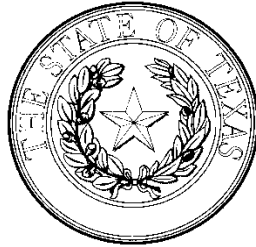


Opinion issued February 22, 2018



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-17-00737-CR

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**KAYLEN DEWAYNE SIMMONS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the County Court at Law No. 1 and Probate Court  
Brazoria County, Texas  
Trial Court Case No. 223663**

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**MEMORANDUM OPINION**

Appellant, Kaylen Dewayne Simmons, was charged with a class B misdemeanor offense of possession of marijuana, less than two ounces, under trial

court cause number 223663 in 2016.<sup>1</sup> Appellant’s pretrial motion to suppress the evidence was denied by the trial court on May 12, 2017.

On September 25, 2017, appellant pleaded guilty to the possession charge under a plea bargain. In accordance with his plea bargain with the State, the trial court found appellant guilty as charged and assessed his punishment at 100 days confinement in county jail, with 65 days of credit, no fine, a 180-day driver’s license suspension, court costs to run concurrent with jail time served, and the confinement to run concurrently with the term imposed for an unrelated charge under trial court cause number 217671.<sup>2</sup> The “Judgment and Immediate Sentence” noted that the plea and sentence both took place on September 25, 2017, but the trial court signed the judgment on September 26, 2017. The trial court certified that this was a plea-bargain case and that appellant had no right of appeal. Appellant timely appealed, stating that he was appealing the denial of his pretrial motion. The State has filed a motion to dismiss for want of jurisdiction and appellant has responded. We agree with the State and dismiss this appeal.

### **Background**

In a plea-bargained case, a defendant may only appeal those matters that were raised by written motion filed and ruled on before trial or after getting the trial court’s

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<sup>1</sup> See TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1) (West 2010).

<sup>2</sup> See TEX. PENAL CODE ANN. § 12.22 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (West 2006 and Supp. 2017).

permission to appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 44.02 (West 2006); TEX. R. APP. P. 25.2(a)(2). An appeal must be dismissed if a certification showing that the defendant has the right of appeal has not been made part of the record. *See* TEX. R. APP. P. 25.2(d). The Rules of Appellate Procedure also provide that an amended trial court's certification of the defendant's right to appeal correcting a defect, if any, may be filed in the appellate court. *See id.* 25.2(f), 34.5(c), 37.1. When the Clerk of this Court receives the notice of appeal and clerk's record, it is obligated to review them to ascertain whether the certification of the right of appeal is defective and, if it is defective, it must use Rules 37.1 and 34.5(c) to request a corrected certification. *See id.* 34.5(c), 37.1; *see also Dears v. State*, 154 S.W.3d 610, 614–15 (Tex. Crim. App. 2005).

The trial court's certification of appellant's right to appeal noted that this was a plea bargain case with no right to appeal. *See* TEX. R. APP. P. 25.2(a)(2). Although the suppression hearing record was filed, the plea and sentence hearings apparently were not recorded because no reporter's records were filed for them. On January 18, 2018, appellant filed a brief on the merits. Because the certification appeared that it may be defective, the Clerk of this Court's January 18, 2018 notice requested that the trial court clerk file a supplemental clerk's record. This record was directed to contain an amended certification of appellant's right of appeal, if any, including whether appellant has the right to appeal the pretrial suppression order, or whether

the trial court has given permission to appeal. *See id.* 25.2(a)(2), (d), 34.5(a)(12), (c)(1)-(2), 37.1.

On February 5, 2018, a supplemental clerk's record was filed containing the trial court's findings of fact and conclusions of law, which were based on the court's "review of the record and the personal memory of the Court." Without a hearing and without including an amended certification of the right of appeal, the court entered the following:

### **FINDINGS OF FACT**

1. The Defendant, Kaylen Dewayne Simmons, appeared with counsel Joseph R. Willie, II, on September 25, 2017.
2. Defendant, through counsel, entered a plea bargain with the State to receive 100 days county jail, no fine plus costs, a 180 day driver's license suspension, and given credit for 65 days. Customarily, the Defendant gets credit for 2 days for each day served. The 65 days also applied to costs.
3. The Defendant and his counsel signed a "Trial Court's Certification of Defendant's Right to Appeal", in which the Defendant was admonished that this criminal case "is a plea-bargain case and the defendant has NO right to appeal."
4. Under the terms of the plea-bargain, the defendant would have served no additional time and owed no additional money.
5. The court made the following docket entry on September 25, 2017: Defendant, after having appeared in person and after waiving his – her right to a trial by jury, enters a plea of guilty and upon such plea he-she is adjudged guilty of the offense so charged. For his-her punishment, he-she is assessed a fine of 0+cc and is sentenced to confinement in the County Jail for a term of 100c65 Days and all costs adjudged against the

defendant. Defendant having waived the 10 day period before sentencing was sentenced per order on file. DL suspended 180 days. Fine+cc to run cc w/ jail time. Jail time to run cc w/#217671.

