

ROGERS V. CRAWFORD, 1916-NMSC-087, 22 N.M. 365, 161 P. 1184 (S. Ct. 1916)

**ROGERS
vs.
CRAWFORD**

No. 1895

SUPREME COURT OF NEW MEXICO

1916-NMSC-087, 22 N.M. 365, 161 P. 1184

December 26, 1916

Error to District Court, Chaves County; G. A. Richardson, Judge.

Action by A. J. Crawford against W. E. Rogers. There was a judgment for plaintiff, and defendant brings error.

SYLLABUS

SYLLABUS BY THE COURT

1. Where transcript of proceedings in case tried to court without a jury is certified to this court only by certificate of stenographer, the same imports no verity and will be stricken from files upon motion therefor. P. 365
2. Section 4490, Code 1915, does not authorize an extension of time within which to file a transcript of record in this court, where a transcript has already been filed and where the application is made for the purpose of correcting errors or omissions due to oversight of counsel. P. 366

COUNSEL

W. E. Rogers of Roswell, for plaintiff in error.

Gibbany & Epstein of Roswell, for defendant in error.

JUDGES

Parker, J. Roberts, C.J., and Hanna, J., concur.

AUTHOR: PARKER

OPINION

{*365} {1} OPINION OF THE COURT. This is a suit brought by defendant in error, A. J. Crawford, against W. E. Rogers, plaintiff in error, on three several promissory notes, in which plaintiff in error appears to be an indorser in blank.

{2} The case is not before us on the merits, but upon a motion of defendant in error to strike from the files the transcript of the evidence, on the grounds that the case was tried to the court without a jury and that the transcribed notes of the stenographer have not been certified to this court in accordance with section 4493, Code 1915. That section is as follows: {*366} "In all actions tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, and all motions, orders or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court upon appeal or writ of error, without any bill of exceptions. And it shall not be necessary to have any bill of exceptions settled, signed or sealed, in order to make any of such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury."

{3} It will be seen that under that section matters not record proper are certified to this court by the trial court in cases tried to it without a jury; hence such procedure, when the party proceeds under that section, displaces the procedure by way of bill of exceptions for which provision is elsewhere made.

{4} An examination of the transcript of record on this writ of error discloses a certificate of the court stenographer, who recorded the proceedings at the trial, to the effect that the transcript of proceedings is full, true, and correct; but there is attached no certificate whatever of the trial court. Under the authority of section 4493, Code 1915, quoted supra, it has been held that the certificate of the court stenographer in itself is insufficient to make the transcript of the proceedings on the trial an element in the review of the case, in that the said transcript, in such an event, is not "properly certified to." Street v. Smith, 15 N.M. 95, 103 P. 644; Oliver Typewriter Co. v. Burtner, 17 N.M. 354, 128 P. 62. The plaintiff in error elected to proceed under section 4493, Code 1915, but failed to observe its provisions in respect to having the court certify to the correctness of the stenographer's transcript. The result is that the transcript of testimony does not import verity, and cannot be considered here.

{5} Plaintiff in error, however, seeks to avoid the consequences of the foregoing omission by moving that the time be extended within which to file a complete transcript of record, relying on section 4490, Code 1915. That section {*367} provides for the filing of the transcript and assigning errors in this court with the following proviso:

"That the Supreme Court or the judge of the district court, where such judgment was rendered, or any justice of the Supreme Court, * * * may for good cause shown, satisfactory to him, grant to the appellant or plaintiff in error, further time to file a complete transcript in said cause, even though the time to file the same may have expired."

{6} This section is not available for the correction of errors or omissions in the transcript due to oversight of counsel. It is evidently designed to relieve an appellant or plaintiff in error from the consequences of the delay of the clerk or stenographer in preparing the transcript, or perhaps other circumstances over which he has no control. The section has nothing to do with the contents of the record, but has to do simply with the time within which the transcript is to be filed. The contents of the transcript is, by the section, left entirely to the discretion of the appellant or plaintiff in error, except that it requires as complete a transcript as may be necessary to enable the court to properly review the cause and provides a penalty of affirmance unless the same is done within the time specified.

{7} The motion of defendant in error to strike from the files the transcript of proceedings occurring at the trial will necessarily have to be granted; and it is so ordered.