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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/21/2018 12:21 PM
Accepted 6/21/2018 12:41 PM
DEANA WILLIAMSON
CLERK

CAUSE NO. _____

FILED
COURT OF CRIMINAL APPEALS
6/21/2018
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**INTERNATIONAL FIDELITY INSURANCE CO., AGENT
GLENN STRICKLAND DBA
A-1 BONDING CO.,**

PETITIONER,

VS.

THE STATE OF TEXAS,

RESPONDENT.

**On Petition for Discretionary Review from the First District
Court of Appeals sitting in Houston, Texas regarding three
cases (01-16-00627-CR, 01-16-00628, 01-16-00629)**

PETITION FOR DISCRETIONARY REVIEW

**THE GOOD LAW FIRM
LAW OFFICE OF KEN W. GOOD,
PLLC
KEN W. GOOD
5604 OLD BULLARD RD.,
SUITE 102
TYLER, TEXAS 75703
(903) 579-7507
(903) 581-3701 (FAX)**

ATTORNEYS FOR PETITIONER

IDENTITY OF JUDGES, PARTIES AND COUNSELS

Trial Court Judge:

The Honorable Jim Wallace, Judge of the 337th Criminal District Court of Harris County, Texas.

Parties to the Judgment:

International Fidelity Insurance Company, agent Glenn Strickland d/b/a A-1 Bail Bonds

The State of Texas

Counsel for International Fidelity Insurance Company before trial court and appeal:

Ken W. Good
The Good Law Firm
Law Office of Ken W. Good, PLLC
5604 Old Bullard Rd., Suite 102
Tyler, Texas 75703

Counsel for The State of Texas

Kim Ogg, District Attorney, Harris County, Texas
Michael Butera, Assistant Criminal District Attorney, Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner does not believe that oral argument would be helpful in this case.

STATEMENT OF THE CASE

This petition for review regarding three bond forfeiture cases. The appellant posted three bonds in the amount of \$30,000.00 each for three cases for defendant Israel Fernando Rivera. The bonds were posted on June 24, 2014 (CR 6). Mr. Rivera failed to appear for a court hearing on January 27, 2015 (CR 12). The trial court issued a judgment nisi on January 29, 2015. *Id.* The trial court entered a final judgment on May 6, 2016 (CR 5). The clerk's office issued a bill of costs (CR 56). On May 16, 2016, the Defendant-Surety filed a motion for new trial and motion to retax costs regarding the bill of costs (CR 36). The Defendant-Surety also filed a brief in support of the motion (CR 43).

STATEMENT OF PROCEDURAL HISTORY

On July 14, 2016, the trial court conducted a hearing regarding the motion for new trial. After conducting an evidentiary hearing, the trial court denied the motion for new trial (CR 40). On August 4, 2016, the Defendant-Surety filed a notice of appeal, request for items to be included in the clerk's record and request for preparation of the reporter's record (CR 124, 127 & 130). The court of appeals remanded the case to the trial court to conduct a hearing regarding the missing

reporter's record. The trial court entered findings stating that the reporter did not transcribe the hearing and that this failure was through no fault on the part of the petitioner. Nevertheless, the court of appeals affirmed. The petitioner filed a motion for rehearing which was denied on May 22, 2018. Therefore, the Petitioner has filed the following Petition for Discretionary Review.

CAUSE NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**INTERNATIONAL FIDELITY INSURANCE CO., AGENT
GLENN STRICKLAND DBA
A-1 BONDING CO.,**

PETITIONER,

VS.

THE STATE OF TEXAS,

RESPONDENT.

