

NO. PD-748-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
FILED
COURT OF CRIMINAL APPEALS
8/23/2017
DEANA WILLIAMSON, CLERK

KELSEY JO LACKEY

v.

THE STATE OF TEXAS

From the Waco Court of Appeals
Cause No. 10-17-00016-CR

APPELLANT'S CORRECTED
PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

Identity of Judge, Parties and Counsel

Appellant, pursuant to Rule of Appellate Procedure 68.4(a), provides the following list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel.

THE TRIAL COURT:

Travis Bryan, III 272nd District Court, Brazos County 300 East 26th Street, Suite 204 Bryan, Texas 77803	Trial Court Judge
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THE DEFENSE:

Kelsey Jo Lackey	Appellant
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Craig A. Greening Greening Law, PC 409 East 26th Street Bryan, Texas 77803	Trial Counsel
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Chad P. Van Brunt Law Office of Chad Van Brunt 310 South St. Mary's Street, Suite 1840 San Antonio, Texas 78205	Trial/ Appellate Counsel
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E. Alan Bennett Sheehy, Lovelace & Mayfield, PC 510 North Valley Mills Dr., Suite 500 Waco, Texas 76710	Appellate Counsel
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THE STATE:

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Assistant District Attorney

Trial Counsel

Douglas Howell, III
Assistant Criminal District Attorney

Appellate Counsel

Jarvis Parsons
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Statement Regarding Oral Argument

Oral argument will aid the decisional process. By granting oral argument, counsel may answer questions posed by the judges and offer further explanation of why this case is like other cases where Texas appellate courts have refused to enforce boilerplate waivers of appeal. For these reasons and to address any other issues, Appellant respectfully requests the opportunity to appear and present oral argument.

Statement of the Case

The trial court denied Appellant's motion to quash the indictment. Thereafter, Appellant pleaded guilty to 2 counts of theft of property with an aggregate value of \$200,000 or more. The trial court sentenced Appellant to 3 years' imprisonment on one count and 10 years' community supervision on the other count. Appellant sought to appeal the ruling on the motion to quash.

Statement of Procedural History

The Waco Court of Appeals dismissed Appellant's appeal in an opinion authored by Justice Scoggins that was handed down March 20, 2017. Chief Justice Gray dissented. Appellant timely filed a motion for rehearing on April 4, 2017. After requesting a response and receiving same, the Waco Court denied Appellant's motion for rehearing on June 13, 2017 with Chief Justice Gray dissenting.

This Court has granted Appellant an extension of time to file a PDR which is due August 14, 2017.

Grounds for Review

1. Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing a boilerplate waiver?

Statement of Facts

A Brazos County grand jury indicted Appellant for two counts of theft of property with an aggregate value of \$200,000 or more. Appellant filed two pretrial motions to quash the indictment. (CR32-40, 128-31) The trial court denied both. (CR13, 14)

Then, the parties negotiated a plea bargain whereby Appellant would plead guilty to the lesser-included offenses of theft of property valued at \$100,000 or more but less than \$200,000 and the State would recommend a three-year sentence on the first count and a probated sentence for the second count. (CR217-18)

As part of that plea process, Appellant signed two 4-page documents entitled "Defendant's Plea of Guilty, Waiver, Stipulation and Judicial Confession." (CR219-26) The first section of each of these documents consists of Appellant's voluntary statement that he understands the charges, his right to a jury trial, his right to remain silent, his right of confrontation. Appellant also acknowledged that admonitions that were set out below in the document "have been explained to me by the Judge and

by my defense attorney before entering an oral plea of guilty or nolo contendere.” (CR219, 223)

Next the plea documents acknowledged that Appellant was charged with first-degree felonies and the applicable punishment range.

The plea documents then provide an admonishment regarding the right of appeal.

I further understand that any recommendation of the prosecuting attorney as to punishment is not binding on the Judge, and that where there is a plea bargain agreement and the punishment assessed by the Judge does not exceed the agreed recommendation, I do not have the right to appeal without permission of the Judge except for those matters raised by written motions filed before trial.

