

IN THE SUPREME COURT OF TEXAS

No. 06-0917

LAWRENCE HIGGINS, PETITIONER,

v.

RANDALL COUNTY SHERIFF'S OFFICE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE BRISTER, and JUSTICE MEDINA joined.

JUSTICE GREEN filed a dissenting opinion, in which JUSTICE WAINWRIGHT and JUSTICE WILLETT joined.

JUSTICE JOHNSON did not participate in the decision.

Texas Rule of Appellate Procedure 20.1 governs the procedures to establish an appellant's indigence. The rule enumerates eleven items of financial information that the affidavit of indigence must contain, TEX. R. APP. P. 20.1(b), and also provides that if no contest to the affidavit is filed, "no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs," TEX. R. APP. P. 20.1(f). We must decide whether the appeal of a party asserting indigence may proceed when the affidavit lacks complete information on all of the items enumerated in subsection (b) but no contest to the affidavit is filed.

We hold that it may. Accordingly, we reverse the court of appeals' judgment of dismissal and remand the case to that court for consideration of the petitioner's appeal.

Lawrence Higgins, a *pro se* inmate, timely appealed the trial court's dismissal of his civil suit for want of prosecution but failed to either pay the filing fee or file an affidavit of indigence. When the court of appeals requested payment of the filing fee within ten days, Higgins filed an affidavit of indigence. Because Higgins failed to file the affidavit *with* his appeal as Texas Rule of Appellate Procedure 20.1(c)(1) provides, and because the affidavit failed to fully comply with Rule 20.1(b), the court dismissed Higgins's appeal. *Higgins v. Randall County Sheriffs Office*, No. 07-05-0004-CV, 2005 Tex. App. LEXIS 495, at *1–*2 (Tex. App.—Amarillo Jan. 19, 2005). We reversed on both grounds, holding that an appeal may not be dismissed for a formal procedural defect unless the party is provided a reasonable opportunity to correct the defect. *See Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898, 899–900 (Tex. 2006) (“*Higgins I*”).

After our decision, by letter dated July 18, 2006, the court of appeals directed Higgins to file, by July 27, 2006, a written response justifying the late filing of his affidavit and an amended affidavit that complied with Rule 20.1. According to Higgins, he received the court's letter on July 24th and that same day mailed a new affidavit of indigence, a copy of his inmate trust fund account statement, and a statement justifying his belatedness. That affidavit, in its entirety, reads:

I, Lawrence Daniel Higgins, hereby swear that I am unable to pay any court costs in court of appeals No. 07-05-00004-CV. I am incarcerated and do not receive any monies from anywhere. I have no money at this time nor do I expect any money in the immediate future. I have attached a copy of the last trust fund account statement that I received which shows my balance to be \$00.03. Please allow my appeal to proceed in forma pauperis since I am unable to pay the costs.

Higgins contends that under prison rules governing access to the law library, it was impossible for him to access the appellate rules and ascertain Rule 20.1's requirements in time to comply with the court's July 27th deadline. No contest was filed to Higgins's affidavit. The court of appeals dismissed Higgins's appeal for failure to comply with Rule 20.1(b). No. 07-05-0004-CV, 2006 Tex. App. LEXIS 7423, at *7. We grant Higgins's petition for review to consider the effect of incomplete compliance with Rule 20.1(b) when an affidavit of indigence is uncontested.

The concept that courts should be open to all, including those who cannot afford the costs of admission, is firmly embedded in Texas jurisprudence. *See, e.g.*, TEX. CONST. art. I, § 13; *Griffin Indus., Inc. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 353 (Tex. 1996); *Pinchback v. Hockless*, 164 S.W.2d 19, 19–20 (Tex. 1942); *see also Goffney v. Lowry*, 554 S.W.2d 157, 159 (Tex. 1977); *Pendley v. Berry*, 65 S.W. 32, 33 (Tex. 1901). The option of submitting an affidavit of indigence in lieu of a filing fee has been available in civil appeals for more than a century, first by statute and now by rule. *See* Act of May 3, 1871, 12th Leg., R.S., ch. 71, §§ 1–2, 1871 Tex. Gen. Laws 74, *amended by* Act of Apr. 14, 1879, 16th Leg., R.S., ch. 81, § 1, art. 1401, 1879 Tex. Gen. Laws 90, *amended by* Act of May 18, 1931, 42d Leg., R.S., ch. 134, § 1, 1931 Tex. Gen. Laws 226, *repealed by* Act of May 15, 1939, 46th Leg., ch. 25, § 1, 1939 Tex. Gen. Laws 201 (current version at TEX. R. APP. P. 20.1); *see also Pendley*, 65 S.W. at 32–33. Throughout this time, the fundamental requirement for asserting indigence has remained the same: the applicant must declare to the court, by affidavit, an inability to pay any, or the ability to pay only some, of the costs of appeal. TEX. R. APP. P. 20.1(a)(1), (b), (k); *Pendley*, 65 S.W. at 32–33.

