



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

ORDER OF ABATEMENT

Appellate case name: Jorge Montalvo v. The State of Texas

Appellate case number: 01-20-00109-CR

Trial court case number: 1526956

Trial court: 174th District Court of Harris County

Without an agreed punishment recommendation, appellant, Jorge Montalvo, pleaded guilty to the felony offense of murder. The trial court found appellant guilty and assessed his punishment at confinement for forty years. The trial court signed a certification of appellant's right to appeal, stating "defendant has waived the right of appeal." Appellant timely filed a notice of appeal.

Appellant has filed a motion to abate the appeal, requesting that this Court abate the appeal and order the trial court to hold a hearing to determine whether the certification of defendant's right to appeal is accurate.

On September 24, 2019, appellant pleaded guilty to the felony offense of murder without an agreed punishment recommendation from the State. Appellant signed a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" stating that he agreed to waive his right to appeal in exchange for the State agreeing to waive its right to a jury trial. *Ex parte Broadway*, 301 S.W.3d 694, 697–99 (Tex. Crim. App. 2009) ("[A] defendant may knowingly and intelligently waive his appeal as a part of a plea when consideration is given by the State, even when sentencing is not agreed upon.").

During the punishment phase of trial, appellant notified the trial court that he wished to withdraw his guilty plea, stating that he "felt pressured to plead guilty when he in fact was not guilty." The trial court informed appellant that he would not be allowed to withdraw his plea of guilty. However, the trial court also advised appellant that:

If you would like to appeal after this, you can do everything you need to do to effect an appeal, but we're not going to go backwards when I went thoroughly through all of your admonishments and asked you specifically if you were entering to this plea, and not one second did I get any indication

that you did not want to enter a plea of guilty. So we're not going to go backwards. We can go forward, and you can appeal anything that happens from this hearing. And if you're successful, then whatever the Court says in the higher Court will be followed. So at this point we're moving forward. You'll have an opportunity to appeal if you like.

2 R.R. at 73 (emphasis added).

A valid waiver of appeal—one made voluntarily, knowingly, and intelligently—prevents a defendant from appealing without the trial court's consent. *See Carson v. State*, 559 S.W.3d 489, 492–93 (Tex. Crim. App. 2018). The trial court's oral grant of permission to appeal conflicts with its certification and judgment stating that appellant waived his right to appeal, and that the trial court did not grant appellant permission to appeal. This inconsistency must be resolved before the appeal may proceed. *See Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014) (“When there exists a conflict between the oral pronouncement of a sentence and the written judgment, the oral pronouncement controls.”)

The Texas Rules of Appellate Procedure require this Court to dismiss an appeal unless the record contains a written certification showing that the appellant has the right of appeal. *See* TEX. R. APP. P. 25.2(d). The rules also permit amendment of a defective certification and prohibit the Court from dismissing an appeal based on the lack of a valid certification when we determine that an appellant has a right of appeal. *See* TEX. R. APP. P. 25.2(f), 34.5(c)(2), 37.1, 44.4; *see also Dears v. State*, 154 S.W.3d 610, 615 (Tex. Crim. App. 2005).

Accordingly, we grant appellant's motion and abate the appeal and remand the cause to the trial court for further proceedings. The trial court shall immediately conduct a hearing at which a representative of the Harris County District Attorney's Office and appellant's counsel, Nicholas Mensch, 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 closed-circuit video conferencing.¹

We direct the trial court to:

- 1) make a finding clarifying the trial court's intention, or not, to grant appellant permission to appeal;
- 2) if necessary, execute an amended certification of appellant's right to appeal;
- 3) make any other findings, conclusions, and recommendations the trial court deems appropriate; and
- 4) enter written findings of fact, conclusions of law, and recommendations as

¹ Any such teleconference must use a closed-circuit video conferencing system that provides for a simultaneous compressed full motion video and interactive communication of image and sound between the trial court, appellant, and any attorneys representing the State or appellant. 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.

to these issues, separate and apart from any docket sheet notations.

See TEX. R. APP. P. 25.2(a)(2), (d), (f), 34.5(a)(12), (c)(2), 37.1.

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 amended certification of appellant's right to appeal, if any, and any other findings, recommendations, and orders of the trial court with this Court no later than 30 days from the date of this order. *See* TEX. R. APP. P. 34.5(c)(2). 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 the supplemental clerk's record is 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/ Evelyn V. Keyes

Acting individually Acting for the Court

Date: July 14, 2020