(CR220, 224)

Next, the plea documents discuss deportation consequences for non-citizens. (CR220, 224)

After that, the plea documents contain a series of express waivers, including:

1. Reading of indictment;
2. Service of indictment 10 days before trial;
3. Arraignment;
4. Jury trial;
5. Right to remain silent;
6. Right of confrontation;
7. 10 days preparation after appointment of counsel; and

8. Presentence report.

(CR221, 225)

The plea documents next contain judicial confessions to the offenses charged and any lesser-included offenses. (CR221, 225)

Next, the plea documents affirm that the pleas are voluntary. (CR221, 225)

The plea documents then include boilerplate waiver language regarding the right to pursue a motion for new trial and to appeal.

I further understand that if I am convicted I have the right to pursue a motion for new trial and appeal to the appropriate Court of Appeals of Texas, and the right to be represented on appeal by an attorney of my choice or if I am too poor to pay for such attorney or the record on appeal, the Judge will, without expense to me, provide an attorney and a proper record for such motion for new trial and appeal. However, it is my desire to waive my right to *pursue a motion for new trial* and to appeal, and I hereby voluntarily, knowingly and intelligently waive those rights in the event that the Judge accepts the plea bargain agreement. I understand that if the Judge accepts the plea bargain agreement, I may appeal only with permission of the court.

(CR221, 225)

The plea documents conclude with the signatures of Appellant, the attorneys and the court. The court's certification, preceding its signature, provides, among other things, that it clearly appeared to the court "that the

defendant understands the consequences of *waiving his right to pursue a motion for new trial* and appeal and that he/she has voluntarily, knowingly and intelligently waived those rights in the event that the Court accepts the plea bargain agreement.” (CR222, 226)

The plea proceedings took place in August 2016. During the plea colloquy, the trial court first confirmed that Appellant’s name was spelled correctly. Then Appellant waived the right to have the indictment read. (CR257)¹ The court next reviewed the 2 plea documents: Exhibit 1 reflecting the plea bargain and Exhibit 2 being the above-described plea, stipulation, waiver and judicial confession. (App.2 at 4-5) The court reviewed the applicable range of punishment. (App.2 at 5)

The court then advised Appellant that the plea documents “also give you your rights in the criminal case.” The court specifically addressed the right to jury trial, the burden of proof, the right of confrontation, and the right to remain silent. (CR408-09) Appellant answered affirmatively when the court asked him if by signing the documents he “indicate[d his] desire

¹ Although the reporter’s record was never filed in the Court of Appeals, the reporter’s record from the plea hearing is included in the clerk’s record as Exhibit 17 to a mandamus petition filed with the court of appeals, a copy of which was also filed with the trial court. (CR403-18)

to waive [his] rights and plead guilty.” (CR409) The court did not discuss the right of appeal.

The court confirmed the terms of the plea bargain and received Appellant’s guilty pleas. (CR410)

The parties asked the court to postpone sentencing while they negotiated the amount of restitution. (CR410-11) The court found Appellant guilty and delayed sentencing. (CR411-12)

The court signed the trial court certification of defendant’s right of appeal for Count 2 on December 19, 2016 certifying that this is a plea-bargain case but Appellant had the right to appeal the court’s rulings on a pretrial motion that was “not withdrawn or waived.” (CR212) The court signed a similar certification for Count 1 on January 6, 2017. (CR211)

The parties had the sentencing hearing on January 6, 2017. The court sentenced Appellant in accordance with the plea bargain. (CR456)² Appellant’s appellate counsel Mr. Van Brunt then advised the court of Appellant’s intent to appeal the denial of the motion to quash. Van Brunt

² The reporter’s record from the sentencing hearing is included in the clerk’s record as Exhibit 18 to Appellant’s mandamus petition. (CR451-63)

asked the court to approve an appeal bond for prison case and allow Appellant to remain on his current bond for the probation case. (CR458)