The method of ensuring fairness, permitting interested parties to contest the claim of indigence, has also been in place for more than a century. Act of Apr. 14, 1879, 16th Leg., R.S., ch.

81, § 1, art. 1401, 1879 Tex. Gen. Laws 90 (amending Act of May 3, 1871, 12th Leg., R.S., ch. 71, §§ 1–2, 1871 Tex. Gen. Laws 74); TEX. R. APP. P. 20.1(e). If the affidavit is contested, the burden is on the applicant to prove indigence by a preponderance of the evidence. TEX. R. APP. P. 20.1(g); *Pinchback*, 164 S.W.2d at 20. The test for determining indigence is straightforward: “Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good-faith effort to do so?” *Pinchback*, 164 S.W.2d at 20; *see also* TEX. R. APP. P. 20.1(h)–(i). Depending upon the circumstances, certain types of financial information may be relevant and helpful to a court when evaluating a contested claim of indigence, including the following items described in Rule 20.1(b):

- (1) the nature and amount of the party’s current employment income, government-entitlement income, and other income;
- (2) the income of the party’s spouse and whether that income is available to the party;
- (3) real and personal property the party owns;
- (4) cash the party holds and amounts on deposit that the party may withdraw;
- (5) the party’s other assets;
- (6) the number and relationship of any dependents;
- (7) the nature and amount of the party’s debts;
- (8) the nature and amount of the party’s monthly expenses;
- (9) the party’s ability to obtain a loan for court costs;
- (10) whether an attorney is providing free legal services to the party without a contingent fee; and
- (11) whether an attorney has agreed to pay or advance court costs.

TEX. R. APP. P. 20.1(b). Although the rule was revised in 1997 to include these enumerated items, such information was already considered by the courts in determining whether, “from the record as a whole, it really appears that a party is unable to pay the costs.” *Pinchback*, 164 S.W.2d at 20; see TEX. R. APP. P. 20.1(b)(1)–(11); *Griffin Indus.*, 934 S.W.2d at 354 (considering the nature of the fee agreement between the appellant and her attorney, as well as the record as a whole, as demonstrating appellant’s indigence).

The financial information described in Rule 20.1(b) is virtually the same information that Texas Rule of Civil Procedure 145 requires to demonstrate indigence in the underlying proceedings before the trial court. TEX. R. CIV. P. 145(b). Unlike in federal court,¹ our procedural rules require the filing of an affidavit of indigence both upon the initial filing of suit in the trial court and again if an appeal is taken. TEX. R. APP. P. 20.1(a); TEX. R. CIV. P. 145(a). Rule 145 permits the defendant or the clerk to contest the affidavit, provided it is not accompanied by an IOLTA certificate.² TEX. R. CIV. P. 145(d). The trial court in this case dismissed Higgins’s claim for want of prosecution rather than for failure to pay costs, and it appears from the record that the trial court was satisfied that Higgins was indeed indigent. No party contested Higgins’s indigence at the trial court level.

On appeal, Higgins’s affidavit did not specifically discuss all of the items enumerated in Rule 20.1(b). However, Higgins did clearly attest that he had no current or expected income of any kind,

¹ In federal court, an indigent party may rely upon the affidavit filed in the trial court and need not file a second affidavit on appeal. 28 U.S.C. § 1915(a). The Federal Rules of Civil Procedure contain a form that indigent parties may complete to satisfy the indigence requirements. See FED. R. CIV. P. form 4.

