



**IN THE
TENTH COURT OF APPEALS**

No. 10-16-00354-CR

No. 10-16-00355-CR

No. 10-16-00356-CR

THE STATE OF TEXAS,

Appellant

v.

AMY MEREDITH CLARKE,

Appellee

**From the 272nd District Court
Brazos County, Texas
Trial Court Nos. 22,495-272,
22,498-272, and 22,501-272**

MEMORANDUM OPINION

In three separate cases, the State of Texas appeals the trial court's orders granting Appellee Amy Meredith Clarke's motions for judicial clemency. In one point of error, the State argues that the trial court did not have jurisdiction to grant Clarke's motions. Because the underlying facts and issues are the same in each of these cases as it relates to this appeal, we will consider them together. Based upon our holding in *State v. Fielder*, 376 S.W.3d 784 (Tex. App. – Waco 2011, no pet.), we will reverse the trial court's order.

The underlying facts are not disputed. The trial court sentenced Clarke to ten years' community supervision on October 28, 1993 in Cause Numbers 22,495-272, 22,498-272, and 22,501-272. The trial court signed an order in each case in August 2003 discharging Clarke from community supervision. On September 2, 2016, Clarke filed a motion to set aside the verdict in each case requesting "judicial clemency" pursuant to article 42.12, § 20(a) of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 42.12, § 20(a).¹ The trial court granted Clarke's motions on September 29, 2016 after a hearing in all three cases. The trial court's orders directed that Clarke was permitted to withdraw her guilty plea in each case and dismissed the indictments against her.

In her brief, Clarke argues that we have no jurisdiction to consider the State's appeal. Clarke specifically argues that appellate review is foreclosed by *Cooksey v. State*, No. 05-12-00301-CR, 2013 WL 1934943, at *2 (Tex. App.—Dallas May 10, 2013, no pet.) (mem. op., not designated for publication) (citing *Cuellar v. State*, 70 S.W.3d 815, 818-19 (Tex. Crim. App. 2002).) The *Cooksey* court determined that it had no jurisdiction to consider the defendant's appeal of the trial court's denial of his request for judicial clemency. *Cooksey* is distinguishable in that the appeal was initiated by the defendant. Appeals by either the State or a defendant in a criminal case are permitted only when

¹ Article 42.12 was repealed effective January 1, 2017 and replaced with article 42A.701 as part of a non-substantive revision of community-supervision law. See Act of June 17, 2015, 84th Leg., R.S., ch. 770 (H.B. 2299), § 1.01, § 301, 2015 Tex. Gen. Laws 2320, 2358-59, 2394 and amended by Act of May 23, 2017, 85th Leg., R.S., ch. 1017 (H.B. 1507), § 4, 2017 Tex. Gen. Laws 4054, 4056, effective Sept. 1, 2017 (current version at TEX. CODE CRIM. PROC. art. 42A.701 (West Supp. 2017)). As this recodification occurred after the relevant events in Clarke's cases, we will refer to the version of the statute that is cited by Clarke and that was in effect at the time the trial court granted her motion for judicial clemency. The language of the statute has not substantively changed since the time Clarke was originally sentenced.

specifically authorized by statute. *See State v. Fine*, 330 S.W.3d 904, 915 (Tex. Crim. App. 2011). There is no statutory authorization for a defendant to appeal an order granting or denying judicial clemency pursuant to article 42.12, § 20(a). *See Dewalt v. State*, 417 S.W.3d 678, 685 n.34 (Tex. App. – Austin 2013, pet. ref’ d); *see also Raley v. State*, 441 S.W.3d 647, 651 (Tex. App. – Houston [1st Dist.] 2014, pet. ref’ d); *Cooksey*, 2013 WL 1934943, at *2 (no statutory authority authorizing appeal from denial of motion for judicial clemency). However, the State is authorized to pursue an appeal when an indictment is dismissed, as occurred in Clarke’s cases. *See* TEX. CODE CRIM. PROC. art. 44.01 (West Supp. 2017). We therefore conclude that we have jurisdiction to consider Clarke’s appeal.