The prosecutor argued that Appellant waived appeal. Van Brunt replied that the certification indicated he could appeal, and the court coordinator confirmed that. (CR458) Appellant's trial counsel Mr. Greening added that they had "crossed out the waivers" in the plea documents because they intended to appeal the denial of the motion to quash. (CR458-59)

The prosecutor replied that he understood there would not be an appeal without the court's permission. Greening responded that they only agreed to plead guilty so they could appeal because the State refused to allow Appellant to plead "no contest" and waive his right to appeal. The prosecutor insisted that they had only discussed the State's refusal to allow a no-contest plea and never addressed the right of appeal. (CR459-60)

After reviewing the plea documents, the court observed that Mr. Greening had not struck any waivers. (CR461) Mr. Greening asked for permission to appeal. The State confirmed that Appellant could appeal only with the court's permission. The court denied the request. (CR461-62)

Appellant filed a notice of appeal stating his intent to appeal the denial of his written pretrial motion. (CR213-14)

The parties appeared before the court again on January 30. The State asked the court to deny an appeal bond and amend the certifications. The court advised that it had already prepared an amended certification and asked Mr. Van Brunt to review it. (CR468)³ Mr. Van Brunt responded by explaining that Appellant and his attorneys went forward with the guilty pleas based on the attorneys' understanding that he could appeal the pretrial ruling. The attorneys specifically advised Appellant that he could appeal that decision. (CR468-69) The court replied that he considers such an appeal waived unless it is brought to the court's attention at the time the plea is entered. (CR469-70) The court conceded that he did not read the initial certifications before signing them. (CR470)

After an additional exchange⁴ between the court and Mr. Van Brunt, the State asked the court to enter the proposed first amended certification that states Appellant waived his right of appeal. (CR472-73) The court

³ The reporter's record from the January 30, 2017 hearing is included in the clerk's record as Exhibit 19 to Appellant's mandamus petition. (CR464-81)

⁴ Among other things, the court advised that it believed Mr. Van Brunt had "pulled a fast one on the Court." (CR471)

noted the refusal of the defense to sign the amended certification. The State reiterated its insistence that an appeal was never discussed during plea negotiations. The State also commented that the prosecutors do not usually see the certification before it is submitted to the court. (CR473-74) The court replied, "It was slipped in." Mr. Greening disputed that, but the court persisted in its opinion. (CR474)

The court concluded by reciting the language included in the amended certification:

I, Judge of the Trial Court, certify this criminal case is a plea bargain case; and matters were raised by written motion, filed and ruled on before trial; but those matters were waived at the plea hearing; and permission to appeal, though not appropriate, was denied. See State's Exhibit Number 1.

(CR475), (CR239)

The Court of Appeals dismissed the appeal based on the amended certification. (App.1)

Reasons for Granting Review

The right to appeal does not depend on tracking through a trail of technicalities. Here, Appellant seeks to exercise his statutory right to appeal the trial court's denial of a motion to quash the indictment. The State and the trial court have tried to veto his right of appeal.

During the course of signing pages of documents for a plea-bargain proceeding, Appellant signed boilerplate waivers of appeal. Conversely, the trial court signed certifications of the right of appeal reflecting Appellant's right to appeal the adverse ruling on his pretrial motion.

At sentencing, Appellant notified the trial court of his intent to appeal. The State objected, and the trial court indicated that it would not permit the appeal. The trial court later amended the certifications to indicate that Appellant had waived appeal.

The Waco Court of Appeals dismissed the appeal based on the amended certification. Chief Justice Gray dissented.

This Court should grant review because the Waco majority's decision conflicts with the decisions of this Court and other courts of appeals and

the Waco majority misconstrued and misapplied Article 44.02 and Rule 25.2(a) such that Appellant's statutory right of appeal has been denied.

.

Argument

1. Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing a boilerplate waiver?