**On Petition for Discretionary Review from the First District
Court of Appeals sitting in Houston, Texas regarding three
cases (01-16-00627-CR, 01-16-00628, 01-16-00629)**

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, International Fidelity Insurance Co., agent Glenn Strickland
d/b/a A-1 Bonding Co, Petitioner in the above-entitled and numbered cause and files

the following Petition for Discretionary Review and in support thereof would respectfully show the court the following:

GROUND FOR REVIEW

The Texas Court of Criminal Appeals should accept this petition for discretionary review. Rule 66.3 of the Texas Rules of Appellate Procedure states that the following will be considered by the court in deciding whether to grant discretionary review:

(f) whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

TEX. R. APP. P. 66.3.

These cases were selected to address an issue reserved by this Court in *Safety Nat'l Cas. Corp. v. State*, 305 S.W.3d 586 (Tex. Crim. App. 2010). The issue was raised by a motion to retax costs and a motion for new trial. There was a contested hearing in which evidence was offered before the trial court. The parties stipulate that they requested a court reported and that a court reported appeared to transcribe the hearing at issue. However, when the record was filed before the court of appeals, no reporter's record was filed. The record was the subject matter of the hearing that was the issue to be appealed to the court of appeals. Without the record, it was

presumed that all the evidence offered supported the trial court's ruling. Therefore, the petitioner asked for a new trial. The court of appeals denied the request. This was error.

SUMMARY OF ARGUMENT

The reporter's record in this case has been lost. The court reporter has presented an affidavit to the court stating that she has not been able to find a record for this hearing. However, the parties have stipulated that the court reporter was present for the hearing at the request of the parties, that evidence was offered at the hearing and that the attorneys exchanged contact information with the reporter after the hearing because the hearing had been transcribed. The only issue for appeal was the matters presented at this hearing. Therefore, this was the heart of the appeal. A new trial should have been granted.

ARGUMENT

I. Introduction

The parties to this appeal filed a stipulation that before the trial court a court reporter was requested and was present to transcribe the hearing that is at issue in this case. The parties stipulated that the court reported was requested to come to the court room and after she appeared the hearing began. However, on appeal after the

reporter's record was requested it was never filed. The court of appeals remanded the matter to the trial court to conduct a hearing regarding the missing reporter's record. The trial court entered findings of fact that found that after the court reporter appeared in the courtroom she did not transcribe the hearing and that her failure to do so was through no fault on the part of the parties or the petitioner. Therefore, this is a very novel situation wherein everyone is in agreement that the court reporter was called to the courtroom to transcribe a hearing, she came to the courtroom and took her position but she did not transcribe the hearing. The trial court even concluded that it was not the fault of the petitioner that a record was not made. Therefore, the issue in this case is what should happen in this situation. The court of appeals affirmed the trial court. The petitioner maintains that it is should not be the petitioner's responsibility to ensure, after the court reporter is called to the courtroom and after she takes position for the hearing, that she actually perform the job upon which she was requested. In this situation, there is nothing further that the petitioner could have done to ensure that a record was made of a hearing. Therefore, the petitioner asks the court to hold that under the limited facts of this case, a new trial should have been granted.

II. Discussion

Rule 34.6 of the Texas Rules of Appellate Procedure set out the requirements for the reporter's record on appeal. TEX. R. APP. P. 34.6. The rule sets out the requirements that must be met for a party to be entitled to a new trial: (1) the records was requested timely; (2) if without the party's fault, a significant portion of the court reporter's record has been lost; (3) if the lost portion is necessary to the appeal; and (4) the lost part cannot be replaced by agreement. *Id.*

In the present case, Petitioner met these requirements. This Court addressed this rule in *Issac v. State*, 989 S.W.2d 754 (Tex. Crim. App. 1999). In *Issac* this Court concluded that a new trial was not granted because the missing record was not necessary to the appeal's resolution. However, in the current case the hearing on the motion for new trial was a disputed hearing where in evidence was introduced before the trial court. The trial court held that the record at issue was not prepared through no fault on the part of the Petitioner. The lost part of the record is necessary to the petitioner's appeal because it was the preservation record of the issue. Finally, the record could not be replaced by the agreement of the parties. Therefore, the court of appeals should have ordered a new trial.