² Rule 145 was amended in 2005 to prohibit contests to affidavits of indigence that are accompanied by an IOLTA certificate indicating that the party has passed the rigorous screening process for beneficiaries of IOLTA-funded programs. See TEX. R. CIV. P. 145(c)–(d). The amendment’s purpose was to eliminate frivolous challenges to a party’s indigence, thereby promoting “two important principles of our judicial system — conservation of judicial resources and increased access to justice for the poor.” Chief Justice Wallace B. Jefferson, *Access to Justice*, 70 TEX. B. J. 687, 687 (2007). Our proposed 2008 rule changes extend the IOLTA certificate rule to appellate filings. See *Court Orders*, 71 TEX. B. J. 286, 289–90 (2008).

and that he had no prospects for receiving any money in the future. Further, as we indicated in *Higgins I*, “common sense” supports the notion that an incarcerated individual is highly unlikely to qualify for loans, and Higgins is not represented by counsel. 193 S.W.3d at 900 (quoting *Allred v. Lowry*, 597 S.W.2d 353, 355 (Tex. 1980)); see TEX. R. APP. P. 20.1(b)(9), (11). Importantly, neither the clerk, the court reporter, nor any party challenged Higgins’s claim of indigence by filing a contest to his affidavit, as subsection (e) specifically allows.³ TEX. R. APP. P. 20.1(e). Had any one done so, subsection (h) would apply, which provides as follows:

If the affidavit of indigence is filed in an appellate court *and a contest is filed*, the court may:

- (1) conduct a hearing and decide the contest;
- (2) decide the contest based on the affidavit and any other timely filed documents;
- (3) request the written submission of additional evidence and, without conducting a hearing, decide the contest based on the evidence; or
- (4) refer the matter to the trial court with instructions to hear evidence and grant the appropriate relief.

TEX. R. APP. P. 20.1(h) (emphasis added). If no contest is filed, subsection (f) provides that “no hearing will be conducted, the affidavit’s allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.” TEX. R. APP. P. 20.1(f).

The purpose of Rule 20.1 is to *permit* parties to proceed without paying filing fees if they are unable to do so, and we have long interpreted the Rules of Appellate Procedure liberally in favor of preserving appellate rights. See *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997); *Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex. 1987) (“Indigency provisions, like other appellate rules, have

³ Respondent Randall County Sheriff’s Office elected not to file either a response to Higgins’s petition for review or a brief on the merits in this Court.

long been liberally construed in favor of a right to appeal.”); *see also* TEX. R. CIV. P. 1 (“[T]o obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law . . . with as great expedition and dispatch and at the least expense . . . as may be practicable, these rules shall be given a liberal construction.”). It is a simple matter under the rule to contest an affidavit of indigence; the contest must only be timely and it need not be sworn. TEX. R. APP. P. 20.1(e). The dissenting justices posit that, when no contest is filed, subsection (f) only operates to “deem[] true” whatever allegations the affidavit contains; if those allegations are incomplete, the appeal should be dismissed. ___ S.W.3d ___, ___. Subsection (f), however, does more than “deem” the affidavit’s allegations true; it specifically provides that the allegations “will be deemed true, *and the party will be allowed to proceed* without advance payment of costs.” TEX. R. APP. P. 20.1(f) (emphasis added). The dissent’s view would render the foregoing language meaningless.

Once again, “[w]e decline to elevate form over substance, as the dissenters would,” *Verburgt*, 959 S.W.2d at 617, and conclude that Higgins’s uncontested affidavit was adequate to fulfill the fundamental purpose of Rule 20.1. Our decision “reflect[s] the policy embodied in our appellate rules that disfavors disposing of appeals based upon harmless procedural defects.” *Id.* at 616; *see Jones*, 747 S.W.2d at 370. We have steadfastly adhered to this policy in refusing to require strict conformance with other formal aspects of Rule 20.1, including the requirement that an affidavit of indigence be filed “with or before the notice of appeal.” *See, e.g., Sprowl v. Payne*, 236 S.W.3d 786, 787 (Tex. 2007); *Springer v. Springer*, 240 S.W.3d 871, 872 (Tex. 2007); *Hood v. Wal-Mart Stores, Inc.*, 216 S.W.3d 829, 830 (Tex. 2007); *Higgins I*, 193 S.W.3d at 899–900.

Higgins's affidavit adequately explained that he is unable to pay the required filing fee and, as no challenge was made to his assertion of indigence, Higgins is entitled to proceed without advance payment of costs. Accordingly, without hearing oral argument, we grant the petition for review, reverse the court of appeals' judgment, and remand Higgins's appeal to that court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1.

Harriet O'Neill
Justice

OPINION DELIVERED: May 16, 2008