COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00418-CR

DEVIN KEITH CUTLER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 9 OF TARRANT COUNTY
TRIAL COURT NO. 1403493

MEMORANDUM OPINION[1]

Appellant Devin Keith Cutler appeals the trial court's ruling that he is not indigent for purposes of his appeal. In addition, two motions are pending that were filed before and led up to the trial court's ruling that is before us—(1) Appellant's appointed attorney's motion to withdraw as counsel because Appellant is no longer indigent and (2) Appellant's pro se motion to withdraw his

[1]*See* Tex. R. App. P. 47.4.

appeal because, without the assistance of counsel, he has no desire to prosecute the appeal pro se. We affirm the trial court's ruling that Appellant is no longer indigent, grant appointed counsel's motion to withdraw as counsel for Appellant, and grant Appellant's pro se motion to dismiss his appeal.

I. Background

On November 9, 2015, a jury found Appellant guilty of the offense of DWI-Misdemeanor Repetition, and the trial court assessed his punishment at 180 days' confinement in the Tarrant County Jail and a fine of $500. The trial court suspended Appellant's sentence and placed him on community supervision for twenty-four months. On the same date, November 9, 2015, Appellant filed a notice of appeal that both he and his appointed trial attorney, Patrick T. Curran, signed.

Subsequently, on November 20, 2015, Mr. Curran filed a motion to withdraw as counsel for Appellant. In his motion, Mr. Curran explained that on November 13, 2015, the Tarrant County Office of Court Appointments re-evaluated Appellant and determined that he was no longer indigent. The tenor of Mr. Curran's motion suggested that Appellant's status was changed without any prior notice to Mr. Curran and without Mr. Curran's participation. Because Mr. Curran had been appointed and had not been retained for the appeal, he asked that he be allowed to withdraw as counsel.

On December 7, 2015, we abated the appeal for a hearing "with appellant and counsel present" to determine whether Appellant desired to prosecute his

appeal, whether Appellant was indigent, and whether new counsel should be appointed for Appellant and, in the event Appellant wished to proceed pro se, to ensure the trial court admonished Appellant of the dangers and disadvantages of self-representation. A visiting judge conducted a hearing on December 21, 2015. Appellant and counsel for the State appeared at the hearing, but Appellant's counsel, Mr. Curran, did not. In response to the trial court's first question, Appellant informed the trial court that he was no longer indigent; however, it appears that Appellant was relying on the determination by the Office of Court Appointments that he was no longer indigent, and no proof was offered or admitted that such a determination had been made or recommended to the trial court, nor even as to who made that determination or how. Appellant informed the trial court that he had spoken with some attorneys and determined that he could not afford to hire one. Yet when the trial court asked Appellant to confirm he was no longer indigent, Appellant did so verbally but with no more information than he had when the hearing started. When the trial court asked Appellant if he wanted to prosecute his appeal pro se, Appellant declined, and the trial court advised him that, under those circumstances, he should file a motion to withdraw his appeal. Two days later, on December 23, 2015, Appellant filed in this Court a pro se motion to withdraw his appeal.

On February 19, 2016, we abated the appeal a second time. Among our concerns was the fact that Appellant appeared at the December 21, 2015 abatement hearing without the assistance of counsel. Because we had not yet

ruled on Mr. Curran's motion to withdraw, he still represented Appellant. *See* Tex. Code Crim. Proc. Ann. art. 26.04(j)(2) (West Supp. 2016). Accordingly, we abated the appeal a second time for the trial court to conduct the hearing with Mr. Curran present to assist Appellant in responding to a specific list of unanswered issues in our order of abatement concerning Appellant's indigent status.

The presiding trial judge conducted the second hearing on March 9, 2016. At the hearing, the trial court found that Appellant did not meet the indigence requirements and ruled on the record that Appellant was not indigent. After being advised by the trial court that he could appeal that adverse ruling, Appellant stated his desire to do so. The trial court appointed Mr. Curran to assist Appellant with the appeal of that issue. *See Whitehead v. State*, 130 S.W.3d 866, 879 n.70 (Tex. Crim. App. 2005) (holding trial court could delay leave to withdraw even to retained counsel until indigence issue was concluded).

