Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00536-CV

Arturo **DELGADILLO**,
Appellant

v.

BANDERA AUTO SALES,
Appellee

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CI19868
Honorable Norma Gonzales, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 3, 2020

AFFIRMED

Appellant Arturo Delgadillo appeals from the trial court's dismissal of his lawsuit for want of prosecution. We affirm.

The clerk's record in this appeal reflects that on October 26, 2017, Delgadillo sued Bandera Auto Sales for breach of contract and for claims under the Texas Deceptive Trade Practices Act, relating to his purchase of a used automobile. On February 25, 2019, the trial court issued an order, stating that the underlying case had been pending for an extended period of time, had not been prosecuted, and would be dismissed for want of prosecution unless Delgadillo showed "good and

sufficient cause" for retention of the case on the court's docket at a hearing on March 26, 2019. The clerk's record does not reflect that the hearing occurred on March 26, 2019. Instead, on June 25, 2019, the trial court issued another order, again stating the underlying case had been pending for an extended period of time and had not been prosecuted. The order explained Delgadillo's case would be dismissed for want of prosecution unless he showed "good and sufficient cause" for retention of the case on the court's docket at a hearing on July 30, 2019. On July 30, 2019, the trial court signed an order dismissing the case for want of prosecution. On August 12, 2019, Delgadillo filed a notice of appeal.

In his pro se brief, Delgadillo argues that because he is imprisoned, the trial court erred in not allowing him to appear at the July 30, 2019 hearing by video or telephonic conference. Delgadillo also argues that his inability to appear should not have been a basis for dismissal of his case and that the trial court erred in not allowing his family members to introduce evidence at the hearing. Delgadillo further claims that the trial court stated at the hearing his case was "too old"; according to Delgadillo, a defendant can still be served after a statute of limitations runs.[1] There is no reporter's record of the July 30, 2019 hearing, so we do not know what was argued by the parties or what was said by the trial court.[2] Additionally, the clerk's record does not contain any filing of the evidence Delgadillo claims his family members attempted to introduce at the hearing.

"A trial court has the authority to dismiss a suit for want of prosecution pursuant to two sources: Texas Rule of Civil Procedure 165a and its own inherent power to dismiss when the plaintiff fails to prosecute the case with due diligence." *In re J.M.H.*, No. 01-11-00591-CV, 2013

[1]From this statement in appellant's brief, it appears he is conceding that he never served Bandera Auto Sales with the underlying lawsuit. There is nothing in the clerk's record to indicate that Bandera Auto Sales was ever served with citation.

[2]It appears no record was taken. In his brief, appellant relies on what his family members have told him about the hearing.

WL 396244, at *1 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (mem. op.) (citing *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999)); *see also* TEX. R. CIV. P. 165a (providing that the trial court may dismiss a case for want of prosecution when the party seeking affirmative relief fails to appear for a hearing or trial, or when a case is not disposed of within the time standards *proscribed* by the Texas Supreme Court and no good cause is shown); TEX. R. JUD. ADMIN. 6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (providing that civil nonjury cases should be disposed of within twelve months and civil jury cases should be disposed of within eighteen months).

We review the trial court's decision to dismiss a case for want of prosecution under an abuse of discretion standard. *In re J.M.H.*, 2013 WL 396244, at *2; *see Allen v. Rushing*, 129 S.W.3d 226, 229 (Tex. App.—Texarkana 2004, no pet.) (reviewing dismissal of an inmate's civil suit for want of prosecution for abuse of discretion). Thus, we will disturb the trial court's decision only if it amounts to a clear abuse of discretion. *In re J.M.H.*, 2013 WL 396244, at *2; *Fox v. Wardy*, 225 S.W.3d 198, 199 (Tex. App.—El Paso 2005, pet. denied). "A trial court abuses its discretion when it acts in an arbitrary and unreasonable manner, without reference to any guiding rules or principles." *In re J.M.H.*, 2013 WL 396244, at *2. When determining whether to dismiss a case for want of prosecution, the trial court may consider the entire case, including the amount of activity in the case, the length of time the case was on file, requests for a trial date, and the existence of reasonable excuses for delay. *Id.*; *see WMC Mortg. Corp. v. Starkey*, 200 S.W.3d 749, 752 (Tex. App.—Dallas 2006, pet. denied) (explaining that no single factor is dispositive).

