the trial court erred when it did not grant his motion for new trial. He asserts that the trial court should have granted his motion and reinstated his case based on his assertions that he had been unable to attend trial due to his incarceration and the trial court's implied denial of his request for a bench warrant.

A motion to reinstate is the only remedy available to a party whose case has been dismissed for want of prosecution. *Watson v. Clark*, No. 14–14–00031–CV, 2015 WL 780563, at *1 (Tex. App.—Houston [14th Dist.] Feb. 24, 2015, no pet.) (mem. op.) (citing *Sierra Club v. Tex. Comm'n on Envtl. Quality*, 188 S.W.3d 220, 222 (Tex. App.—Austin 2005, no pet.)). In his brief, Brown acknowledges that, although titled as a motion for new trial, his post-judgment motion is in substance a motion to reinstate. Rule of Civil Procedure 165a(3) requires that a motion to reinstate be verified by the movant or his attorney. Civil Practice & Remedies Code Sections 132.001 permits an inmate to file an unsworn declaration in lieu of a sworn declaration or verification if it follows a prescribed form. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001 (West Supp. 2016).

Brown's motion was not verified or otherwise accompanied by a proper unsworn declaration. Thus, the trial court did not abuse its discretion by permitting his reinstatement motion to be overruled by operation of law. *Cf. McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990) (orig. proceeding) (holding that trial court abused its discretion when it granted unverified motion to reinstate.)

We overrule Brown's second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.