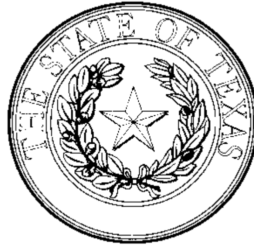
Opinion issued January 25, 2018



In The

Court of Appeals

For The

First District of Texas

NOS. 01-16-00627-CR, 01-16-00628-CR, 01-16-00629-CR

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

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case Nos. 1429386-A, 1429387-A, 1429388-A

MEMORANDUM OPINION

In these bail bond forfeitures cases, appellant, International Fidelity Insurance Co. (Agent: Glenn Strickland) d/b/a A-1 Bonding, appeals the trial court's order denying its motion for new trial and to retax costs. In its sole point of error, appellant

contends that the trial court erred in denying its motion because the reporter's record is missing through no fault of its own, and therefore, it is entitled to a new trial under Rule of Appellate Procedure 34.6(f). We affirm.

Background

Israel Fernando Rivera, the criminal defendant in the underlying cases, was charged by indictment with the felony offense of indecency with a child in three separate causes. Appellant executed a bail bond in the amount of $30,000 in each case, as the surety on the bonds for Rivera, the principal on the bonds, to secure Rivera's release from custody pending resolution of the charges. Rivera failed to appear and answer the charges against him, and the trial court entered judgments of forfeiture (judgments nisi) for the full amount of the bond plus costs of court. On May 6, 2016, the trial court entered final judgments of forfeiture and the district clerk issued a bill of costs in each case.

On May 16, 2016, appellant filed a motion for new trial and to retax costs. On July 14, 2016, after conducting a hearing, the trial court issued an order denying the motion after "having reviewed the evidence, stipulations, and written arguments of the parties."

On August 4, 2016, appellant appealed the trial court's ruling but no reporter's record was produced. On December 14, 2016, the court reporter filed an affidavit indicating that she did not have "a steno file nor audio file" for the hearing or any

record of "a hearing reported by [her]" on the date of the hearing. On March 14, 2017, the State filed a motion requesting that this Court abate the appeal and remand the case to the trial court for a determination regarding the reporter's record. On April 6, 2017, we granted the State's motion, abated the appeal, and remanded to the trial court to conduct a hearing to determine whether (1) a reporter's record was created; (2) that record was lost or destroyed; (3) the record was necessary to resolution of the appeal; and (4) the parties could agree on replacement of the lost or destroyed record.

On May 1, 2017, the trial court held an abatement hearing. Thereafter, the trial court entered the following written findings of fact:

1. The court finds that a hearing occurred on July 14, 2016 on the appellant's motion for new trial and motion to retax costs, but that hearing was not stenographically or otherwise recorded. Therefore, a court reporter is not able to prepare, certify, and file a transcription of any testimony, argument, or other proceedings.

2. Because the court finds that the record was not stenographically or otherwise recorded, the court finds that the record was neither lost nor destroyed. The fact that the record was not stenographically or otherwise recorded is due to no fault on the appellant's part.

3. Because the court finds that the record was not stenographically or otherwise recorded, the court does not make a finding as to whether or not the lost or destroyed portions of the record are necessary to appellant's appeals.

4. Because the court finds that the record was not stenographically or otherwise recorded, the parties cannot agree on a replacement of the lost or destroyed record.

After we reinstated the appeals, appellant filed a supplemental brief.

Discussion

Appellant argues that it is entitled to a new trial pursuant to Rule of Appellate Procedure 34.6(f) because the court reporter's record is missing through no fault of its own. Under rule 34.6(f), an appellant is entitled to a new trial if:

> (1) the appellant has timely requested a reporter's record;
>
> (2) 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;
>
> (3) 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) 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.

TEX. R. APP. P. 34.6(f); *Routier v. State*, 112 S.W.3d 554, 571 (Tex. Crim. App. 2003). If the record does not support each of these facts, the appellant is not entitled to a new trial. *See* TEX. R. APP. P. 34.6(f).

At the abatement hearing, the parties advised the court that a record had been requested and they believed that the July 14, 2016 hearing had been stenographically recorded. The court reporter, however, testified that she did not believe it was

possible that a record of the hearing had been created which later could not be found, and that it had never happened in her nearly thirty years as a court reporter. The trial court found that the July 14, 2016 hearing on appellant's motion for new trial and motion to retax costs "was not stenographically or otherwise recorded" and that "[b]ecause the court finds that the record was not stenographically or otherwise recorded, the court finds that the record was neither lost nor destroyed."

Rule 34.6(f), by its plain language, applies only to situations in which a portion of the proceedings was recorded but was later lost or destroyed. *See Williams v. State*, 937 S.W.2d 479, 486 (Tex. Crim. App. 1996) (holding rule 50(e), predecessor to Rule 34.6(f), not applicable if no record made); *see Routier*, 112 S.W.3d at 570 (noting that principles underlying former rule 50(e) apply to rule 34.6(f), and that rule applies regardless of whether only portion of record or entire record is lost or destroyed). "When the complaining party cannot show that the court reporter ever *recorded* the missing proceedings, he is not entitled to a new trial[.]" *Williams*, 937 S.W.3d at 486 (emphasis in original).

Here, appellant has failed to show that the trial court abused its discretion in finding that the July 14, 2016 hearing was not stenographically or otherwise recorded. *See Coulter v. State*, 510 S.W.3d 210, 215 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting trial court's findings of fact are reviewed under abuse of discretion standard). Having failed to show that the hearing was recorded,

appellant is not entitled to a new trial under rule 34.6(f). *See Williams*, 937 S.W.3d at 486; *see also Waterman v. State*, No. 02-16-00023-CR, 2016 WL 4040597, at *1 (Tex. App.—Fort Worth July 28, 2016, no pet.) (mem. op., not designated for publication) (concluding appellant's failure to show that hearing was actually recorded rendered him ineligible for relief under rule 34.6(f)); *Duhon v. State*, No. 01-99-00946-CR, 2000 WL 1641139, at *1 (Tex. App.—Houston [1st Dist.] Nov. 2, 2000) (not designated for publication) (concluding that appellant failed to show that voir dire was recorded by court reporter and was not entitled to new trial under rule 34.6(f)).[1] Accordingly, we overrule appellant's point of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

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

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[1] Because appellant has not shown that the record was lost or destroyed, we need not address the remaining requirements of rule 34.6(f). *See* TEX. R. APP. P. 34.6(f); *see also Aranda v. State*, Nos. 2-08-119-CR & 02-08-120-CR, 2009 WL 279489, at *4 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (mem. op., not designated for publication) (concluding defendant could not satisfy requirements of rule 34.6(f) because he could not show that any portion of record related to adjudication hearing was lost or destroyed).