

**No. 01-10-00510-CR
IN THE COURT OF APPEALS
FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS**

RICHARD ROY HART

APPELLANT

VERSUS

STATE OF TEXAS

APPELLEE

**MOTION TO ABATE APPEAL AND REMAND FOR HEARING ON MOTION
FOR NEW TRIAL AND
FOR PERMISSION TO FILE OUT OF TIME MOTION FOR NEW TRIAL**

To the Court of Appeals, First Judicial District:

Now comes Richard Roy Hart, Appellant, by and through his attorney of record in the above entitled and numbered cause, and files this Motion to Abate Appeal and Remand for Hearing on Motion for New Trial and For Permission to File Out of Time Motion for New Trial, and would show the following:

I.

In the 174th District Court of Harris County, Texas in Cause No. 1247618 entitled *The State of Texas v. Richard Roy Hart*, the Appellant entered his plea of guilty on April 7, 2010. Appellant was convicted of the offense of aggravated assault and sentenced to eight years in prison on June 16, 2010.

II.

On June 16, 2010, Mr. Hart filed his written Notice of Appeal. In the Notice of Appeal, Appellant's trial counsel included his motion to withdraw. The Trial Court

signed the Order incorporated in the Notice of Appeal/Motion to Withdraw on June 16, 2010, giving the appearance of granting the motion to withdraw, and the Judge informed the parties that counsel was withdrawn. Affidavit of Richard Hart is attached hereto and incorporated herein as Exhibit E addressing this issue. Unfortunately, the Judge failed to check the applicable box on the Notice of Appeal granting or denying the motion to withdraw and failed to appoint appellate counsel. A copy of the Notice of Appeal is attached hereto and incorporated herein as Exhibit A.

III.

On July 30, 2010, the Court conducted another hearing and again found the defendant indigent and this time appointed undersigned counsel to represent Appellant on appeal. A copy of this Order is attached hereto and incorporated herein as Exhibit B. Clearly the Judge intended to grant trial counsel's motion to withdraw and intended to appoint appellate counsel on June 16, 2010, as evidenced by his appointing appellate counsel on July 30, 2010. More than likely, the Judge expected his staff to fill in the blanks and assign counsel as is customary, just as was done on July 30, 2010.

IV.

A defendant has 30 days to file a motion for new trial after the Judge imposes sentence. *Tex.R.App.P.* 21.4(a). The Court of Criminal Appeals has determined "that the time for filing a motion for new trial is a critical stage of the proceedings, and that a defendant has a constitutional right to counsel during that period." *Cooks v. State*, 240 S.W.3d 906, 911 (Tex.Cr.App. 2007).

V.

Appellant was unrepresented during the entire 30 day period for filing a motion for new trial. Trial counsel filed his motion to withdraw on the same day as sentencing. Therefore, there was no time for him to review potential issues for presentation in a motion for new trial and discuss those issues with Appellant before he withdrew. Mr. Hart's affidavit confirms that trial counsel did not discuss potential issues for filing a motion for new trial with him. Appellate counsel was not appointed until after the 30 day period had expired. Therefore, clearly Mr. Hart was deprived of counsel during this critical stage.

VI.

“This deprivation of counsel is subject to a harmless error or prejudice analysis.” *Cook* at 911. To show harm, there must be “facially plausible claims” that could have been presented in a motion for new trial. *Id* at 912. Also see *Massingill v. State*, 8 S.W.3d 733 (Tex.App.-Austin 1999, pet. ref'd).

VII.

In Mr. Hart's case, the issue in a motion for new trial will be ineffective assistance of counsel at the sentencing hearing. Trial Counsel did not call a single witness or present a single document to show positive characteristics of Mr. Hart in the sentencing hearing. 1 RR 3-4. This failure surely left the Judge believing that there was no one who could provide any evidence of any redeeming qualities in Mr. Hart. In a motion for new trial, Mr. Hart will provide witnesses to assist the Court in better evaluating his character.

These witnesses will include Chris Newbolt and Kenny Thigpen both of whom have known Mr. Hart for many years as a friend, and Mr. Newbolt knows Mr. Hart as an employee as well. Chris Newbolt's affidavit is attached hereto and incorporated herein as Exhibit C. Mr. Thigpen's affidavit is attached hereto and incorporated herein as Exhibit D. Mr. Newbolt will testify that Mr. Hart worked for Sak N'Save for nineteen years as the manager of the meat department. Mr. Hart always treated Mr. Newbolt well. Even when they were drinking, Mr. Hart never became violent. Mr. Thigpen will also confirm that he never saw Mr. Hart become violent or do anything wrong to anyone. The testimony of these witnesses directly contradicts the information provided at sentencing that Mr. Hart is just a violent abusive man. 1 RR 8.

VIII.

In addition, trial counsel did not advise Mr. Hart of his right to testify on his own behalf. Mr. Hart would have contested some of the statements in the presentence investigation and he would have provided the Judge facts regarding his work history, his support of his children and the complaining witness, and his desire to get help with alcohol. See attached Affidavit of Mr. Hart.

IX.

This issue of ineffective assistance of counsel provides plausible grounds for a motion for new trial. In addition to providing information to the Trial Judge, the Motion for New Trial is necessary to adduce these additional facts for purposes of presenting the issue on appeal. As a result, Mr. Hart was clearly prejudiced by the lack of counsel during the critical stage for filing a motion for new trial.

Wherefore, premises considered, Appellant requests that the Court abate the appeal and remand the case for hearing on a motion for new trial and requests permission to file the motion for new trial outside of the time limitations.

Respectfully submitted,

Daphne L. Pattison
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(713) 229-0687
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Abate Appeal and Remand for Hearing on a Motion for New Trial and for Permission to File and Out of Time Motion for New Trial* was mailed or hand delivered to the Harris County District Attorney's Office at 1201 Franklin, 5th Floor, Houston, Texas 77002, on this the _____ day of _____, 2010.

Daphne L. Pattison

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ORDER

On this the ____ day of _____, 2010, Appellant's *Motion to Abate Appeal and Remand for Hearing on a Motion for New Trial and for Permission to File and Out of Time Motion for New Trial Motion* was considered and this Court is of the opinion that the Motion should be:

_____ GRANTED.

_____ DENIED.

This cause is abated and remanded for hearing on a Motion for New Trial. Appellant is authorized to file an out of time Motion for New Trial.

SIGNED and **ENTERED** this _____ day of _____, 2010.

JUDGE PRESIDING