



**IN THE
TENTH COURT OF APPEALS**

No. 10-07-00358-CR

KODELL FOSTER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 19th District Court
McLennan County, Texas
Trial Court No. 2004-1159-C1**

ORDER

Appellant Kodell Foster has filed an "Unopposed Motion to Stay, Execution of Set Aside or Withdraw Mandate."¹ The motion, which seeks to have this court recall its mandate, was filed in conjunction with Foster's untimely second petition for discretionary review (for which a request for extension of time was filed but has been denied). For the reasons below, the court denies the motion.

¹ This motion, which contains both this court's cause number as the lead cause number and a Court of Criminal Appeals cause number (No. PD-1325-09), was filed in this court on May 6, 2010. The same motion (but with the Court of Criminal Appeals cause number as the lead cause number) was also filed in the Court of Criminal Appeals on May 7, 2010. The bodies of the two motions are identical.

The court issued a memorandum opinion in this case on June 3, 2009. After the filing and denial of Foster's motion for rehearing, Foster, after obtaining an extension of time from the Court of Criminal Appeals, timely filed a petition for discretionary review on December 1, 2009. *See* TEX. R. APP. P. 50. As allowed by Rule 50, this court issued a "memorandum opinion on petition for discretionary review" (also known as a "Rule 50 opinion") on January 27, 2010 and withdrew the June 3, 2009 memorandum opinion that was the subject of, and attached to, the December 1 petition for discretionary review.² Thereafter, no timely amended petition for discretionary review or new petition for discretionary review was filed, (*see* TEX. R. APP. P. 50(a, b)), and the mandate was duly issued.

Foster then filed a second petition for discretionary review and the instant motion with this court on May 6, 2010, and a motion for extension of time, which the

² Previously, in *Guyton v. State*, No. 10-07-00070-CR, after this court had issued a Rule 50 opinion on February 6, 2009, the Clerk forwarded the record and the petition for discretionary review to the Court of Criminal Appeals on February 10, 2009. A week later, the Clerk of the Court of Criminal Appeals returned the record with a February 17 letter stating the following:

This Court is returning the record in the above styled and numbered cause number because the parties still have time in which to file petitions for discretionary review. *See* Tex. R. App. P. 50(b) and 68.2. As pertinent to this case, and in accord with rule 68.2, the parties have 30 days after the day the court of appeals renders judgment to file a petition for discretionary review. Then see rule 68.7(c) for forwarding to this Court.

For this reason, Foster's December 1 petition for discretionary review and the record were not forwarded to the Court of Criminal Appeals.

As a result of telephone communications between the Clerk of this court and the Court of Criminal Appeals' Clerk's office after the filing of Foster's second petition for discretionary review, the Clerk of this court is under the impression that it was proper to not have forwarded Foster's December 1 petition for discretionary review and the record to the Court of Criminal Appeals.

Court of Criminal Appeals denied.³ The Court of Criminal Appeals nevertheless requested that this court transmit the record, and it and both of Foster's petitions for discretionary review were forwarded to the Court of Criminal Appeals.

The Clerk of this court received a copy of a June 9, 2010 letter from the Clerk of the Court of Criminal Appeals to Foster's counsel.⁴ That letter states in full:

This Court is in receipt of the Appellant's Petition for Discretionary Review in the above styled cause number. Records reflect an Opinion was issued by the 10th Court of Appeals on 01/27/2010 pursuant to T.R.A.P. Rule 50, affirming the conviction; a motion for rehearing was not filed. Petition for Discretionary Review was due in the 10th Court of Appeals on 02/26/2010. The 10th Court of Appeals issued mandate in the above styled cause on 05/04/2010.

The Appellant filed an extension of time to file Petition for Discretionary Review on 05/07/2010 and the motion was denied on 05/17/2010. Since the 10th Court of Appeals has issued mandate in the case, **NO ACTION WILL BE TAKEN ON THIS PETITION.** The petition is being placed in the file and the record is being returned to the 10th Court of Appeals.

In addition, on May 17, the Court of Criminal Appeals denied Foster's identical "Unopposed Motion to Stay, Execution of Set Aside or Withdraw Mandate" that was filed in the Court of Criminal Appeals on May 7.⁵ Because the Court of Criminal Appeals has considered Foster's two petitions for discretionary review and the issues

³ The instant motion explains Foster's counsel's personal circumstances relating to the untimely second petition for discretionary review.

⁴ The letter came to this court with the record. Included was Foster's first petition for discretionary review, and it was returned with a diagonal line marked across it with the notation, "Rule 50."

⁵ This court received notice of the Court of Criminal Appeals' ruling by email on May 17. The Clerk of the Court of Criminal Appeals has subsequently provided this court with the Court of Criminal Appeals' file-marked copy of the motion and its letter ruling in connection with its return of the petitions for discretionary review and the record.

surrounding them and has already denied Foster's "Unopposed Motion to Stay, Execution of Set Aside or Withdraw Mandate" that was also filed in the Court of Criminal Appeals, this court denies Foster's motion.

PER CURIAM

Before Chief Justice Gray,
Justice Reyna, and
Justice Davis
(Chief Justice Gray dissenting)

Motion denied

Order issued and filed September 1, 2010

Publish

[CR25]