

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00206-CR

EX PARTE ROBERT WAYNE McCULLOCH

**On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 98-06-00725-CR(2)**

MEMORANDUM OPINION

On June 4, 2010, Robert Wayne McCulloch filed a motion for extension of time to file notice of appeal from the trial court's order denying a subsequent petition for writ of habeas corpus. *See* TEX. CODE. CRIM. PROC. ANN. art 11.072, § 9 (Vernon 2005). The trial court signed an order denying the relief requested on October 21, 2009. McCulloch first sought to appeal on April 22, 2010, more than thirty days after the date of the appealable order and outside the time for requesting an extension of time for filing the notice of appeal. We notified the parties that the notice of appeal did not appear to have been timely filed. McCulloch filed a response that concedes the notice of appeal was filed

late. McCulloch contends good cause exists because he did not receive notice of the signing of the order.

The three rules of appellate procedure cited by McCulloch do not authorize this Court to grant an extension of time for filing notice of appeal in the appeal of a criminal case. *See* TEX. R. APP. P. 2; TEX. R. APP. P. 4.2(a)(1); TEX. R. APP. P. 4.5(a). Rule 4.5(a) applies only to a party who does not receive notice of the appellate court's judgment until after the time expired for filing a motion for rehearing or for en banc reconsideration, or for petition for review or petition for discretionary review. *See* TEX. R. APP. P. 4.5(a). Rule 4.2(a)(1) applies only to appeals of civil cases. *See* TEX. R. APP. P. 4.5(a). Rule 2 does not permit the appellate court to suspend any provision in the Code of Criminal Procedure. TEX. R. APP. P. 2; *see Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998).

McCulloch complains that he should not be prejudiced by the loss of a substantive right due to what he alleges is an official mistake. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 7 (Vernon 2005). An out-of-time appeal may be granted in the exercise of original habeas jurisdiction. *See Rodriguez v. Court of Appeals, Eighth Supreme Judicial Dist.*, 769 S.W.2d 554, 557 (Tex. Crim. App. 1989). Our Article 11.072 jurisdiction is appellate, not original. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 8 (Vernon 2005); *see also* TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon 2005).

The Court finds that notice of appeal was not timely filed. *See* TEX. R. APP. P. 26.2. The motion for extension of time to file notice of appeal was not filed within fifteen days of the last day for filing notice of appeal. *See* TEX. R. APP. P. 26.3. It does not appear that appellant obtained an out-of-time appeal from the Court of Criminal Appeals. The Court finds it is without jurisdiction to entertain this appeal. Accordingly, we deny the motion for extension of time to file notice of appeal and dismiss the appeal for want of jurisdiction.

APPEAL DISMISSED.

HOLLIS HORTON
Justice

Opinion Delivered June 23, 2010
Do Not Publish
Before McKeithen, C.J., Gaultney and Horton, JJ.