This is a unique situation to which the petitioner has not found a similar matter.

In the present case, it is uncontested that there is a missing or incomplete reporter's record, that it was requested by parties and that the failure to have the hearing transcribed was through no fault on the part of the petitioner. Under the current rules of appellate procedure, in considering a missing or incomplete reporter's record, the court must conduct a harm analysis. *See Issac v. State*, 989 S.W.2d 754, 756-57 (Tex. Crim. App. 1999). If the missing portion of the record is not necessary to the appeal's resolution, then the loss of that portion of the record is harmless and a new trial is not required. *Routier v. State*, 112 S.W.3d 554, 571-72 (Tex. Crim. App. 2003).

The purpose of the hearing was to prepare the case for appeal of an important issue in the bail bond industry. This issue dealt with an issues previously argued before this court and reserved to be resolved for another day. The issue is the proper calculation of "costs of court" in a criminal bond forfeiture case. This is an issue that has been pending before the appellate courts for some time. The petitioner maintains that the State of Texas is improperly charging "civil filing fees" as costs of court in these criminal bond forfeiture cases even through the filing fee statutes state that the fees are to be paid on the filing of a civil case. The issue was first addressed in 2006 in a Texas Attorney General Opinion which held that a civil filing fee statute could

not be charged as a cost of court in a bond forfeiture proceeding. Tex. Atty. Gen. Op. GA-486 (2006). The Texas Court of Criminal Appeals was asked to address the issue in 2010 in *Safety Nat'l Cas. Corp. v. State*, 305 S.W.3d 586 (Tex. Crim. App. 2010). The Court reserved the issue of trial court fees to another day and declined to address the issue. However, the Court did conclude that the courts of appeals in Texas were improperly charging civil filing fees for appeals in bond forfeiture cases. The bondsmen filed a civil proceeding seeking to have the issue resolved. However, the case was dismissed holding that the issue should be resolved in each underlying criminal case. Cause No. 01-12-00214-CV; *Kubosh v. Harris County*; In the 1st District Court of Appeals (May 2, 2013).

Therefore, the petitioner selected these three cases to address the issue of whether the court clerk properly calculated court costs in the underlying criminal cases. A motion to retax costs is a motion to correct the ministerial act of the clerk in calculating costs. *See Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807, 813 (1959).

In the present case, the appellant filed a motion for new trial and a motion to retax costs to raise and preserve the issue of whether the calculation of court costs was properly calculated by the clerk. The matter was set for a hearing and the parties presented evidence and filed exhibits before the trial court. Without the reporter's

record it is presumed that the missing record supports the trial court's ruling. Therefore, the appellant must have the record to proceed with this issue on appeal.

Since the reporter's record is missing through no fault on the part of the appellant, and the hearing was the issue upon which the appellant filed this appeal, the court of appeals erred in refusing to order a new trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner, International Fidelity Insurance Co., agent Glenn Strickland d/b/a A-1 Bonding Co. asks the Court of Criminal Appeals to remand this case for a new trial and for such other and further relief either at law or in equity to which the Petitioner may show just entitlement.

Respectfully submitted,

THE GOOD LAW FIRM
Law Office of Ken W. Good, PLLC
5604 Old Bullard Road, Suite 102
Tyler, Texas 75703
(903) 579-7507
(903) 581-3701 Fax

By: /s/ Ken W. Good
KEN W. GOOD
State Bar No. 08139200

ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

This petition for discretionary review complies with the typeface and word county requirements of Tex. R. App. P. 9.4 because is has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for foot notes, and contains approximately 1518 words, excluding those parts specifically exempted, as computed by WordPerfect X4- the computer program used to prepare document.

/s/ Ken W. Good
KEN W. GOOD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has this day been forwarded by regular mail, unless otherwise noted below, on this the 21th day of June, 2018.