Here, the trial court's order does not give its reason for dismissing the cause for want of prosecution. "If the order dismissing the case does not specify a reason for the dismissal, we will affirm if any proper ground supports the dismissal." *In re J.M.H.*, 2013 WL 396244, at *2; *see Fox*, 225 S.W.3d at 200. "The appellant bears the burden of presenting a record demonstrating that

the trial court abused its discretion in dismissing the case." *In re J.M.H.*, 2013 WL 396244, at *2; *see Fox*, 225 S.W.3d at 200. "If the appellant fails to bring forth a record of the dismissal hearing, we indulge every presumption in favor of the trial court's findings and presume that the evidence before the trial court was adequate to support its decision." *In re J.M.H.*, 2013 WL 396244, at *2; *see Herrera v. Rivera*, 281 S.W.3d 1, 6-7 (Tex. App.—El Paso 2005, no pet.) (holding that because there was no record of the hearing on the motion to dismiss for want of prosecution, the appellate court indulged every presumption in favor of the trial court's ruling and "presume[d] that the evidence before the trial court was adequate to support its decision").

Delgadillo argues that the trial court dismissed his case because he is imprisoned. However, nothing in the record indicates Delgadillo's imprisonment was the basis for the trial court's dismissal. Delgadillo further argues that the trial court erred in not allowing him to appear by video or telephonic conference. It is well established that litigants cannot be denied access to the courts simply because they are inmates. *Ringer v. Kimball*, 274 S.W.3d 865, 867 (Tex. App.—Fort Worth 2008, no pet.) (citing *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)). "However, an inmate does not have an absolute right to appear in person in every court proceeding." *Id*. "The inmate's right of access to the courts must be weighed against the protection of our correctional system's integrity." *Id*.

However, a trial court abuses its discretion if it fails to consider an inmate's "request to participate at trial by alternative means." *Id*. at 868 (quoting *In re D.D.J.*, 136 S.W.3d 305, 314 (Tex. App.—Fort Worth 2004, no pet.)). "This decision is grounded in '[t]he right of a prisoner to have access to the courts[,] [which] entails not so much his personal presence as the opportunity to present evidence or contradict the evidence of the opposing party.'" *Id*. at 868-69 (quoting *In re D.D.J.*, 136 S.W.3d at 314). There is nothing in the record to reflect that the trial court failed to consider a request made by Delgadillo. And, in his brief, Delgadillo does not argue that the trial

court abused its discretion by not considering his request for video or telephonic conference.[3] Instead, he argues that the trial court erred by denying his request.

In determining whether the trial court abused its discretion in denying Delgadillo's video or telephonic request, we apply the same factors applicable to bench warrant requests. *See id*. at 869. With regard to an inmate's request for a bench warrant, the supreme court in *In re Z.L.T.*, 124 S.W.3d 163, 165-66 (Tex. 2003), identified a variety of factors that trial courts should consider, including (1) the cost and inconvenience of transporting the prisoner to the courtroom; (2) the security risk the prisoner presents to the court and public; (3) whether the prisoner's claims are substantial; (4) whether the matter's resolution can reasonably be delayed until the prisoner's release; (5) whether the prisoner can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; (6) whether the prisoner's presence is important in judging his demeanor and credibility; (7) whether the trial is to the court or a jury; and (8) the prisoner's probability of success on the merits. The court held that a trial court has no independent duty to identify and evaluate on the record these relevant factors before denying a request. *Id*. at 166. According to the supreme court, "our rules place the burden on litigants to identify with sufficient specificity the grounds for the ruling they seek." *Id*. (citing Texas Rule of Civil Procedure 21 and Texas Rule of Appellate Procedure 33.1). "A litigant's status as an inmate does not alter that burden." *Id*. "The central issue is the trial court's responsibility to independently inquire into relevant factors not provided by the moving party." *Id*. Thus, even though an inmate had listed the above factors in his request for a bench warrant, because the inmate

[3]In his brief, Delgadillo states that the trial court "erred, or committed error and abused [its] discretion" by not ordering video or telephonic conference. Assuming Delgadillo is attempting to argue the trial court abused its discretion by not considering his request to attend the hearing by alternative means, there is nothing in the record to indicate that the trial court did not consider his request. Thus, he would have failed in his burden on appeal to show the trial court abused its discretion. *See In re J.M.H.*, 2013 WL 396244, at *2 (explaining that the appellant bears the burden of presenting an appellate record demonstrating trial court's abuse of discretion in dismissing the case).

did not include "information by which the court could assess the necessity of his appearance," the inmate failed to meet his burden and the trial court did not abuse its discretion by denying his request. *Id*.