6. The Defendant accepted a plea-bargain agreement and it was presented to the Court.
7. The Court accepted the plea of guilty and the plea-bargain agreement and the punishment assessed did not exceed the plea bargain agreement, but rather mirrored the agreement exactly.
8. As it was a plea-bargain agreement, the Court admonished the defendant and counsel at the time of his plea that he had no right to appeal the case. The Court additionally admonished the defendant and counsel that this waiver extended to pre-trial matters.
9. The Defendant filed his Notice of Appeal on September 25, 2017.
10. At no time was the permission of the Court sought to appeal.

### **CONCLUSIONS OF LAW**

1. The Defendant entered into a plea-bargain agreement.
2. The punishment did not exceed the plea bargain agreement.
3. The Defendant was admonished at the time of his plea that by accepting the plea-bargain he was waiving his right to appeal the case and all pre-trial matters.
4. The Defendant did not seek the Court's permission to appeal.
5. The Defendant was not granted permission to appeal.
6. The Defendant has no right to appeal the motion to suppress after waiving that right as part of the plea-bargain.

7. Defendant's appeal should be dismissed because he has no right to appeal because said right was waived as part of the plea-bargain.

Also on February 5, 2018, appellee, the State of Texas, filed a motion to dismiss the appeal for lack of jurisdiction. *See* TEX. R. APP. P. 10.3(a)(2). The State contends that this Court lacks jurisdiction because the case was resolved by a plea bargain, appellant waived his right to appeal any pre-trial matters as part of that plea bargain, and the trial court did not grant permission for this appeal. Thus, the State contends that the trial court properly entered its certification, which was not defective because it was supported by the record that this was a plea bargain case, and that appellant did not have the right to appeal his pretrial suppression motion after he waived that right as part of his plea bargain.

Later on February 5, 2018, appellant filed a response to the State's motion to dismiss. Appellant contends that this Court has jurisdiction over this appeal because he filed a pretrial motion that was ruled upon before his plea, and there was no written waiver in the clerk's record expressly waiving his right to appeal the denial of that pretrial motion. Then on February 6, 2018, appellant filed a supplemental response to the State's motion contending that, because the trial court did not comply with the Clerk of this Court's notice to file a corrected certification of the right of appeal, subject-matter jurisdiction is conferred upon this Court by statute and

appellate rule. *See* TEX. CODE CRIM. PROC. ANN. art. 44.02; TEX. R. APP. P. 25.2(a)(2)(A).<sup>3</sup>

### **Analysis**

Contrary to his contention that the trial court did not comply with the Clerk of this Court’s notice to amend the certification, appellant presumes that the notice concluded that the certification was defective whereas it only stated that it appears to be defective. While courts of appeals have a right to order the trial court to produce an amended certification that corrects a defective one, courts of appeals are prohibited from dictating the content of certifications. *See Marsh v. State*, 444 S.W.3d 654, 659 (Tex. Crim. App. 2014) (citation omitted). Although “Rule 25.2(a)(2)(A) does, in fact, grant defendants who plead guilty as part of a plea bargain the right to appeal pretrial motions,” a “defendant may waive this right as long as the waiver is made voluntarily, knowingly, and intelligently.” *Id.* at 660 (internal quotation marks and citations omitted). A waiver is valid if the defendant waived his right to appeal in exchange for a recommended sentence. *See Blanco v. State*, 18 S.W.3d 218, 219–20 (Tex. Crim. App. 2000).

Here, the State, appellant, and his counsel signed a “Defendant’s Admonitions and Waivers of Constitutional Rights” on September 25, 2017, which listed several rights, including, in pertinent part, the following:

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<sup>3</sup> On February 16, 2018, the State filed its appellee’s brief on the merits and appellant filed his reply brief on the merits.