Mr. Michael Butera
Harris County Bond Forfeiture Division
Harris County District Attorney's Office
1201 Franklin Street
Houston, Texas 77002

Via Email

/s/ Ken W. Good
KEN W. GOOD

APPENDIX A

NO. 1429386-A

THE STATE OF TEXAS § IN THE DISTRICT COURT
 V. § OF HARRIS COUNTY, TEXAS
 ISRAEL FERNANDO RIVERA AKA § 337TH JUDICIAL DISTRICT
 ISRAEL RIVERA, ET AL

FINAL JUDGMENT OF FORFEITURE

On the 6TH day of MAY, 2016, came on for trial the above-captioned cause wherein the State of Texas is Plaintiff, ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA is Defendant-Principal, and INTERNATIONAL FIDELITY INSURANCE COMPANY (AGENT: GLENN D. STRICKLAND) is Defendant-Surety; Defendant-Principal was duly notified of the forfeiture, but failed to answer or appear, and has wholly defaulted; Defendant-Surety answered and appeared; and the Court, after considering the pleadings and evidence herein, including the bail bond and the Judgment of Forfeiture on file in this cause, finds: that no sufficient cause was shown for the Defendant-Principal's failure to appear on JANUARY 27, 2015, to answer the charge by indictment accusing him of a felony; and the Judgment of Forfeiture heretofore rendered against the Defendants should be made final.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Judgment of Forfeiture is hereby made final and the State of Texas shall have and recover from ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA, Defendant-Principal, and INTERNATIONAL FIDELITY INSURANCE COMPANY (AGENT: GLENN D. STRICKLAND), Defendant-Surety, jointly and severally, the sum of \$30,000.00 (DOLLARS), and costs of court, for all of which let execution issue. All relief not expressly granted herein is denied.

SIGNED this 6 day of May, 2016

Approved as to form:

[Signature]
 ASSISTANT DISTRICT ATTORNEY
[Signature]
 ATTORNEY/DEFENDANT-SURETY
 CW

[Signature]
 JUDGE PRESIDING FILED
 Chris Daniel
 District Clerk
 MAY 06 2016
 Time: 9:15
 By JA, Texas
 eputy

05-06-16

In accordance with Rule 239a of the Texas Rules of Civil Procedure, I hereby certify to the District Clerk of Harris County, Texas, that the last known mailing address of the party against whom Judgment is taken in Scire Facias No. 1429386-A in the 337TH District Court of Harris County, Texas, is as follows:

DEFENDANT-
 PRINCIPAL: ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA
 8846 KEMPWOOD DR.
 HOUSTON, TEXAS 77080

So witness my hand and signature this 7th day of March, 2016.

[Signature]
 Assistant District Attorney

NO. 1429388-A

THE STATE OF TEXAS

§

IN THE DISTRICT COURT

V.

§

OF HARRIS COUNTY, TEXAS

ISRAEL FERNANDO RIVERA AKA
ISRAEL RIVERA, ET AL

§

337TH JUDICIAL DISTRICT

FINAL JUDGMENT OF FORFEITURE

On the 6TH day of MAY, 2016, came on for trial the above-captioned cause wherein the State of Texas is Plaintiff, ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA is Defendant-Principal, and INTERNATIONAL FIDELITY INSURANCE COMPANY (AGENT: GLENN D. STRICKLAND) is Defendant-Surety; Defendant-Principal was duly notified of the forfeiture, but failed to answer or appear, and has wholly defaulted; Defendant-Surety answered and appeared; and the Court, after considering the pleadings and evidence herein, including the bail bond and the Judgment of Forfeiture on file in this cause, finds: that no sufficient cause was shown for the Defendant-Principal's failure to appear on JANUARY 27, 2015, to answer the charge by indictment accusing him of a felony; and the Judgment of Forfeiture heretofore rendered against the Defendants should be made final.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Judgment of Forfeiture is hereby made final and the State of Texas shall have and recover from ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA, Defendant-Principal, and INTERNATIONAL FIDELITY INSURANCE COMPANY (AGENT: GLENN D. STRICKLAND), Defendant-Surety, jointly and severally, the sum of \$30,000.00 (DOLLARS), and costs of court, for all of which let execution issue. All relief not expressly granted herein is denied.

