

Affirmed and Majority and Dissenting Opinions filed February 22, 2018.



In The

Fourteenth Court of Appeals

NO. 14-16-00304-CR

MICHAEL BELLE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Cause No. 15CR0003**

D I S S E N T I N G O P I N I O N

Appellant, a criminal defendant convicted of being a felon in possession of a firearm, has asserted his constitutionally protected right to represent himself in this appeal. He has filed a handwritten brief in this court. Appellant's lack of legal know-how makes some of his arguments hard to discern and his brief challenging to process. The court disposes of five of appellant's issues on briefing waiver rather than address the merits of the arguments. A merits review might reveal reversible error.

Once a criminal defendant files a notice of appeal invoking the jurisdiction of this court,¹ we have the authority to address any issue or claim pertinent to the judgment, unless otherwise restricted by statute.² The Court of Criminal Appeals has underscored the importance of our role, explaining that we hold the authority to revise the whole case upon the law and facts, as shown by the record.³ We have discretion to review claims preserved in the trial court but not raised by either party on appeal.⁴ But, we have no discretion to pass over issues an appellant presents.⁵ We are obliged to conduct a thorough review of an appellant's issues.⁶

Standards of Review Governing Briefing Waiver in Criminal Cases

Texas Rule of Appellate Procedure 38 spells out the briefing requirements.⁷ Rule 38.1(i) provides that an appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."⁸ But, Rule 38.9 tempers these requirements by providing that substantial compliance suffices.⁹ Rules 38.1 and 38.9 are intended to ensure that courts decide cases on their merits, rather than dismiss them on technical grounds.¹⁰ In keeping with this principle, courts of appeals seldom dispose of issues in criminal appeals based on briefing waiver. In *Henry v. State*, for example, we rejected the

¹ *Pfeiffer v. State*, 363 S.W.3d 594, 599 (Tex. Crim. App. 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007).

⁶ *Id.*

⁷ Tex. R. App. P. 38.

⁸ Tex. R. App. P. 38.1(i).

⁹ Tex. R. App. P. 38.9.

¹⁰ *Portillo v. State*, 117 S.W.3d 924, 927 n.1 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

State's argument that the appellant had not adequately briefed an issue by failing to cite the record because we were able to locate the relevant exhibits on our own.¹¹ Generally speaking, in criminal appeals, if we can discern the gist of the complaint, we address the merits of the appellant's argument.

The Finding of Briefing Waiver in Today's Case

Issue One Part A: comments made by trial court

The court concludes that appellant waived his contention that the trial court showed bias because appellant's brief "contains no references to the record where such comments were made."¹² In his brief, appellant points to specific events. He asserts that the first time he went before the trial judge, on August 19, 2015, the trial judge stated, "you realize anyone who represents himself has a fool for a client." Appellant also explains that when the trial judge admonished him during the *Spears* hearing,¹³ she continually said "when you're convicted" instead of "if you're convicted." Appellant gives no specific record citation, but he gives the date of the hearing and identifies the judge's comments. Instead of finding briefing waiver based on appellant's failure to cite the record, practice and tradition call us to address the merits of appellant's argument.¹⁴

Issue One Part C: failing to hold a hearing on pre-trial motions

Under Part C, appellant asserts two issues. In the first, he says the trial court abused its discretion by not allowing him to file an interlocutory appeal of the

¹¹ See *Henry v. State*, 331 S.W.3d 552, 554 n.1 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

¹² See *ante* at 4.

¹³ See *Spears v. McCotter*, 766 F.2d 179, 180 (5th Cir. 1985) (suggesting procedure to investigate whether a prisoner's motion to proceed in forma pauperis should be denied on grounds of frivolity).

¹⁴ See *Portillo v. State*, 117 S.W.3d 924, 927 n.1 (noting that Rule 38.1 was intended to ensure that cases are decided on merits rather than dismissed on technical grounds).

judge's decision to hold hearings on appellant's pretrial motions before jury selection but later than appellant wanted the hearings to occur. The court disposes of this issue on briefing waiver, stating appellant did not provide either citations to the record or authority in support of his argument.¹⁵ Appellant did both.

Appellant provides record citations in support of different points.

- Appellant cites page 11 of the Clerk's Record in support of his contention that he presented three motions and requested a ruling on the motions.
- Appellant cites pages 71 through 79 of the Clerk's Record to show where he presented his motion to dismiss the indictment.
- Appellant cites pages 80 through 85 of the Clerk's Record in reference to his motion to suppress evidence.
- Appellant cites pages 86 through 89 of the Clerk's Record in reference to his motion for a pretrial hearing on the admissibility of prior offenses.

Appellant cites to Texas Rule of Appellate Procedure 18.6 as the authority for his argument that he is entitled to an interlocutory appeal. Though the cited rule, which governs issuance of the mandate in accelerated appeals, is not the correct rule, the error is hardly fatal to a merits review. Parties, even represented ones, do not always cite the correct authority in support of their arguments and generally we still reach the merits. Appellant's argument can be understood and appellant's briefing substantially complies with the briefing rules.¹⁶ Though his brief contains a reference to the wrong rule, we have addressed arguments with similar shortcomings.¹⁷

Issue One Part D: providing video of appellant's arrest to prosecutor

Under Part D, appellant claims that the trial court abused its discretion by

¹⁵ See *ante* at 5.

¹⁶ See Tex. R. App. P. 38.1.

¹⁷ See *Bufkin v. State*, 179 S.W.3d 166, 173–74 (Tex. App.—Houston [14th Dist.] 2005), *aff'd* 207 S.W.3d 779 (Tex. Crim. App. 2006).

giving the copy of his arrest video to the district attorney instead of to him. Appellant argues that the trial judge should have given a copy of the video directly to him because he explained to the trial judge that he would be allowed to watch the video at the jail. Though appellant cites to page ten of the clerk's record in support of his argument, the court disposes of appellant's issue on briefing waiver, citing as grounds that appellant's brief contains no references to the record.¹⁸

Conclusion

Although appellant could have presented more cogent arguments and better citations in his pro se briefing to this court, appellant's briefing is not so poor that his arguments are unintelligible or unworthy of merits review. In some places, appellant's brief does not lack the citation to the record or citation to authority that the court cites as the reason for today's waiver-due-to-inadequate-briefing holdings. We would serve appellate justice best by opting for merits review and analyzing the issues appellant has raised in challenging his felony conviction. Because the court instead finds briefing waiver, I respectfully dissent.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise. (Donovan, J., majority).

Publish — TEX. R. APP. P. 47.2(b).

¹⁸ See *ante* at 5.