



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00217-CR

WAYNE EAST, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court No. 7099-B, Honorable Lee Hamilton, Presiding

April 12, 2018

ORDER OF ABATEMENT AND REMAND

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant, Wayne East, appearing *pro se*, appeals the trial court's order denying his Chapter 64 motion for forensic DNA testing.¹ We abate this appeal and remand the cause to the trial court to prepare an amended certification of appellant's right of appeal.

In 1982, appellant was convicted by a jury of capital murder and sentenced to death. The Fifth Circuit Court of Appeals later granted appellant habeas relief, vacated his death sentence, and remanded the case for a new trial on punishment. See *East v.*

¹ This appeal was transferred to this Court from the Eleventh Court of Appeals by order of the Supreme Court. See TEX. GOV'T CODE ANN. § 73.001 (West 2013).

Johnson, 123 F.3d 235, 241 (5th Cir. 1997). On remand, appellant entered into a “Stipulation and Agreement” with the State. Therein, the State agreed to waive the death penalty and recommend a life sentence in exchange for appellant’s admission of guilt, waiver of his right of appeal, and waiver of all rights “to pursue post-conviction or collateral relief from his conviction.” On September 10, 1999, the trial court accepted the plea bargain and imposed a life sentence.

In 2016, appellant filed a motion for forensic DNA testing in the trial court pursuant to Chapter 64 of the Texas Code of Criminal Procedure. The trial court considered and denied the motion. Appellant filed this appeal. See TEX. CODE CRIM. PROC. ANN. art. 64.05 (West 2006). The trial court’s certification of appellant’s right of appeal certified that this was a plea-bargain case with no right of appeal and that appellant waived the right of appeal. Upon examination of the certification and the record, we found the certification was defective as it was not signed by appellant and the Chapter 64 proceeding was not a “plea-bargain case.” *East v. State*, No. 07-17-00217-CR, 2017 Tex. App. LEXIS 7567 (Tex. App.—Amarillo Aug. 9, 2017, order) (per curiam) (not designated for publication). We, thus, remanded the cause to the trial court to prepare an amended certification of appellant’s right of appeal consistent with the record and to determine whether appellant voluntarily, knowingly, and intelligently waived his right to appeal the trial court’s order denying forensic DNA testing.

On remand, the trial court issued an “Amended Trial Court’s Certification of Defendant’s Right of Appeal as to Motion for Forensic DNA Testing,” certifying that appellant waived the right of appeal. The amended certification was signed by appellant. The trial court also issued findings of fact and conclusions of law concluding that appellant voluntarily, knowingly, and intelligently waived his right to appeal the trial court’s order

denying forensic DNA testing. According to the trial court's findings, appellant voluntarily entered into a plea bargain to avoid the death penalty; by entering into the Stipulation and Agreement, appellant intended to waive all rights of appeal and rights to pursue any post-conviction proceedings or any future collateral attack on his conviction and sentence, including all "claims that may arise or be cognizable in the future though unavailable now"; and appellant agreed that the Stipulation and Agreement would "permanently foreclose any further challenge to his capital murder conviction and sentence."

As with the original certification of appellant's right of appeal, we must compare the amended certification with the record to ascertain whether the certification is defective and, if defective, to obtain an accurate certification. *Jones v. State*, 488 S.W.3d 801, 804-05 (Tex. Crim. App. 2016); *Dears v. State*, 154 S.W.3d 610, 614-15 (Tex. Crim. App. 2005). A defendant may waive his right of appeal so long as the waiver is made voluntarily, knowingly, and intelligently. *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003). A defendant knowingly and intelligently waives his right to appeal only when he is aware of what has occurred in the trial proceedings and is in a position to know the nature of the claims he could have brought on appeal but for his waiver. *Ex parte Reedy*, 282 S.W.3d 492, 498 (Tex. Crim. App. 2009).

In *Ex parte Reedy*, the Court of Criminal Appeals addressed what a defendant must know to make a "knowing and intelligent" waiver. *Ex parte Reedy*, 282 S.W.3d at 496. Reedy pled guilty to capital murder and waived his right to file an application for writ of habeas corpus in exchange for the State's agreement not to seek the death penalty. *Id.* at 494. Despite the waiver, Reedy later filed an application and the trial court recommended dismissal based on the waiver. *Id.* The Court of Criminal Appeals held that a defendant could waive his right to seek post-conviction habeas corpus relief if the

waiver was made voluntarily, knowingly, and intelligently. *Id.* at 495-96. Surveying the case law on “knowing and intelligent” waiver of direct appeal, the Court held that “a blanket waiver of habeas corpus relief may not be enforceable as to claims that the applicant could not reasonably have known about at the time of the waiver.” *Id.* at 494. Thus, a defendant can validly waive his right to raise claims by collateral attack if the defendant knew or should have known of the purported defects at the time of the waiver. *Id.* at 498. However, if the claims are “predicated upon facts that did not exist or were not within the applicant’s knowledge or comprehension” when he agreed to the waiver, the defendant’s waiver cannot be knowing and intelligent, and, therefore, cannot be enforceable. *Id.* Claims such as actual innocence based on newly available evidence will often meet this description. *Id.*

With this in mind, we must determine whether the trial court’s certification is consistent with the record. *Jones*, 488 S.W.3d at 805. Appellant entered into the Stipulation and Agreement on September 10, 1999. Despite the Stipulation and Agreement’s broad language waiving all rights of appeal and all rights “to pursue post-conviction or collateral relief,” appellant’s right to file a motion for forensic DNA testing and right to appeal under Chapter 64 did not exist when he agreed to the waiver. Chapter 64 of the Texas Code of Criminal Procedure was not enacted until March 22, 2001. Act of March 22, 2001, 77th Leg., R.S., ch. 2, § 2, 2001 Tex. Gen. Laws 2 (effective April 5, 2001). As the right to seek forensic DNA testing and the right to appeal under Chapter 64 were not within appellant’s knowledge or comprehension when he signed the Stipulation and Agreement, he could not have knowingly and intelligently waived those rights. See *Ex parte Reedy*, 282 S.W.3d at 498. We, therefore, find that appellant did

not knowingly and intelligently waive his right to appeal the trial court's denial of his motion for forensic DNA testing.

Because the record does not support the trial court's certification that appellant waived his right to appeal, the certification is defective. Rather than dismiss the appeal based on the defective certification, we must remand the cause to the trial court to prepare a correct certification. See *Dears*, 154 S.W.3d at 614-15; *Hargesheimer v. State*, 126 S.W.3d 658, 659-60 (Tex. App. —Amarillo 2004, pet. ref'd) (per curiam); TEX. R. APP. P. 25.2(d) (requiring dismissal of the appeal if a certification that shows the defendant has the right of appeal has not been made part of the record).

Accordingly, we abate this appeal and remand the cause to the 104th District Court of Taylor County (trial court) to prepare an amended certification of appellant's right of appeal consistent with the record. See TEX. R. APP. P. 25.2(f). Because appellant has received the required notices and signed the Amended Trial Court's Certification of Defendant's Right of Appeal as to Motion for Forensic DNA Testing, we suspend the requirement that appellant sign the amended certification. See *id.* at 2, 25.2(d). The amended certification shall be included in a supplemental clerk's record filed with this Court by May 14, 2018. See *id.* at 34.5(c)(2). Should further time be needed to perform these tasks, then same must be requested before May 14, 2018.

It is so ordered.

Per Curiam

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