Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00642-CR

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MICHAEL W. ALFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 760,368

O P I N I O N

On June 3, 1998, appellant was convicted of the offense of theft and sentenced to one year in the Texas Department of Criminal Justice--Institutional Division. Appellant, who is pro se, filed a notice of appeal. The clerk's record was filed October 2, 1998, but appellant never paid or made arrangements to pay for the reporter's record. Accordingly, on January 6, 2000, this Court ordered appellant to file his brief on or before February 4, 2000. The brief was not filed despite two past due notices. On March 9, 2000, we ordered the trial court to hold a hearing to determine why appellant had not filed his brief. The record of that hearing was filed in this Court on March 27, 2000.

At the hearing, appellant stated he wanted to pursue his appeal. He stated he was no longer represented by counsel. The trial court found appellant was not indigent and desired to pursue his appeal. When questioned as to why he had not filed his appellate brief, appellant stated that he believed he was prohibited from filing his brief by an order of the federal district court. Appellant has filed a civil rights action in federal court. However, the only federal court order appearing in this Court's file is an "Initial Order," which states appellant "may be requested to furnish a more definite statement of facts." While this order does state that appellant cannot file motions or conduct discovery in the federal court without consent of the federal court, it does not prohibit appellant from filing his brief and/or other documents in *this* Court. Accordingly, we ordered appellant to file the federal court order that allegedly prohibits appellant from filing his brief and/or other documents with this Court. Appellant was ordered to file any such federal court order in this Court on or before April 17, 2000. Appellant did not provide this Court with any federal court order that would prohibit appellant from filing his brief in this Court. Accordingly, we ordered appellant to file his brief on or before June 5, 2000. On June 5, 2000, time to file appellant's brief, pursuant to this Court's order, expired without a brief; and no motion for extension of time was filed. *See* TEX. R. APP. P. 38.6(a). Appellant was notified by phone that no brief had been received. No satisfactory response was received; appellant was apparently still under the mistaken belief that he was prohibited from filing a brief in this Court by a federal court order.

As of June 29, 2000, appellant still had not filed his brief in this Court. Appellant did not provide this Court with any federal court order that would prohibit appellant from filing his brief in this Court. Moreover, this Court conferred with the federal court and determined there is no federal court order that would prohibit appellant from filing his brief in this Court.

Because this Court is generally not permitted to dismiss a criminal appeal for want of prosecution, we ordered the trial court to once again hold a hearing to determine appellant's intentions regarding his appeal.

Pursuant to this Court's order of June 29, 2000, the trial court again held a hearing to determine appellant's intentions. The record of that hearing was filed in this Court on July 14, 2000. At the hearing, the trial court explained to appellant, in excruciating detail, that if he wanted to pursue his appeal he would

have to file a brief with the appellate court. Appellant told the trial court that "I'm going to hire an attorney this week or next week." The trial court informed appellant that he needed to hire an attorney immediately and appellant stated he would. The trial court questioned appellant closely as to when he intended to hire an attorney and appellant specifically stated that he would hire an attorney by July 14, 2000, and would inform the appellate court.

Based on appellant's representations to the trial court, this Court set a new brief due date of September 13, 2000. Appellant neither filed his brief nor retained counsel to represent him on appeal. As of that date, appellant had neither retained counsel nor filed his brief. Accordingly, on September 21, 2000, this Court issued another order, which states, in pertinent part:

> We order appellant to file a brief, which complies with the Texas Rules of Appellate Procedure, in this appeal *on or before October 23, 2000*. If appellant fails to file his brief, we will decide this appeal upon the record before the Court. *See Lott v. State*, 874 S.W.2d 687, 688 (Tex. Crim. App. 1994) (affirming conviction on record alone where appellant failed to file a pro se brief after being properly admonished); *Coleman v. State*, 774 S.W.2d 736, 738-39 (Tex. App.–Houston [14th Dist.] 1989, no pet.) (holding that former rule 74(l)(2) (now Rule 38.8(b)) permitted an appeal to be considered without briefs "as justice may require" when a pro se appellant has not complied with the rules of appellate procedure). No further extensions of time to file the brief will be granted by this Court under any circumstances.

(emphasis in the original).

Despite this order, appellant has not filed his brief nor even requested an extension of time to file the brief. Appellant was clearly warned that if he failed to file his brief on or before October 23, 2000, we would decide this appeal upon the record before the Court. More than two years have now passed since appellant was sentenced, and no appellate brief has been filed. This Court has been very lenient with appellant, recognizing he is at a disadvantage representing himself. Although appellant has had ample time in which to retain counsel and/or prepare his brief, he has failed to do so. This Court has now reached the inescapable conclusion that appellant will not file a meaningful brief in this appeal.

Rule 38.8 provides that we will not dismiss or consider the appeal without briefs unless it is shown the appellant no longer desires to prosecute his appeal or that he is not indigent and has failed to make necessary arrangements for filing a brief. It is clear that the rule was designed to protect an indigent appellant from the failure of his appointed counsel to provide a brief. A hearing has already been held as required under Rule 38.8. In fact, in this case, two hearings have been held pursuant to Rule 38.8. Because the trial court has already held two hearings to make the findings required under Rule 38.8, and we can find nothing in the rules or case law which requires this Court to once again send this matter back to the trial court, we decline to do so.

Accordingly, on the basis of the trial court's findings and our previous orders, this Court has considered the appeal without briefs. *See* TEX. R. APP. P. 38.8(b). We find no fundamental error and affirm the trial court's judgment.

PER CURIAM

Opinion and judgment filed November 2, 2000.
Panel consists of Justices Yates, Wittig, and Frost.
Do not publish — TEX. R. APP. P. 47.3(b).