

**Dismissed and Memorandum Opinion filed April 22, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-09-01039-CR**

**NO. 14-10-00148-CR**

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**RICKY FRANK McVICKERS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 262nd District Court  
Harris County, Texas  
Trial Court Cause Nos. 1108921 & 1231761**

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**MEMORANDUM OPINION**

On November 20, 2009, appellant Ricky Frank McVickers filed a pro se notice of appeal in cause number 1108921, and the appeal was assigned to this court under number 14-09-01039-CR. According to the clerk's record, cause number 1108921 was dismissed on September 17, 2009, and appellant was re-indicted under cause number 1231761. On March 12, 2010, appellant filed a motion to dismiss the appeal in cause number 1108921, or alternatively, to transfer that appeal to a new cause number. Because we have already been assigned a second appeal with the new trial court number, we grant the motion to dismiss the appeal in cause number 1108921.

Appellant entered a guilty plea to murder in cause number 1231761. Appellant and the State agreed that appellant's punishment would not exceed confinement in prison for more than thirty-five years. In accordance with the terms of this agreement with the State, the trial court sentenced appellant on November 18, 2009, to confinement for thirty-five years in the Institutional Division of the Texas Department of Criminal.

Appellant filed an amended notice of appeal stating his desire to appeal cause number 1223176, and the second appeal was assigned to this court under number 14-10-00148-CR. The trial court entered a certification of the defendant's right to appeal cause number 1231761 in which the court certified that this is a plea bargain case, and the defendant has no right of appeal. *See* Tex. R. App. P. 25.2(a)(2). The trial court's certification is included in the record on appeal. *See* Tex. R. App. P. 25.2(d).

The clerk's record filed February 17, 2009, supports the trial court's certification. *See Dears v. State*, 154 S.W.3d 610, 615 (Tex. Crim. App. 2005). An agreement that places a cap on punishment is a plea bargain for purposes of Texas Rule of Appellate Procedure 25.2(a)(2). *Waters v. State*, 124 S.W.3d 825, 826-27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding reviewing court lacked jurisdiction where defendant pled guilty with a sentencing cap of ten years, even though trial judge mistakenly certified defendant had right of appeal); *Threadgill v. State*, 120 S.W.3d 871, 872 (Tex. App.—Houston [1st Dist.] 2003, no. pet.) (holding statement in record indicating that there was no agreed recommendation did not convert proceeding into an open plea where plea was entered pursuant to agreed sentencing cap); *see also Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003) (stating sentence-bargaining may be for recommendations to the court on sentences, including a recommended "cap" on sentencing). Therefore, we are without jurisdiction over this appeal.

The clerk's record in cause number 1231761 also contains a second certification of the defendant's right of appeal signed December 3, 2009, by a different trial judge and bearing cause number 1108921, the dismissed case. This certification states that this "is a

plea-bargain case, but matters were raised by written motion filed and ruled on before trial, and not withdrawn or waived, and the defendant has the right of appeal.” The record does not contain any rulings on pre-trial motions, however. On March 18, 2010, the court sent a notice to appellant’s counsel advising him that the appeal in cause number 1231761 would be dismissed unless a response was filed within ten days demonstrating that appellant has the right to appeal. No response was filed.

Accordingly, the appeals are ordered dismissed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.  
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