An appellate court will enforce a defendant's waiver of appeal if made voluntarily, knowingly and intelligently unless the trial court grants permission to appeal. A boilerplate waiver of appeal will not be enforced if the record contains other information indicating that the defendant did not intend to waive the right of appeal. Here, Appellant intended to pursue his statutory right to appeal the trial court's pretrial denial of his motion to quash. Therefore, his boilerplate waiver was not voluntarily, knowingly and intelligently made.

A. A plea-bargaining defendant has the statutory right to appeal an adverse ruling on a pretrial motion.

Article 44.02 of the Code of Criminal Procedure authorizes a plea-bargaining defendant to appeal, but "he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial." TEX. CODE CRIM. PROC. art. 44.02. Stated differently, a plea-bargaining defendant has a statutory right to appeal the denial of a written pretrial motion regardless of whether the trial court permits the appeal.

Rule of Appellate Procedure 25.2(a)(2) was drafted to effectuate this statutory right. The rule provides that a plea-bargaining defendant may appeal only:

- (A) those matters that were raised by a written motion filed and ruled on before trial, or
- (B) after getting the trial court's permission to appeal.

TEX. R. APP. P. 25.2(a)(2).

Rule 25.2(a) also requires a trial court to enter a certification of the defendant's right of appeal concurrently with entry of judgment. *Id.*

B. Any waiver of appeal must be made voluntarily, knowingly and intelligently.

A defendant may waive many of his constitutional and statutory rights, including the right of appeal. *See* TEX. CODE CRIM. PROC. art. 1.14(a). An appellate court will enforce a waiver of appeal if "made voluntarily, knowingly, and intelligently." *Ex parte Broadway*, 301 S.W.3d 694, 697 (Tex. Crim. App. 2009).

Yet a defendant who has signed an enforceable waiver of appeal may still pursue an appeal if the trial court grants permission. *Willis v. State*, 121 S.W.3d 400, 403 (Tex. Crim. App. 2003).

C. A boilerplate waiver will not be enforced if the record contains other information indicating the defendant did not intend to waive appeal.

Most courts use lengthy plea documents filled with boilerplate language when receiving a guilty plea. The apparent purpose of these legalese-filled documents is to address as many conceivable legal grounds for challenging a conviction as possible to forestall a subsequent attack by a plea-bargaining defendant. Because these documents usually include even the kitchen sink as well as an extra stopper, courts will not enforce boilerplate waivers of appeal if the record contains other information suggesting that the defendant did not intend to waive his right of appeal.

Boilerplate plea documents typically include: a judicial confession; the admonishments required by article 26.13; waivers of various constitutional rights such as the right to jury trial and the right of confrontation; waivers of various statutory rights afforded by the Code of Criminal Procedure (whether applicable to the specific case or not);⁵ and verbiage designed to ensure that the defendant is competent to plead guilty. The possibilities for inclusion vary by jurisdiction but are extensive.

⁵ The plea documents here purport to waive or acknowledge at least 8 separate statutory rights or requirements, several of which did not apply to Appellant's case (e.g., sex offender registration).

Because a waiver of appeal must have been made voluntarily, knowingly, and intelligently to be enforceable, appellate courts should be reluctant to enforce them if the record contains other information suggesting that the defendant did not intend to waive appeal.

In *Alzarka*, this Court thus held that a boilerplate waiver of appeal would not be enforced because the trial court had granted oral permission to appeal, the parties had discussed the defendant's anticipated appeal during the plea hearing, and the State did not claim waiver in its initial appellate brief. *Alzarka v. State*, 90 S.W.3d 321, 322-24 (Tex. Crim. App. 2002).

The First Court applied *Alzarka* later that same year. In *Garcia*, the trial court denied a motion to suppress and immediately inquired whether the defendant intended to enter a plea bargain then appeal the decision. Defense counsel stated that was his intent, and the State consented on the record. *Garcia v. State*, 95 S.W.3d 522, 523 (Tex. App. – Houston [1st Dist.] 2002, no pet.). *Garcia* then pleaded “no contest” and received probation under a plea bargain. *Id.* at 523-24. The docket sheet reflected that permission to appeal had been granted. However, the plea documents included a boilerplate waiver of appeal. *Id.* at 524.

