Opinion issued March 1, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00279-CR

ALLEN BERNARD GIMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1262460

DISSENTING OPINION

Because the majority errs in not abating this case to allow the trial court to conduct a new voluntariness hearing and make sufficient findings of fact and conclusions of law in compliance with the Texas Code of Criminal Procedure, I

respectfully dissent. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon Supp. 2017).

In his second, third, and fourth issues, appellant, Allen Bernard Gims, argues that the trial court erred in not making sufficient findings of fact and conclusions of law related to his motion to suppress his statements to law enforcement officers, as required by article 38.22, section 6, because "[t]he only finding or conclusion made by the trial court" is a "one sentence" statement in the reporter's record that appellant's statements were voluntary and non-custodial. He asserts that he is "entitled to have specific findings of fact and conclusions of law entered by the trial court." *See id*.

Prior to trial, appellant moved to suppress "all statements made by [himself] to the police . . . on the grounds that the statement(s) w[ere] not knowingly and voluntarily made and thus w[ere] obtained in violation of federal and state constitutions." In his motion, appellant further argued that because his statements did not comply with the requirements of article 38.22, they were not admissible.

The trial court then held a hearing, during which the parties litigated the issue of whether appellant made his statements to law enforcement officers voluntarily. Following the voluntariness hearing, the trial court denied appellant's motion, stating orally, on the record:

> We've previously conducted a hearing on [appellant's] motion to suppress [his] statements and to prohibit the State from attempting to

> introduce those statements. The Court after considering the evidence introduced at the hearings and the recordings themselves, the State's exhibits and arguments of counsel, I'm going to deny the motion to suppress [appellant's] statements. So I find that they were made voluntarily and the defendant was not in custody at the time that they were made since he left the police station after making the statements.

After filing his notice of appeal with this Court, appellant filed a motion to abate, requesting that we abate his appeal to allow the trial court to enter findings of fact and conclusions of law as required by article 38.22, section 6. The Court, however, denied appellant's motion, relying on the above-quoted statements by the trial court and concluding that the "trial court [had] entered [sufficient] oral findings of fact and conclusions of law into the record."

Appellant then filed a second motion to abate, again requesting that this Court abate his appeal because the trial court's findings of fact and conclusions of law do not comply with article 38.22, section 6. This Court denied appellant's second motion to abate, again relying on the above-quoted statements by the trial court.

In his brief, appellant challenges the trial court's denial of his motion to suppress his statements made to law enforcement officers. He argues that his statements were made involuntarily because he was "suffering [from] some form of mental illness," was "in no way capable of making a rational decision to waive his

right to make any statement," and was "coerced and intimidated in[to] making incriminating statements" to law enforcement officers.[1]

Here, the record clearly shows that the trial court, outside the presence of the jury, held a hearing during which the parties litigated the issue of whether appellant made his statements to law enforcement officers voluntarily. After the hearing, the trial court, on the record, orally denied appellant's motion to suppress, concluding that he made his statements voluntarily. And the trial court admitted appellant's statements to law enforcement officers into evidence.

When a question is raised as to the voluntariness of a defendant's statements, a trial court *must* make an independent finding in the absence of the jury as to whether the statements were made under voluntary conditions. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6. If the trial court finds that the statements were made voluntarily and holds them admissible as a matter of law and fact, it *must* then enter

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[1] In its opinion, the majority addresses only appellant's argument that he made his statements involuntarily because he was "suffering [from] some form of mental illness." It asserts that he "waived [his] challenge to the voluntariness of his statement due to his mental state," and that conclusion "is dispositive of [his] appeal." Thus, the majority fails to address appellant's arguments that he made his statements to law enforcement officers involuntarily because he was "in no way capable of making a rational decision to waive his right to make any statement" and was "coerced and intimidated in[to] making incriminating statements." At the very least, however, the record in this case clearly shows that the parties at the hearing on appellant's motion to suppress actually litigated his complaint that he was "coerced and intimidated" by law enforcement officers into making incriminating statements. And the majority's conclusion that "abatement for . . . findings" of fact and conclusions of law relevant to appellant's issues on appeal would be "futile" and "irrelevant" is erroneous.

an order stating its conclusion as to whether the statement was voluntarily made, along *with the specific finding of facts upon which the conclusion was based*.[2] *Id.* The Texas Court of Criminal Appeals has repeatedly held that such findings of fact and conclusions of law are *mandatory*, without exception. *See Vasquez v. State*, 411 S.W.3d 918, 920 (Tex. Crim. App. 2013); *Urias v. State*, 155 S.W.3d 141, 142 (Tex. Crim. App. 2004).