SIGNED this 6 day of May, 2016.

Approved as to form:

[Signature]
ASSISTANT DISTRICT ATTORNEY
[Signature]
ATTORNEY/DEFENDANT-SURETY
CW

[Signature]
JUDGE PRESIDING
FILED
Chris Daniel
District Clerk
MAY 06 2016
Time: 9:15
Harris County, Texas
By: JA
Deputy

In accordance with Rule 239a of the Texas Rules of Civil Procedure, I hereby certify to the District Clerk of Harris County, Texas, that the last known mailing address of the party against whom Judgment is taken in Scire Facias No. 1429388-A in the 337TH District Court of Harris County, Texas, is as follows:

DEFENDANT-
PRINCIPAL:

ISRAEL FERNANDO RIVERA AKA ISRAEL RIVERA
8846 KEMPWOOD DR.
HOUSTON, TEXAS 77080

So witness my hand and signature this 7th day of March, 2016.

[Signature]
Assistant District Attorney

APPENDIX B

CAUSE NOS. 1429386-A, 1429387-A, & 1429388-A

THE STATE OF TEXAS

VS.

ISRAEL FERNANDO RIVERA,
ET AL.

§
§
§
§
§
§

IN THE 337TH CRIMINAL

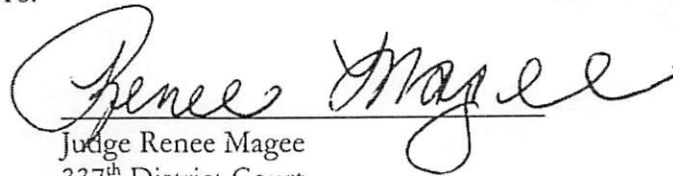
DISTRICT COURT OF

HARRIS COUNTY, TEXAS

ORDER

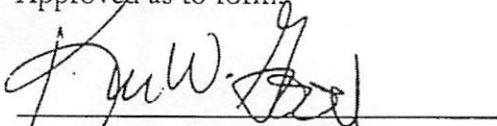
The Court, having reviewed the evidence, stipulations, and written arguments of the parties,
DENIES the Defendant-Surety's Motion for New Trial and to Retax Costs.

Signed on this, the 14th day of July, 2016.



Judge Renee Magee
337th District Court
Harris County, Texas

Approved as to form:


Attorney for Defendant-Surety
Attorney for State

FILED
Chris Daniel
District Clerk

JUL 15 2016

Time _____
By _____
Harris County, Texas
Deputy

APPENDIX C

The State of Texas
Plaintiff,

vs.

Israel Fernando Rivera,
Defendant - Principal,

International Fidelity Insurance Co.,
agent Glenn Strickland d/b/a A-1
Bonding Co.,
Defendant-Surety.
(Bond Amount: \$30,000.00)

§
§
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§

In the District Court

337th Judicial District

Harris County, Texas

STIPULATIONS REGARDING REPORTER'S RECORD

COMES NOW, Defendant-Surety and the State of Texas in the above-entitled and numbered cause and file the following stipulations regarding reporter's record and in support thereof would respectfully show the court the following:

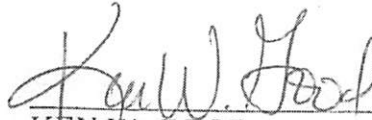
I.

The parties make the following stipulations:

1. On July 14, 2016, this matter came on for hearing before the trial court on the defendant-surety's motion for new trial.
2. At the start of the hearing, the parties announced to the court that a court reporter was needed for the hearing.
3. The court reporter was called to the courtroom.
4. The court reporter was present for the hearing.
5. The parties introduced evidence during the hearing.
6. At the close of the hearing the attorneys exchanged contact information with the court reporter.
7. The parties believe that a reporter's record was taken of the hearing.

