

NO. 07-11-0297-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL C
NOVEMBER 29, 2011

CIRILO DIAZ, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE 242ND DISTRICT COURT OF HALE COUNTY;
NO. B17995-0904; HONORABLE ED SELF, JUDGE

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

ORDER

In 2009, Appellant, Cirilo Diaz, Jr., was convicted of burglary of a habitation¹ and sentenced to five years confinement and assessed a \$750 fine. Punishment was suspended in favor of five years community supervision. At a hearing on the State's motion to revoke, Appellant entered a plea of true to the State's allegations and the trial

¹Tex. Penal Code Ann. § 30.02 (West 2011).

court found he had violated the terms and conditions of community supervision and revoked his community supervision. The trial court assessed the original sentence and Appellant subsequently perfected this appeal. Thereafter, Appellant was released on an appeal bond.

On September 29, 2011, attorney of record, Paul Holloway, filed a *Motion to Withdraw* from this appeal in which he explained that he had been retained only to prosecute a motion for new trial but had filed the notice of appeal to protect Appellant's rights. Counsel further explained that Appellant's family had indicated they would retain new counsel to prosecute the appeal, but later advised him they were financially unable to do so.² On October 13, 2011, this Court abated this appeal and remanded the cause to the trial court to determine whether the *Motion to Withdraw* was well taken and whether Appellant was indigent and entitled to appointed counsel.

Upon remand, the trial court gave notice of hearing. On October 27, 2011, a hearing was held. The State and Appellant's counsel were present, but Appellant, who had been notified of the hearing by counsel and by his bail company, failed to appear. Resultantly, the trial court forfeited Appellant's appeal bond, ordered that a *capias* issue for his arrest, and raised the amount of a new bond to \$100,000.

Due to Appellant's failure to appear, the trial court was unable to determine the questions posed by the order of abatement.³ The trial court did, however, find that

²Counsel incurred the expense of the reporter's record but the clerk's record is past due and as far as this Court is concerned, no arrangements have been made to have the clerk's record prepared and filed.

³The order of abatement directed the trial court to determine whether Appellant (1) desired to prosecute his appeal; (2) is indigent and entitled to appointed counsel; and (3) is entitled to a free record.

Appellant was a fugitive⁴ and that it could not determine whether he wished to pursue his appeal. No finding was made on counsel's *Motion to Withdraw*.

Pending before this Court is Mr. Holloway's *First Amended Motion for Leave to Withdraw*. The motion complies with Rule 6.5 of the Texas Rules of Appellate Procedure. The motion is granted and Mr. Holloway is no longer attorney of record for Appellant in this appeal. For purposes of this appeal, Appellant shall be considered a *pro se* litigant and, until further notice, all notices from this Court to Appellant shall be sent to his last known address: 1602 W. 16th Street, Plainview, Texas 79072-0695.

Although the reporter's record has been filed, the clerk's record was due on October 21, 2011, but has yet to be filed. Appellant, now proceeding *pro se*, is directed to certify to this Court, in writing, whether he has requested preparation of the clerk's record and complied with Rule 35.3(a)(2) of the Texas Rules of Appellate Procedure in making arrangements to pay for the clerk's record. The certification is due on or before December 19, 2011. Failure to comply with this Court's order will result in dismissal of the appeal per Rules 37.3(b) and 42.3(b) and (c).

It is so ordered.

Per Curiam

Do not publish.

⁴An appellate court must dismiss an appeal on the State's motion, supported by affidavit, showing that an appellant has escaped from custody pending the appeal and that to the affiant's knowledge, the appellant has not, within ten days after escaping, voluntarily returned to lawful custody within the state. Tex. R. App. P. 42.4.