On appeal, the State argued that Garcia had waived appeal. *Id.* The First Court followed the reasoning of *Alzarka* and held that Garcia had not intended to waive appeal. *Id.* at 524-25.

The Court reached a similar result in *Willis* a year later. There, the defendant had signed plea documents that included a boilerplate waiver of appeal. The parties signed a reset form that included a handwritten notation, “check atty on appeal of MSEH.” *Willis*, 121 S.W.3d at 401. The trial court signed a handwritten notation on the notice of appeal that stated, “The trial court grants permission to appeal.” The trial court also signed an order appointing appellate counsel. *Id.* at 401-02. The appellate court dismissed the appeal *sua sponte* because of the boilerplate waiver, even though the State did not contend that the defendant had waived appeal. *Id.* at 402. This Court reversed. “We now hold that the trial court's subsequent handwritten permission to appeal controls over a defendant's previous waiver of the right to appeal, allowing the defendant to appeal despite the boilerplate waiver.” *Id.* at 403.

In *Iles*, a defendant filed motions to suppress that the trial court denied. He then accepted a plea bargain for 35 years. *Iles v. State*, 127 S.W.3d 347, 348 (Tex. App.—Houston [1st Dist.] 2004, no pet.). His plea

documents included a boilerplate waiver of appeal. *Id.* at 348-49. Afterward, he filed a notice of appeal stating his intent to appeal the denial of the suppression motions. The trial court appointed appellate counsel, ordered preparation of the appellate record at no cost to the appellant, and entered written findings of fact and conclusions of law regarding the voluntariness of his statement to the police—one of the things challenged in his suppression motions. *Id.* at 349.

The First Court upheld the waivers of appeal. The court did so because the defendant signed 4 separate documents that contained express waivers of appeal. The parties did not discuss an appeal during the suppression hearing. The defendant waived the making of a reporter's record during the plea hearing so there was no indication at that hearing of an intent to appeal. The court concluded that the handwritten statement in the notice of appeal stating an intent to appeal the suppression rulings was ambiguous "at best." So the court concluded that the waiver of appeal was voluntarily, knowingly and intelligently made. *Id.* at 349-50. The court also held that the trial court's actions in appointing appellate counsel, approving a free appellate record, and making the findings on the

voluntariness of the defendant's statement did not equate to permission to appeal. *Id.* at 350-51.

In *Grice*, the defendant likewise filed a pretrial motion to quash the indictment that the trial court denied. *Grice v. State*, 162 S.W.3d 641, 643 (Tex. App. – Houston [14th Dist.] 2005, pet. ref'd). The documents from the plea proceeding were inconsistent on the issue of appeal: (1) a boilerplate waiver of appeal, (2) a notation on the judgment that appeal had been waived, and (3) the trial court certification reflecting that Grice had the right of appeal. The trial court verbally addressed Grice's jury waiver but not an appeal waiver during the plea hearing. *Id.* Additionally, defense counsel advised the trial court of his intent to file a notice of appeal to challenge the ruling on the motion to quash, and the State did not object. *Id.* at 643-44.

The Fourteenth Court applied *Willis* and *Alzarka* to conclude that Grice had not waived his right of appeal. *Id.* at 644-45.

D. Appellant's waiver was not made voluntarily, knowingly or intelligently.

The procedural facts of Appellant's case are more like those in *Willis* and *Grice* than in *Iles*. Despite the boilerplate waivers, the initial trial court

certifications and Appellant's notice of appeal confirm his intent to appeal the trial court's denial of the motion to quash and cast severe doubt on his intent to waive appeal. Further, like *Grice* the trial court addressed the jury waiver but did not address a waiver of appeal when the court accepted Appellant's guilty plea. *See Grice*, 162 S.W.3d at 643.

This Court has held on more than one occasion that the rules relating to the perfection of an appeal must not be construed in a manner that elevates form over substance.

A person's right to appeal a civil or criminal judgment should not depend upon tracking through a trail of technicalities. In former days, this Court was sometimes accused of elevating form over substance in demanding technical perfection in the notice of appeal.

