



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-13-00459-CR

GREGORY MCCAIN

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY

OPINION

Appellant Gregory McCain filed a post-conviction motion for forensic DNA testing.¹ See Tex. Code Crim. Proc. Ann. art. 64.01(a-1) (West Supp. 2013). On July 1, 2013, the trial court denied Appellant's motion "because no evidence containing biological material exists in a condition making DNA testing possible." See *id.* art. 64.03(a)(1)(A)(i) (West Supp. 2013). Appellant contends he did not

¹We do not have any information regarding Appellant's underlying conviction.

receive notice of the trial court's denial until August 13, 2013.² Appellant's notice of appeal from the trial court's order was postmarked August 23, 2013, but was not filed until September 19, 2013.

On September 27, 2013, we notified Appellant that we had not received a certification of his right to appeal and that his notice of appeal appeared to be untimely. See Tex. R. App. P. 25.2(d), 42.3. On October 7, 2013, Appellant filed a motion for extension of time to ensure the certification was filed. Appellant also filed a motion to hold the clerk in contempt for failure to submit the certification to this court. Appellant has not responded to our notice that his notice of appeal was untimely.

Our appellate jurisdiction is triggered through a timely notice of appeal. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). If a notice of appeal is not timely filed under Rule 26.2, we do not have jurisdiction to address the merits of the appeal and may take no action other than dismissal. *Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998). An appeal from the denial of a motion for DNA testing is treated in the same manner as an appeal from any other criminal matter. Tex. Code Crim. Proc. Ann. art. 64.05 (West 2006). Rule 26.2(a) requires that a notice of appeal be filed within thirty days after the date

²We note that when Appellant received notice of the denial is not considered in calculating the deadline to file his notice of appeal. Compare Tex. R. App. P. 4.2, with Tex. R. App. P. 26.2(a).

the trial court enters an appealable order.³ Tex. R. App. P. 26.2(a). Appellant did not file his notice of appeal within thirty days of the trial court's July 1, 2013 order. Therefore, we have no jurisdiction over his appeal and dismiss the appeal for that reason. See Tex. R. App. P. 43.2(f). Because we have no jurisdiction, we may not decide Appellant's two pending motions. See *Slaton*, 981 S.W.2d at 210.

PER CURIAM

PANEL: GABRIEL, J.; LIVINGSTON, C.J.; and DAUPHINOT, J.

DAUPHINOT, J., filed a concurring opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: November 21, 2013

³A notice of appeal also is timely if filed within 45 days after the appealable order is signed and accompanied by a compliant motion for extension. Tex. R. App. P. 26.3. Appellant did not file a compliant motion to extend the time to file his notice of appeal, and his notice of appeal was filed outside of the 45-day deadline.