On June 6, 2016, Mr. Curran, on behalf of Appellant, filed a letter brief addressing the indigence issue in depth and urging that, based upon Appellant's testimony at the second hearing, Appellant remained indigent. On June 16, 2016, the State filed its response opposing Appellant's continued indigence.

II. Discussion

A. Lack of Compliance with Article 26.04(p)

Appellant was indigent for purposes of the trial court proceedings; therefore, he argues that we must presume that he remains indigent unless "the defendant, the defendant's counsel, or the attorney representing the state"

moved to reconsider that determination. Tex. Code Crim. Proc. Ann. art. 26.04(p). Because the record does not show that he, his attorney, or the prosecutor ever moved to have the trial court reconsider his status, Appellant initially contends that his indigent status was re-evaluated and changed in violation of article 26.04(p).

Like Appellant, we too were confused by the manner in which his status as an indigent was changed. When we abated the appeal the second time on February 19, 2016, one of the questions we specifically listed in our order sought clarification about how Appellant's status had been changed and by whom in the absence of a motion by "the defendant, the defendant's counsel, or the attorney representing the state," as required by article 26.04(p).

The Texas Fair Defense Act, adopted in 2001, mandated a task force on indigent defense for the adoption of formal and fair procedures for indigence determinations and appointment of counsel for indigent criminal defendants by all counties in Texas, apparently for the first time. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 906, § 14, 2001 Tex. Gen. Laws 1800, 1812, *repealed by* Act of May 26, 2011, 82d Leg., R.S., ch. 984, § 15, 2011 Tex. Sess. Law Serv. 2460, 2475 (West). The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county are now required to "adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant arrested for, charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony." Tex. Crim.

Proc. Code Ann. art. 26.04(a). They are also required to adopt uniform procedures and financial standards for determining whether defendants are indigent and to establish formal procedures for qualifications and appointment of counsel. *Id.* art. 26.04(*l*). In 2006, Tarrant County district courts trying criminal cases established the Tarrant County District Courts Felony-Court Appointment Plan. Subsequently, the statutory county criminal courts of Tarrant County adopted a similar plan. The Tarrant County Plans established an Office of Court Appointments with a magistrate and financial investigation officers to collect necessary information from defendants to guide judges in determining indigence.[2]

At neither the first hearing nor the second hearing on abatement of March 9, 2016, however, did Appellant object to the reevaluation of his status as indigent after his conviction in the absence of any motion as required by article 26.04(p), nor was that issue addressed by the trial court. Accordingly, we hold that error, if any, was not preserved. *See* Tex. R. App. P. 33.1.

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[2]Notably, it remains the trial court's ultimate duty to determine whether an accused or a defendant is indigent, not that of a financial investigation officer or the magistrate (unless designated by the trial court to do so, which was not shown to have been done here). The Plans do not trump or replace the applicable sections of the Texas Code of Criminal Procedure or the Texas Rules of Appellate Procedure for determining indigence. The Plans adopted for each county in Texas must be filed with the Texas Indigent Defense Commission, and may be accessed on the Commission's website at Texas Indigent Defense Commission, http://www.tidc.texas.gov (last visited August 29, 2016); *see also* Texas Indigent Defense Commission, http://tidc.tamu.edu/public.net/ (last visited on August 29, 2016).

B. Whether Appellant was Indigent

1. Standard of Review

A defendant is indigent for purposes of the appointment of counsel if he is not financially able to employ counsel. Tex. Code Crim. Proc. Ann. art. 1.051(b) (West Supp. 2016). For purposes of the record, the defendant must be unable to pay or give security for the record. Tex. R. App. P. 20.2. Indigence determinations are made at the time the issue is raised and are decided on a case-by-case basis. *McFatridge v. State*, 309 S.W.3d 1, 5 (Tex. Crim. App. 2010). Determining indigence for the purposes of appointing counsel and indigence for purposes of obtaining a free appellate record are discrete inquiries, but the factors to be considered are the same. *Id.* at 5–6. A defendant can be found indigent for one purpose without being found indigent for the other. *Id.* at 6. Relevant to both indigence determinations are the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, number and ages of dependents, and spousal income that is available to the defendant. *Id.* Each county across this State should have, and now must have, procedures and financial standards that it applies for a judge to determine whether a defendant is indigent for purposes of appointing counsel. *Id.*