WHEREFORE, PREMISES CONSIDERED, Defendant-Surety asks the court to take notice of this filing and for such other and further relief either at law or in equity to which the parties may show just entitlement.

AGREED:



KEN W. GOOD

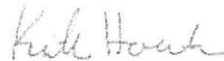
State Bar No. 08139200

ATTORNEYS FOR DEFENDANT-SURETY



MICHAEL N. BUTERA

State Bar No. 24045590



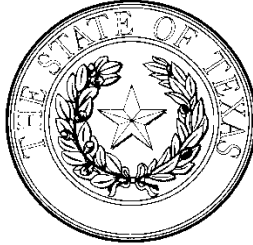
KEITH HOUSTON

State Bar No. 24069950

ATTORNEYS FOR STATE OF TEXAS

APPENDIX D

Opinion issued January 25, 2018



In The
Court of Appeals
For The
First District of Texas

NOS. 01-16-00627-CR, 01-16-00628-CR, 01-16-00629-CR

**INTERNATIONAL FIDELITY INSURANCE CO. (AGENT: GLENN
STRICKLAND) DBA A-1 BONDING, Appellant**

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case Nos. 1429386-A, 1429387-A, 1429388-A**

MEMORANDUM OPINION

In these bail bond forfeitures cases, appellant, International Fidelity Insurance Co. (Agent: Glenn Strickland) d/b/a A-1 Bonding, appeals the trial court's order denying its motion for new trial and to retax costs. In its sole point of error, appellant

contends that the trial court erred in denying its motion because the reporter's record is missing through no fault of its own, and therefore, it is entitled to a new trial under Rule of Appellate Procedure 34.6(f). We affirm.

Background

Israel Fernando Rivera, the criminal defendant in the underlying cases, was charged by indictment with the felony offense of indecency with a child in three separate causes. Appellant executed a bail bond in the amount of \$30,000 in each case, as the surety on the bonds for Rivera, the principal on the bonds, to secure Rivera's release from custody pending resolution of the charges. Rivera failed to appear and answer the charges against him, and the trial court entered judgments of forfeiture (judgments nisi) for the full amount of the bond plus costs of court. On May 6, 2016, the trial court entered final judgments of forfeiture and the district clerk issued a bill of costs in each case.

On May 16, 2016, appellant filed a motion for new trial and to retax costs. On July 14, 2016, after conducting a hearing, the trial court issued an order denying the motion after "having reviewed the evidence, stipulations, and written arguments of the parties."

On August 4, 2016, appellant appealed the trial court's ruling but no reporter's record was produced. On December 14, 2016, the court reporter filed an affidavit indicating that she did not have "a steno file nor audio file" for the hearing or any

record of “a hearing reported by [her]” on the date of the hearing. On March 14, 2017, the State filed a motion requesting that this Court abate the appeal and remand the case to the trial court for a determination regarding the reporter’s record. On April 6, 2017, we granted the State’s motion, abated the appeal, and remanded to the trial court to conduct a hearing to determine whether (1) a reporter’s record was created; (2) that record was lost or destroyed; (3) the record was necessary to resolution of the appeal; and (4) the parties could agree on replacement of the lost or destroyed record.

On May 1, 2017, the trial court held an abatement hearing. Thereafter, the trial court entered the following written findings of fact:

1. The court finds that a hearing occurred on July 14, 2016 on the appellant’s motion for new trial and motion to retax costs, but that hearing was not stenographically or otherwise recorded. Therefore, a court reporter is not able to prepare, certify, and file a transcription of any testimony, argument, or other proceedings.
2. Because the court finds that the record was not stenographically or otherwise recorded, the court finds that the record was neither lost nor destroyed. The fact that the record was not stenographically or otherwise recorded is due to no fault on the appellant’s part.
3. Because the court finds that the record was not stenographically or otherwise recorded, the court does not make a finding as to whether or not the lost or destroyed portions of the record are necessary to appellant’s appeals.
4. Because the court finds that the record was not stenographically or otherwise recorded, the parties cannot agree on a replacement of the lost or destroyed record.