Few v. State, 230 S.W.3d 184, 190 (Tex. Crim. App. 2007); *accord Gonzales v. State*, 421 S.W.3d 674, 675 (Tex. Crim. App. 2014).

To deny Appellant his statutory right of appeal under the circumstances would be to return to the Court's former practice of elevating form over substance.

Appellant's intent has clearly been to appeal the denial of his motion to quash from the beginning. The trial court's initial certification confirms Appellant's intent—regardless of whether the prosecutor or the trial court

read it when Appellant's counsel submitted it (or when the trial court signed it).

This Court must not allow the State and the trial court to veto Appellant's intent to pursue his statutory right of appeal where his trial counsel inadvertently failed to strike the boilerplate language waiving the right to appeal. The trial court's refusal to permit this appeal and the State's refusal to agree to it do not mean that Appellant voluntarily, knowingly and intelligently waived his right of appeal.

E. The Court should grant review.

The Court should grant review of this issue for several reasons. *See* TEX. R. APP. P. 66.3.

The Waco Court has decided an important question of state law – the extent to which a proper application paragraph cures errors in the charge – that has not been, but should be, settled by this Court. *Id.* 66.3(b).

The Waco Court's failure to address this issue conflicts with the applicable decisions of this Court, namely, *Almanza* and its progeny. *Id.* 66.3(c).

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Kelsey Jo Lackey asks the Court to: (1) grant review on the issues presented in this petition for discretionary review; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett

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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 4,446 words.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this corrected petition was served electronically on August 22, 2017 to: (1) counsel for the State, Douglas Howell, III, dhowell@brazoscountytexas.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett

Appendix

1. *Lackey v. State*, No. 10-17-00016-CR, 2017 WL 1148239 (Tex. App. – Waco Mar. 20, 2007, pet. filed) (mem. op., not designated for publication)

APPENDIX – TAB 1

2017 WL 1148239

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do not publish

Court of Appeals of Texas,
Waco.

Kelsey Jo LACKEY, Appellant

v.

The STATE of Texas, Appellee

No. 10–17–00016–CR

|

Opinion delivered and filed March 20, 2017

**From the 272nd District Court, Brazos County, Texas,
Trial Court No. 13–04695–CRF–272**

Attorneys and Law Firms

Jarvis J. Parsons, Douglas Howell III, for The State of
Texas.

E. Alan Bennett, Chad P. Van Brunt, for Kelsey Jo
Lackey.

Before Chief Justice Gray, Justice Davis, and Justice
Scoggins

MEMORANDUM OPINION

AL SCOGGINS, Justice

*1 Kelsey Jo Lackey attempts to appeal from his
conviction for the offense of theft. The amended certificate
of right to appeal indicates this is a plea bargain case and
that Lackey waived his right to appeal. TEX. R. APP. P.
25.2(d).

Accordingly, the appeal is dismissed.¹

(Chief Justice Gray dissents with a note)*

All Citations

Not Reported in S.W.3d, 2017 WL 1148239

Footnotes

¹ A motion for rehearing may be filed within 15 days after the judgment or order of this Court is rendered. See TEX. R. APP. P. 49.1. If the appellant desires to have the decision of this Court reviewed by filing a petition for discretionary review, that petition must be filed in the Court of Criminal Appeals within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled by the court of appeals. See TEX. R. APP. P. 68.2(a).

* Chief Justice Gray dissents. A separate opinion will not issue. He notes, however, that he believes the certificate of the right to appeal that indicates that the defendant waived the right to appeal is not supported by the record. He would direct the trial court to correct the certificate of the right to appeal to reflect that the defendant did not waive the right to appeal adverse decisions on pretrial motions, as part of the plea bargain agreement and because the internal inconsistency in the admonition and plea papers should yield in favor of preserving the right to appeal if it is not clearly and unambiguously waived. Because the majority dismisses these appeals Chief Justice Gray respectfully dissents.