We see no reason why the factors and standards relating to requests for bench warrants should not apply in this case. *See Ringer*, 274 S.W.3d at 869 (applying same factors and standards applicable to an inmate's request for a bench warrant to an inmate request for video or telephonic conference). Delgadillo has not asserted, and there is nothing in the appellate record to indicate, that he had *access* to video conferencing capabilities within the prison facility in which he is incarcerated. *See id*. "In such cases, an inmate's request to appear by a video conference that would require transporting the inmate off prison grounds implicates the same *Z.L.T.* factors regarding the protection of our correctional system's integrity as an inmate's request for a bench warrant." *Id*. "Accordingly, an inmate who seeks to appear by video conference has the burden to demonstrate under the factors listed in *Z.L.T.* why he should be permitted to appear by video conference, and the trial court has no independent duty to evaluate such a request." *Id*.

In his brief, Delgadillo merely states that the trial court erred by failing to order a video or telephonic conference. However, as noted, the trial court had no independent duty to evaluate his request. *See id*. Delgadillo's brief does not address the *Z.L.T.* factors or argue how the specific facts in this case apply to those factors. *See In re Z.L.T.*, 124 S.W.3d at 166. Thus, he has failed to show in his brief how the trial court abused its discretion. *See id*.; s*ee also* TEX. R. APP. P. 38.1(i) (inadequate briefing of appellate issue); *In re S.R.V.*, No. 04-17-00556-CV, 2018 WL 626533, at *3 (Tex. App.—San Antonio 2018, no pet.) (mem. op.). Although Delgadillo is representing himself on appeal, he "is generally held to the same standards as licensed attorneys and must comply with all applicable rules, including the rules governing appellate briefs." *In re S.R.V.*, 2018 WL 626533, at *3; *see also Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (explaining there

cannot be separate procedural rules for those with counsel and those who represent themselves); *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978) (same).

Finally, in considering the merits of the trial court's dismissal of Delgadillo's case for want of prosecution, we note that at the time the trial court dismissed Delgadillo's case for want of prosecution, the case had been pending for more than twenty-one months without activity. The record does not reflect that Delgadillo ever served the defendant with his petition. *See Allen v. Rushing*, 129 S.W.3d 226, 229 (Tex. App.—Texarkana 2004, no pet.) ("Evidence of attempting to serve the named defendants is one of many factors an appellate court may consider in reviewing a trial court's order dismissing a case for want of prosecution."). While Delgadillo claims his family members attempted to introduce evidence at the hearing, no reporter's record was taken. Thus, the record does not reflect whether any evidence was offered on behalf of Delgadillo relevant to the issue of whether he had prosecuted his suit with diligence or whether the trial court prohibited such evidence from being offered. *See Fox*, 225 S.W.3d at 200 ("Fox complains that the trial court prohibited him from presenting any evidence at the dismissal hearing, but the record does not reflect that Fox offered or the court refused to consider any evidence relevant to whether Fox had prosecuted his suit with due diligence."). Nor does any such evidence or response appear in the clerk's record. *See Herrera*, 281 S.W.3d at 6-7; *see also Cappetta v. Hermes*, 222 S.W.3d 160, 164 (Tex. App.—San Antonio 2006, no pet.) ("To avoid dismissal, Cappetta was required to show he exercised reasonable diligence in prosecuting the case."). Moreover, the record does not reflect that Delgadillo filed a motion to reinstate his case. *See Allen*, 129 S.W.3d at 231 (considering fact that plaintiff did not file motion to reinstate when addressing whether plaintiff diligently prosecuted his case).

We therefore conclude the record before us does not show any abuse of discretion by the trial court in dismissing Delgadillo's case for want of prosecution. *See Fox*, 225 S.W.3d at 200

(holding that trial court did not abuse its discretion in dismissing case for want of prosecution when suit had been on file for seven months with minimal activity, citation was not issued and defendant was not served until after court issued Rule 165a notice, plaintiff presented no evidence that he offered and court refused to consider evidence relevant to whether he prosecuted suit with due diligence, and plaintiff presented no evidence explaining delay in service); *Allen*, 129 S.W.3d at 231 (noting, in affirming dismissal for want of prosecution, that case was on file for thirteen months, record did not indicate that plaintiff had contacted clerk's office to effectuate service of process, and plaintiff did not file motion to reinstate after dismissal).

The judgment of the trial court is affirmed.

Liza A. Rodriguez, Justice