Courts use a two-step process when making indigence determinations for purposes of a free record for appeal. *Id.* First, the defendant must make a *prima facie* showing of indigence. Once the defendant satisfies this initial burden of production, the burden then shifts to the State to show that the defendant is not,

in fact, indigent. *Id.* Essentially, this means that unless there is some basis in the record to find the defendant's *prima facie* showing to be inaccurate or untrue, the trial court should accept it as sufficient to find him indigent. *Id.* After a defendant establishes a *prima facie* showing of indigence, an appellate court can uphold a trial court's determination that the defendant was not indigent only if the record contains evidence supporting such a determination. *Id.* This two-step process also applies when determining whether a person is indigent for purposes of appointed counsel. *Id.* An appellate court should uphold a trial court's ruling denying indigent status only if it finds that the trial court, having utilized this two-step process, reasonably believed the defendant was not indigent. *Id.*

2. Evidence

Initially, Appellant testified that, even if he were provided appellate counsel free of charge, he did not want to pursue an appeal. Appellant explained that he had consulted three private attorneys and their quotes ranged from $5,000 to $7,000 just to get started. Later he added that the attorneys told him the final cost could run from $12,000 to $15,000. Those fees included the cost of the record. Appellant testified that, even if he were appointed an appellate attorney, if he lost, he was concerned he would still have to pay for the appellate attorney. If money were not a concern, Appellant indicated, he would appeal.

The trial court responded by explaining to Appellant that regardless of whether he won or lost the appeal, if the court determined he had the ability to

reimburse the court to some degree, it could order something similar to a payment plan. The judge then framed the issue as follows:

> So the . . . issue on the table is do you wish to appeal or not? And . . . of course cost is important when I'm considering my household and making financial decisions, but this is a matter that if this matter is finally resolved is a permanent final conviction that will be your second DWI. And I'll be the first one to jump in line to say I hope there's never another one. But if there's ever another one, it's a felony and you're facing a much higher punishment range. And as expensive as you think things may be today, they would be much more expensive when you're having to deal with a felony charge.
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> So . . . I've heard some back and forth here. . . . The focus today needs to be on do you want to appeal or not. I can't . . . tell you the factors to consider or not to consider when making that decision. But the issue on the table right now is, all things considered, do you wish to appeal your case today or not? What is your answer?
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> THE DEFENDANT: The answer is yes, especially after the way you explained it a little further to me.

At that point the trial court adjourned the hearing and sent Appellant to "the financial staff who review someone's income and make a determination as to whether or not they meet our local established indigency standards." Mr. Curran accompanied Appellant and was present while the investigating financial officer on the Office of Court Appointments staff questioned Appellant, filled out a "Financial Questionnaire" about his assets, salary, and debts, and determined his income and expenses.

When the hearing resumed on the record in the trial court, the trial court ordered the "Financial Questionnaire" filed as Court Exhibit 1, and neither side objected. The "Financial Questionnaire" showed that Appellant was fifty years

old at the time of the March 9, 2016 hearing. He was single. He had no children. He lived with his parents and paid no rent. It showed he made $1,803 gross per month.

The trial court then noted that, according to local standards, in order to qualify under the indigency requirements, a single individual's monthly gross income had to be less than $1,607. Appellant's monthly income was $1,803. Additionally, Appellant had a truck valued at $600 and a checking account with about $500 in it. Appellant's monthly expenses were listed at $754. The trial court also noted that Appellant lived with his parents and did not pay rent.

Appellant explained that, after getting out of jail, he found a job that paid $11.25 per hour. He worked, on average, about thirty-seven hours a week. He had been working at that job about six months.

