



**COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON**

ORDER OF CONTINUING ABATEMENT

Appellate case name: Marlon Windon v. The State of Texas

Appellate case number: 01-18-00500-CR

Trial court case number: 1535144

Trial court: 180th District Court of Harris County

Appellant, Marlon Windon, pleaded guilty, without an agreed punishment recommendation to the felony offense of evading arrest. *See* TEX. PENAL CODE § 38.04. The trial court assessed punishment at confinement for 10 years. The trial court's certification of appellant's right to appeal states that "the defendant has waived the right to appeal." Appellant timely filed a pro-se notice of appeal.

Because the record contained a defective certification, we abated the appeal for the trial court to hold a hearing and make findings of fact. On October 7, 2019, the trial court filed a supplemental clerk's record that found (1) appellant did not waive his right to appeal; (2) no indication appellant waived his right of appeal in exchange for the State abandoning one of the enhancement paragraphs; (3) appellant's guilty plea was involuntary; and (4) during his plea, appellant was not taking his psychiatric medication and was under the influence of a synthetic form of marijuana. Although our previous abatement order requested the trial court to execute an amended certification, we have yet to receive an amended certification. *See* TEX. R. APP. P. 25.2(f), 34.5(c), 37.1.

The record further reflects that on December 27, 2016, the trial court appointed Clyde Williams to represent appellant. Although the record contains no indication that appellant's counsel moved to withdraw or was permitted to withdraw, no counsel has appeared on appellant's behalf in this appeal or in the abatement hearing. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(2) (requiring attorney to "represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record").

If appellant has the right of appeal and still desires to pursue this appeal, he is entitled to court-appointed counsel. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(d)(1), 26.04(p) ("A defendant who is determined by the court to be indigent is presumed to remain indigent for the

remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs."); *Ward v. State*, 740 S.W.2d 794, 798 (Tex. Crim. App. 1987); *Lopez v. State*, 486 S.W.2d 559, 560 (Tex. Crim. App. 1972); *Fowler v. State*, 874 S.W.2d 112, 114 (Tex. App.—Austin 1994, order, pet. ref'd). The record does not contain any indication that appellant has been admonished regarding the dangers and disadvantages of proceeding pro se or made an intelligent and voluntary waiver of the right to counsel on appeal. See TEX. CODE CRIM. PROC. art. 1.051(a), (f); *Goffney v. State*, 843 S.W.2d 583, 584–85 (Tex. Crim. App. 1992); *Hawkins v. State*, 613 S.W.2d 720, 722–23 (Tex. Crim. App. 1981); cf. TEX. CODE CRIM. PROC. art. 1.051(g). Therefore, the record is unclear as to whom, if anyone, represents appellant on appeal.

We, therefore, abate this appeal and remand the cause to the trial court for further proceedings. On remand, the trial court shall conduct a hearing within 20 days of the date of this order at which a representative of the Harris County District Attorney's Office and appellant's counsel, Clyde Williams, shall be present. Appellant shall also be present for the hearing in person or, if appellant is incarcerated, at the trial court's discretion, appellant may participate in the hearing by use of a closed-circuit video teleconferencing system that provides for a simultaneous compressed full motion video and interactive communication of image and sound.¹

We direct the trial court to:

- 1) Determine whether appellant still wishes to pursue this appeal;
- 2) Determine whether appellant wishes to waive his right to counsel on appeal and proceed pro-se;
 - a) If appellant wishes to proceed pro-se, admonish appellant regarding the dangers and disadvantages of self-representation, including admonishments regarding the wisdom and practical consequences of self-representation and that there are rules of appellate procedure that appellant will be obligated to follow and that he will not be granted any special consideration because of his lack of formal training in law;
 - b) Determine whether appellant's waiver is intelligent and voluntary;
 - c) Determine whether any decision by appellant to proceed pro se is in the best interest of appellant, the State, and the administration of justice;
 - d) If appellant wishes to waive counsel, after being properly admonished, and the waiver is intelligent and voluntary and is in the best interest of appellant, the State, and the administration of justice, discharge appointed counsel;
- 3) If appellant does not wish to proceed pro-se, determine whether appellant's appointed counsel, Clyde Williams, intends to represent appellant on appeal or whether counsel should be permitted to withdraw;
- 4) If counsel is permitted to withdraw, appoint substitute appellate counsel at no expense to appellant, regardless of whether appellant has waived the right to appeal;
- 5) Execute an amended certification of appellant's right to appeal indicating either that appellant has the right of appeal or that appellant waived the right to appeal;

¹ On request of appellant, appellant and his counsel shall be able to communicate privately without being recorded or heard by the trial court or the attorney representing the State.

- 6) Make any other findings and recommendations the trial court deems appropriate; and
- 7) Enter written findings of fact, conclusions of law, and recommendations as to these issues, separate and apart from any docket sheet notations.

See TEX. CODE CRIM. PROC. ANN. art. 1.051(a), (c), (d)(1), (f); 26.04(j)(2); 26.04(p); TEX. R. APP. P. 25.2(f), 34.5(c), 37.1; *Monreal*, 99 S.W.3d at 616; *Ward*, 740 S.W.2d at 798; *Lopez*, 486 S.W.2d at 560; *Moreno*, 327 S.W.3d at 268–69; *Fowler*, 874 S.W.2d at 114.

The trial court shall have a court reporter, or court recorder, record the hearing. The trial court clerk is directed to file a supplemental clerk's record containing the trial court's findings, recommendations, amended certification, and orders with this Court within 30 days of the date of this order. The court reporter is directed to file the reporter's record of the hearing within 30 days of the date of this order. If the hearing is conducted by video teleconference, a certified recording of the hearing shall also be filed in this Court within 30 days of the date of this order.

The appeal is abated, treated as a closed case, and removed from this Court's active docket. The appeal will be reinstated on this Court's active docket when records that comply with our order are filed with the Clerk of this Court. The court coordinator of the trial court shall set a hearing date and notify the parties.

It is so ORDERED.

Judge's signature: /s/ Chief Justice Radack

Acting individually Acting for the Court

Date: July 7, 2020