The purpose of requiring the trial court to file such findings of fact is to provide an appellate court and the parties with a basis upon which to review the trial court's ruling. *See State v. Cullen*, 195 S.W.3d 696, 698–99 (Tex. Crim. App. 2006); *Wicker v. State*, 740 S.W.2d 779, 783 (Tex. Crim. App. 1987); *Nichols v. State*, 810 S.W.2d 829, 831–32 (Tex. App.—Dallas 1991, pet. ref'd); *see also Douglas v. State*, 900 S.W.2d 760, 761 (Tex. App.—Corpus Christi 1995, pet. ref'd) ("The purpose served by specific factual findings is to focus the appellate court on particular conclusions drawn by the fact finder in order to determine if there is evidentiary support for them."). Further, without such findings of fact, a defendant is hampered in his ability to demonstrate error, and appellate courts are "left in the undesirable

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[2] The trial court may satisfy the requirements of article 38.22, section 6 by dictating its findings of fact and conclusions of law to the court reporter, who then transcribes them and makes them part of the appellate record. *Mbugua v. State*, 312 S.W.3d 657, 668 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Murphy v. State*, 112 S.W.3d 592, 601–02 (Tex. Crim. App. 2003)). Any oral statements made by the trial court in the instant case are insufficient.

position of having to make assumptions about the reasons for the trial court's decision." *Cullen*, 195 S.W.3d at 698–99; *Nichols*, 810 S.W.2d at 831; *see also Douglas*, 900 S.W.2d at 761. Thus, when no findings of fact, or, as in this case, insufficient ones, are made by the trial court, a court of appeals unquestionably errs in not abating a case for them. *Vasquez*, 411 S.W.3d at 920; *Wicker*, 740 S.W.2d at 784 ("Whether the trial court files findings insufficient in detail to allow an appellate court to resolve the dispute upon which an appealing party predicates his appeal . . . or no findings are made to support the ruling of the trial court on the voluntariness issue, . . . the duty of the appellate court is clear. The proper procedure is that the appeal will be abated and the trial judge will be directed to reduce to writing his findings on the disputed issues surrounding the taking of appellant's [statement].").

Here, although this Court has twice denied appellant's abatement requests, I cannot agree with its conclusion that the trial court's findings of fact and conclusions of law comply with article 38.22, section 6.

Although a trial court's fact findings need not be made with minute specificity as to every alleged and hypothetical possibility for physical or mental coercion, they must be sufficient to provide the appellate court and the parties with a basis upon which to review the trial court's application of the law to the facts. *Wicker*, 740 S.W.2d at 783; *Vasquez v. State*, 179 S.W.3d 646, 654 (Tex. App.—Austin 2005),

aff'd, 225 S.W.3d 541 (Tex. Crim. App. 2007); *Nichols*, 810 S.W.2d at 831. And the trial court must address the specific facts before it and not state simply that the defendant voluntarily made the statements at issue. *See Hester v. State*, 535 S.W.2d 354, 356 (Tex. Crim. App. 1976). Simply put, the trial court's purported fact findings in this case are conclusory in nature, contain no detail, do not resolve the disputed fact issues upon which appellant's issues on appeal are based, and do not assist this Court in any way in reviewing appellant's case on appeal. *See id.*; *see also Alford v. State*, 358 S.W.3d 647, 651 n.6 (Tex. Crim. App. 2012) (findings sufficient where they enable parties to fully address, and appellate courts to review, trial court's ruling); *McKittrick v. State*, 535 S.W.2d 873, 876 (Tex. Crim. App. 1976) (trial court must make findings with enough detail to enable appellate court to resolve fact issues upon which defendant bases grounds of error); *Vasquez*, 179 S.W.3d at 654–55 (holding findings sufficient where trial court made specific reference to facts adduced through testimony at voluntariness hearing and events which occurred during videotaped interrogation); *Nicholas*, 810 S.W.2d at 832 (trial court's findings inadequate where they are "too conclusional"); *Douglas*, 900 S.W.2d at 761 ("The written findings must be specific; general conclusions are not adequate."). Because the trial court's findings of fact are insufficient and do not comply with article 38.22, section 6, abatement is required. *See* TEX. CODE CRIM.