Appellant remembered that he also spent $64 per month for a breath device for his vehicle. He forgot to put that on the questionnaire. Additionally, Appellant testified that the financial officer restricted his answers on the questionnaire to recurring monthly expenses. There were, however, other expenses that were not necessarily monthly ones that the financial officer refused to consider. For example, Appellant asserted he was paying his parents $120 per month for his truck and for repairs made to the truck. Over the course of a year, Appellant estimated he might spend another $270 on the truck for additional repairs or maintenance. Appellant testified that he also had recurring back problems that would require him to see a chiropractor three to five times a

year; that each time he had a back problem, he typically would have to see the chiropractor four or five times; and that each visit cost $80. Over the course of a year, Appellant estimated that, on average, he would spend $120 per month on a chiropractor. Appellant said that he had not been to the chiropractor since getting insurance, so he did not know if his insurance covered visits to a chiropractor. Appellant also spent $15 to $20 per month on a gym so that he could stretch his back and use a sauna and whirlpool.

Appellant explained that he had been living with his parents for over a year and admitted that his parents wanted him to move out. They were expecting him to abandon his appeal. If Appellant moved out, his expenses would change significantly. He determined that rent would cost between $550 and $650 per month. He would also have to pay utilities, which he determined would average about $120 per month.

The trial court estimated Appellant's income at $1,800 per month or $21,600 annually and expenses at approximately $720 per month. The trial court declined to consider the expenses of an apartment and utilities because they were not current expenses. The trial court estimated that Appellant should have been able to save $500 for the six months he had been working and, therefore, could have already saved $3,000 to use for the estimated advance payment toward a retained attorney on appeal. Elsewhere the trial court estimated Appellant had over $1,000 per month in discretionary income. The trial court found that Appellant did not meet the county indigency standards.

3. Discussion

Although the appointment of counsel and the payment of the record are two separate issues, because Appellant did not contemplate proceeding pro se, he treated the two issues as one. We do as well. We agree with the trial court that Appellant had too much income to qualify under the county guidelines. *See McFatridge*, 309 S.W.3d at 6. Additionally, other evidence showed Appellant made $21,600 per year, paid no rent, and had no dependents. Appellant did not meet the first step of making a *prima facie* showing that he was indigent. For the six months that Appellant was employed, assuming, as the trial court calculated, that Appellant had approximately $1,000 of discretionary income per month, he could have saved approximately $6,000, which would have been enough both to retain one of the attorneys Appellant met and pay for the record, because the price quoted to Appellant included the record. We hold the trial court did not abuse its discretion. *See Hornsby v. State*, 65 S.W.3d 801, 802 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (stating indigence determination is reviewed for an abuse of discretion); *see Minjares v. State*, 577 S.W.2d 222, 224 (Tex. Crim. App. [Panel Op.] 1978) (holding trial court did not err finding defendant was not indigent when twenty-six-year-old defendant was employed, lived at home with his parents, and had no dependents to support).[3]

[3]We are not unsympathetic to someone who makes only $21,600 per year being asked to come up with $5,000 in cash within a short time. On the other hand, Appellant's failure to save even $3,000 over the previous six months, which the evidence showed should have been feasible under the circumstances,

III. Mr. Curran's Motion to Withdraw as Counsel

Because Appellant is not indigent, he is no longer entitled to appointed counsel. Accordingly, we grant Mr. Curran's motion to withdraw. The clerk of the court is instructed to remove Mr. Curran as Appellant's attorney of record.

IV. Appellant's Pro Se Motion to Withdraw His Appeal

Appellant has never moved to withdraw his December 23, 2015 pro se motion to withdraw his appeal. Our understanding of Appellant's position is that he was willing to pursue an appeal provided he did not have to pay for it and provided appointed counsel prosecuted it for him. Conversely, he was unwilling to prosecute an appeal if he had to do so at his own expense or pro se. Our earlier ruling affirmed the trial court's finding that Appellant was not indigent for purposes of his appeal. Accordingly, if Appellant is to pursue his appeal, he will have to do so at his own expense or pro se, something he has indicated he was not willing to do. We assume it is for this reason that Appellant has left pending his motion to withdraw his appeal. We, therefore, grant his pro se motion to withdraw his appeal, and we order the appeal dismissed.

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suggests—along with other comments made by Appellant at the hearing and despite the trial judge's warnings that once this conviction became final, a third DWI would be a felony with a greater range of punishment—Appellant was unwilling to spend his own money on his defense.

V. Conclusion

The trial court's ruling that Appellant is not indigent stands. Mr. Curran's motion to withdraw as counsel is granted. Appellant's appeal is dismissed pursuant to his pro se motion.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: GARDNER, WALKER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2016