After we reinstated the appeals, appellant filed a supplemental brief.

Discussion

Appellant argues that it is entitled to a new trial pursuant to Rule of Appellate Procedure 34.6(f) because the court reporter's record is missing through no fault of its own. Under rule 34.6(f), an appellant is entitled to a new trial if:

- (1) the appellant has timely requested a reporter's record;
- (2) without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or—if the proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;
- (3) the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
- (4) the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

TEX. R. APP. P. 34.6(f); *Routier v. State*, 112 S.W.3d 554, 571 (Tex. Crim. App. 2003). If the record does not support each of these facts, the appellant is not entitled to a new trial. *See* TEX. R. APP. P. 34.6(f).

At the abatement hearing, the parties advised the court that a record had been requested and they believed that the July 14, 2016 hearing had been stenographically recorded. The court reporter, however, testified that she did not believe it was

possible that a record of the hearing had been created which later could not be found, and that it had never happened in her nearly thirty years as a court reporter. The trial court found that the July 14, 2016 hearing on appellant’s motion for new trial and motion to retax costs “was not stenographically or otherwise recorded” and that “[b]ecause the court finds that the record was not stenographically or otherwise recorded, the court finds that the record was neither lost nor destroyed.”

Rule 34.6(f), by its plain language, applies only to situations in which a portion of the proceedings was recorded but was later lost or destroyed. *See Williams v. State*, 937 S.W.2d 479, 486 (Tex. Crim. App. 1996) (holding rule 50(e), predecessor to Rule 34.6(f), not applicable if no record made); *see Routier*, 112 S.W.3d at 570 (noting that principles underlying former rule 50(e) apply to rule 34.6(f), and that rule applies regardless of whether only portion of record or entire record is lost or destroyed). “When the complaining party cannot show that the court reporter ever *recorded* the missing proceedings, he is not entitled to a new trial[.]” *Williams*, 937 S.W.3d at 486 (emphasis in original).

Here, appellant has failed to show that the trial court abused its discretion in finding that the July 14, 2016 hearing was not stenographically or otherwise recorded. *See Coulter v. State*, 510 S.W.3d 210, 215 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting trial court’s findings of fact are reviewed under abuse of discretion standard). Having failed to show that the hearing was recorded,

appellant is not entitled to a new trial under rule 34.6(f). *See Williams*, 937 S.W.3d at 486; *see also Waterman v. State*, No. 02-16-00023-CR, 2016 WL 4040597, at *1 (Tex. App.—Fort Worth July 28, 2016, no pet.) (mem. op., not designated for publication) (concluding appellant’s failure to show that hearing was actually recorded rendered him ineligible for relief under rule 34.6(f)); *Duhon v. State*, No. 01-99-00946-CR, 2000 WL 1641139, at *1 (Tex. App.—Houston [1st Dist.] Nov. 2, 2000) (not designated for publication) (concluding that appellant failed to show that voir dire was recorded by court reporter and was not entitled to new trial under rule 34.6(f)).¹ Accordingly, we overrule appellant’s point of error.

Conclusion

We affirm the trial court’s judgment.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).

¹ Because appellant has not shown that the record was lost or destroyed, we need not address the remaining requirements of rule 34.6(f). *See* TEX. R. APP. P. 34.6(f); *see also Aranda v. State*, Nos. 2-08-119-CR & 02-08-120-CR, 2009 WL 279489, at *4 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (mem. op., not designated for publication) (concluding defendant could not satisfy requirements of rule 34.6(f) because he could not show that any portion of record related to adjudication hearing was lost or destroyed).