5. I have the right to appeal. If the punishment assessed by the court does not exceed the punishment agreed to in the plea bargain and recommended by the prosecuting attorney, then I will be allowed to appeal only with the court's permission, except for matters raised in written motions filed prior to trial. If the punishment assessed by the court exceeds the punishment agreed to in the plea bargain and recommended by the prosecuting attorney, then I will be allowed to appeal even without the court's permission. (emphasis added).

Appellant later initialed the statement, "Knowing the above rights I hereby freely and voluntarily enter the following plea and waive these rights:" next to the box marked "Guilty." Near the bottom of the plea waiver, appellant signed under the following statement:

I understand these rights and admonitions. I am aware of the consequences of a plea of "guilty" or "nolo contendere." I am not currently suffering from any mental or physical condition, nor am I under the influence of any substance, that impairs my judgment or understanding. I voluntarily, knowingly, and intelligently waive my rights to a trial by jury, to remain silent, to an attorney (if applicable), to a pre-sentence investigation and report, and to appeal. (emphasis added).

As noted above, on the same day as the plea, September 25, 2017, the trial court accepted appellant's guilty plea and the plea-bargain agreement, which was recorded on the docket that day as 100 days in county jail, no fine plus costs, a 180-day driver's license suspension, and he was given credit for 65 days, and the punishment assessed did not exceed the plea bargain agreement. Then appellant and his counsel signed the certification of the right of appeal which stated that this "is a plea-bargain case and the defendant has NO right to appeal." Furthermore, the trial



court's findings reflect that it had admonished appellant and counsel at the time of appellant's plea that he had no right to appeal the case, and that this waiver extended to pre-trial matters.

The proceedings and documents from the trial court are entitled to a "presumption of regularity." "The presumption of regularity is a judicial construct that requires a reviewing court, absent evidence of impropriety, to indulge every presumption in favor of the regularity of the proceedings and documents in the lower court." *Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000) (citation omitted). Thus, the recitals in court documents "are binding in the absence of direct proof of their falsity." *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984). The plea waiver and certification of defendant's right of appeal are documents from the trial court included in the record on appeal and, therefore, are entitled to a "presumption of regularity."

The burden is on the defendant to overcome this presumption. *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). Although the plea waiver did not mention that appellant had waived the right to have his plea hearing recorded, the trial court found that he had waived the 10-day period before sentencing, and there was no reporter's record of the plea and sentence hearings. Without a reporter's record of the plea and sentence hearings, appellant

cannot demonstrate that he did not waive his right to appeal the pretrial suppression motion ruling in open court as part of his plea bargain.

Furthermore, the plea waiver document supported the trial court's findings and conclusions reciting the terms of the plea bargain, and the certification that appellant had no right of appeal. Appellant initialed under the statement on the plea waiver that he was freely and voluntarily waiving all of the rights listed above when he pleaded guilty, which specifically included the right to challenge matters raised in pretrial motions. *See Marsh*, 444 S.W.3d at 659 (agreeing with State that record shows that appellant knowingly and voluntarily waived his right to appeal motion to suppress because signed plea agreement sets out the waiver). Because we must presume that the trial court's records are binding, without proof of their falsity, we must presume that appellant waived his right of appeal of the pretrial suppression ruling in open court as part of his plea bargain and, thus, the certification was valid. *See Breazeale*, 683 S.W.2d at 450. And, because appellant's sentence was the same as the recommended sentence in his plea bargain, the waiver was valid. *See Blanco*, 18 S.W.3d at 219–20.

Therefore, the clerk's record supports the trial court's certification that this is a plea bargain case and that appellant has no right of appeal. *See TEX. R. APP. P. 25.2(a)(2); Dears*, 154 S.W.3d at 615. Because appellant has no right of appeal, we must dismiss this appeal. *See Chavez v. State*, 183 S.W.3d 675, 680 (Tex. Crim.

App. 2006) (“A court of appeals, while having jurisdiction to ascertain whether an appellant who plea-bargained is permitted to appeal by Rule 25.2(a)(2), must dismiss a prohibited appeal without further action, regardless of the basis for the appeal.”).

**Conclusion**

Accordingly, we grant the State’s motion and dismiss the appeal for want of jurisdiction. *See* TEX. R. APP. P. 43.2(f). We dismiss any other motions as moot.

**PER CURIAM**

Panel consists of Justices Jennings, Keyes, and Higley.

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