PROC. ANN. art. 38.22, § 6; *Dykes v. State*, 649 S.W.2d 633, 636 (Tex. Crim. App. 1983); *McKittrick*, 535 S.W.2d at 876.

Generally, when a trial court makes insufficient written findings of fact, or none at all, to support its ruling that a defendant voluntarily made statements to law enforcement officers, an appellate court simply abates an appeal so that the trial court may make the required written findings and forward them to the court handling the defendant's appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6; *Urias*, 155 S.W.3d at 142 (proper procedure for appellate court to abate appeal and direct trial court to make required written findings of fact and conclusions of law); *Wicker*, 740 S.W.2d at 784; *Douglas*, 900 S.W.2d at 761. If the trial court fails to make sufficient written findings after abatement, the appellate court must then reverse the trial court's judgment and remand the case for a new trial. *See Douglas*, 900 S.W.2d at 761; *Nichols*, 810 S.W.2d at 831.

In the instant case, however, the person who served as the judge of the 176th District Court of Harris County in 2012, and who conducted the hearing related to the voluntariness of appellant's statements, is no longer the judge of that court. *See Douglas*, 900 S.W.2d at 761. And that person is not in a position to now make the necessary findings of fact and file them with our Court. *See id.*

If the original trial judge were still sitting on the bench of the 176th District Court of Harris County, this Court could simply abate the appeal for her to review

the reporter's record to refresh her recollection of the reasons for her ruling on the issue of voluntariness. *See id.*; *see also Wicker*, 740 S.W.2d at 784 ("The trial judge may review the transcription of the testimony upon which [her] original ruling was made, if necessary, in order to refresh [her] recollection of the reasons behind such ruling."). However, because the trial judge who held the hearing related to the voluntariness of appellant's statements is not available, this Court must abate the appeal to allow the current sitting trial judge to hold a new voluntariness hearing and make sufficient written findings of fact and conclusions related to the voluntariness of appellant's statements as required by article 38.22, section 6. *See Garcia v. State*, 15 S.W.3d 533, 536 (Tex. Crim. App. 2000) ("[I]t is not appropriate for [a] second judge . . . to make findings of fact [and conclusions of law]" based upon a "'cold' record" and not upon "a direct evaluation of the credibility and demeanor of the witnesses."); *Taiwo v. State*, No. 01-07-00487-CR, 2010 WL 2306040, at *3 n.2 (Tex. App.—Houston [1st Dist.] June 10, 2010, pet. ref'd) (mem. op., not designated for publication) ("A trial judge may not make statutorily-mandated findings of fact and conclusions of law based on a reporter's record of a hearing over which [s]he did not preside . . . ."); *Franks v. State*, Nos. 01-97-00606-CR, 01-97-00607-CR, 01-97-00608-CR, 1998 WL 470425, at *1 (Tex. App.—Houston [1st Dist.] Aug. 13, 1998, no pet.) (not designated for publication) (where trial judge who held voluntariness hearing died, abating case so successor judge could conduct new

hearing in accordance with article 38.22, prepare written findings of fact and conclusions of law, and forward them to appellate court); *Douglas*, 900 S.W.2d at 761–62 (where original trial judge not available, abating appeal for new voluntariness hearing and written findings of fact and conclusions of law); *see also Schaired v. State*, 786 S.W.2d 497, 498 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (appellate court has authority to abate appeal for evidentiary hearing). Because the trial court is the sole fact-finder regarding the voluntariness of appellant's statements to law enforcement officers, it must be afforded the opportunity to view the witnesses and personally hear their testimony. *See Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Douglas*, 900 S.W.2d at 762.

Accordingly, I would abate appellant's appeal and remand the cause to the trial court for a new hearing to determine the voluntariness of the statements made by appellant to law enforcement officers and admitted into evidence at trial; and I would further order the trial court to make sufficient written findings of fact and conclusions of law that comply with article 38.22, section 6.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6; *see also Douglas*, 900 S.W.2d at 762.

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[3] As previously noted, the trial court may satisfy the requirements of article 38.22, section 6 by dictating sufficient findings of fact and conclusions of law into a reporter's record to then be included in the appellate record. *See Mbugua*, 312 S.W.3d at 668.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Jennings, J., dissenting.

Do not publish. TEX. R. APP. P. 47.2(b).