



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00371-CV

IN THE MATTER OF THE GUARDIANSHIP of Donna Jean **HAMMOND**,
an Incapacitated Person

From the 49th Judicial District Court, Zapata County, Texas
Trial Court No. 9,688
Honorable Jose A. Lopez, Judge Presiding

PER CURIAM

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: February 14, 2018

DISMISSED

Ronald Smith appeals the trial court's order appointing his sister, Vicki Anderson, as the permanent guardian of their mother and her estate. After filing a pro se notice of appeal, Smith filed a docketing statement, noting there were three court reporters who covered the proceedings in the trial court: Julie Winston, Blanca Hill, and Cyndy Lenz. Smith noted in his docketing statement that he had not requested the reporter's record from the court reporters.

On July 7, 2017, the day the reporter's record was due, Ms. Lenz filed a notice of late record, stating she had not received a designation for the reporter's record and was "unsure of what Mr. Smith is requesting to be included." Ms. Lenz's notice indicates Smith was provided a courtesy copy of the notice. On July 12, 2017, we ordered Smith to provide proof to this court by July 27, 2017, that he requested the reporter's record. We advised Smith that if he failed to timely provide

such proof, his brief would be due, and this court would only consider those issues or points raised in appellant's brief that did not require a reporter's record for a decision.

The following day, Ms. Hill filed a notice of late record stating a designation of the reporter's record had not been filed. Ms. Hill certified in her notice of late record she served a copy of the notice on the parties. On July 19, 2017, Ms. Winston filed two volumes of the reporter's record. However, by July 27, 2017, Smith had not provided any proof to this court that he had requested a reporter's record or proof of what he requested be included in the reporter's record.

On August 3, 2017, we issued a second order advising Smith that we had not received written proof that he requested a reporter's record from Ms. Lenz or Ms. Hill. We ordered Smith to provide written proof to this court by August 14, 2017, that he had requested a reporter's record. We again advised Smith that if he failed to timely provide such proof, his brief would be due, and this court would only consider those issues or points raised in appellant's brief that did not require a reporter's record. Smith did not provide any such proof or otherwise timely respond to our July 7, 2017 or August 3, 2017 orders regarding his request for the reporter's record.

After the clerk's record was filed, we ordered Smith to file the appellant's brief by October 23, 2017. On October 23, 2017, Smith filed a document containing a description of the trial court proceedings, numerous exhibits, and occasional assertions that the trial court had erred. On October 27, 2017, we issued an order notifying Smith that his brief flagrantly violated the Texas Rules of Appellate Procedure 38.1, specifically:

- the brief did not identify the parties and counsel, Tex. R. App. P. 38.1(a);
- the brief did not contain a table of contents, Tex. R. App. P. 38.1(b);
- the brief did not contain an index of authorities, Tex. R. App. P. 38.1(c);
- neither the statement of the case nor the statement of facts was supported by references to the record, Tex. R. App. P. 38.1(d), (f);
- the brief did not state concisely all issues or points presented for review, Tex. R. App. P. 38.1(f)
- the brief did not contain a summary of the argument, Tex. R. App. P. 38.1(h);

- the brief did not include a clear and concise argument for the contentions made, Tex. R. App. P. 38.1(i);
- the argument did not contain appropriate citations to authorities and to the record, Tex. R. App. P. 38.1(i); and
- the brief did not include an appendix containing the items specified in Rule 38.1(k), Tex. R. App. P. 38.1(k).

We also noted the brief did not contain a certificate of service, as required by Rule 9.5. We ordered Smith to file an amended brief by November 13, 2017, that corrected these deficiencies. Our order also advised Smith that if a timely amended brief was not filed, we may strike the brief, prohibit him from filing another, and proceed as if he had failed to file a brief, which would include dismissal of this appeal for want of prosecution.

On November 13, 2017, Smith filed a motion for extension of time to file the appellant's brief. His motion stated he had been ill and did not have transcripts from hearings covered by Ms. Hill and Ms. Lenz. His motion also asserted he could not comply with our order without those transcripts and he did not "know how to proceed to get them." Anderson then filed a motion to dismiss this appeal for want of prosecution based on Smith's delays and failure to comply with this court's order.

We took no action on Anderson's motion to dismiss, granted Smith's motion for an extension, and ordered Smith to file the amended appellant's brief by December 22, 2017. Our order granting Smith's motion recited the procedural history of this case, including his failure to comply with or respond to our two orders to provide proof of what he requested be included in the reporter's record. We again advised Smith that if a timely amended brief was not filed, we may strike the brief, prohibit him from filing another, and proceed as if he had failed to file a brief, which would include dismissal of this appeal for want of prosecution.

On December 23, 2017, Smith filed a letter stating he did not have the record, and that he was unable to comply with this court's briefing order without the record. The following day,

Anderson filed a second motion to dismiss this appeal for want of prosecution based on Smith's failure to comply with this court's orders and his failure to file an amended brief. On December 29, 2017, we issued an order directing the clerk of this court to provide Smith with a copy of the volumes of the reporter's record that had been filed in this court. We took no action on Anderson's second motion, but our December 29, 2017 order required Smith to file his amended brief in compliance with this court's prior orders by January 18, 2018, and advised Smith that if he did not timely file his amended brief, this appeal would be dismissed for want of prosecution.

On January 8, 2018, Smith filed another letter in this court stating he received the reporter's record from the clerk of this court, but he has not received the transcripts from Ms. Lenz and Ms. Hill. Smith's letter again asserts he is unable to comply with this court's prior orders without the transcripts from Ms. Lenz and Ms. Hill. Smith has not filed an amended appellant's brief.

Appellate "briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case," and thus "substantial compliance with [the briefing rules in Texas Rule of Appellate Procedure 38.1] is sufficient." Tex. R. App. P. 38.9. But "[i]f the court determines that this rule has been flagrantly violated, it may require a brief to be amended, supplemented, or redrawn. If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief." *Id.* R. 38.9(a). If an appellant fails to file a brief and does not reasonably explain the failure, we may dismiss the appeal for want of prosecution. *Id.* R. 38.8(a)(1). We may also dismiss an appeal if an appellant has failed to comply with a court order. *Id.* R. 42.3(c).

As noted in this court's October 27, 2017 order, we determined Smith's brief flagrantly violated Rule 38.1 and required Smith to amend his brief to correct the deficiencies noted in the order. Smith has not filed an amended brief that complies with Rule 38.1 or this court's October 27, 2017 order. We therefore strike Smith's brief and proceed as if Smith failed to file a brief. *See*

id. R. 38.9(a). Smith's sole explanation for his failure to file an amended brief is that he is unable to comply with our orders without the transcripts from Ms. Lenz and Ms. Hill, which he did not know how to request. In light of the recited procedural history of this case, we conclude Smith has failed to reasonably explain his refusal to file an amended brief. *See id.* R. 38.8(a)(1). We also conclude Smith failed to comply with this court's December 29, 2017 order. *See id.* R. 42.3(c). We therefore dismiss this appeal. *See id.* R. 38.8(a)(1), 42.3(c). Because we dismiss this appeal on our own motion, Anderson's motions to dismiss this appeal for want of prosecution are denied as moot.

PER CURIAM