As noted, the State argues that the trial court lacked jurisdiction to grant judicial clemency under article 42.12 because Clarke’s motions were filed thirteen years after she was discharged from community supervision. The State relies upon our opinion in *Fielder*, which Clarke urges us to reconsider. Nothing Clarke presents persuades us to reconsider *Fielder*.

As we noted in *Fielder*, we are unable to determine the source of any form of jurisdiction on the part of the trial court to modify Clarke’s successfully served and discharged community supervision, other than the “plenary power” to modify or rescind an order within thirty days of its entry. *Fielder*, 376 S.W.3d at 786. Our sister courts have taken the same approach as *Fielder*. *See State v. Perez*, 494 S.W.3d 901, 905 (Tex. App. – Corpus Christi 2016, no pet.) (“If the Legislature intended to provide the trial court with continuing jurisdiction to order judicial clemency at any time after discharging a defendant from community supervision, it would have expressly done so.”); *see also State*

v. Shelton, 396 S.W.3d 614, 619 (Tex. App. – Amarillo [Panel D] 2012, pet. ref’d); *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532, at *1 (Tex. App. – Texarkana Sept. 20, 2013, no pet.) (mem. op., not designated for publication). Even the *Cooksey* case, upon which Clarke has relied, cites *Fielder* with approval. *Cooksey*, 2013 WL 1934943, at *2 n.4. Any plenary power the trial court may have retained after signing the orders discharging Clarke from community supervision in 2003 expired long before she filed her current motions.

Clarke attempts to distinguish *Fielder* by raising issues not specifically addressed in that case, but none of these issues has legal support. Clarke argues that the language “at any time” in section 20(a)² extends the trial court’s jurisdiction to consider a judicial clemency claim indefinitely. However, the “at any time” phrase does not refer to judicial clemency, but to the trial court’s ability to end or reduce the conditions of community supervision. *See Shelton*, 396 S.W.3d at 619 (phrase “at any time” does not include judicial clemency); *see also Perez*, 494 S.W.3d at 905.

Finally, Clarke argues that following *Fielder* would violate the due process and open courts provisions of the Texas constitution and the due process clause of the Fourteenth Amendment to the United States Constitution as it would allow a judge to sign an order, without notice to either party, terminating a defendant’s community supervision and thereby prohibiting the defendant from ever pursuing a claim of judicial

² The first sentence of the applicable version of the statute specifically provides, “At any time after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the period of community supervision may be reduced or terminated by the judge.”

clemency. A statute satisfies due process if it provides the parties notice and an opportunity to be heard. *See House of Praise Ministries, Inc. v. City of Red Oak*, No. 10-15-00148-CV, 2017 WL 1750066, at *7 (Tex. App.—Waco May 3, 2017, no pet.) (mem. op., not designated for publication). Article 42.12 specifically provides that the trial court shall give notice to the State and a defendant prior to modifying or terminating a term of community supervision. Clarke does not argue that she was not given notice in any of the cases when she was discharged from community supervision in 2003. There is, therefore, no basis for Clarke’s due process claim. Finally, Clarke has failed to establish an open courts violation because she has identified no well-recognized common-law cause of action that article 42.12 restricts. *See Dykstra v. State*, No. 01-98-01292-CR, 2001 WL 522018, at *1 (Tex. App.—Houston [1st Dist.] May 17, 2001, pet. ref’d) (op. on rehearing, not designated for publication).

We therefore conclude that the trial court lacked jurisdiction to grant Clarke’s motions for judicial clemency, making its orders void. *See Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014). We sustain the State’s sole issue in each of these appeals. We reverse the trial court’s orders granting Clarke judicial clemency in each of these cases and render judgment ordering that Clark’s motions for judicial clemency are dismissed for lack of jurisdiction.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and rendered
Opinion delivered and filed April 25, 2018
Do not publish
[CR25]

