**Dismissed and Opinion Filed December 21, 2017**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-17-01369-CR**

**KEVIN DION HARVEY, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 363rd Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. F99-01391-W**

## MEMORANDUM OPINION

Before Justices Bridges, Myers, and Schenck
Opinion by Justice Bridges

Kevin Dion Harvey was charged with causing the death of Michael Jones by shooting him with a firearm, a deadly weapon. After finding appellant guilty "as charged in the indictment," the jury assessed punishment at ninety-nine years in prison. The judgment did not include an affirmative finding on use of a deadly weapon.

Appellant filed a timely appeal with this Court in which he challenged the sufficiency of the evidence to support his conviction, the trial court's admission of certain evidence, and the trial court's jury instructions. We affirmed his conviction. *Harvey v. State*, No. 05-00-00610-CR, 2001 WL 849749 (Tex. App.—Dallas July 30, 2001, pet. ref'd) (not designated for publication). The Texas Court of Criminal Appeals later denied appellant's petition for discretionary review, and our mandate issued on July 31, 2002.

Appellant then filed, in the trial court, a June 4, 2012 motion for reformation of the judgment and a February 10, 2014 motion nunc pro tunc. In both motions, appellant asserted the trial court did not make an affirmative finding on use or exhibition of a deadly weapon but that the "officials at TDCJ are requiring petitioner to serve more than 30 years before being eligible for parole." He argued that the trial court should "order the officials at TDCJ to delete [the deadly weapon] finding from the judgment." When the trial court did not respond to his motions, appellant filed a petition for writ of mandamus with this Court. The trial court eventually concluded the judgment was erroneous because it failed to include a deadly weapon finding and, on March 7, 2016, ordered the judgment corrected to reflect a deadly weapon finding. In light of this, we dismissed his petition for writ of mandamus as moot. *Harvey v. State*, No. 05-16-00155-CV, 2016 WL 1019377 (Tex. App.—Dallas Mar. 15, 2016, orig. proceeding) (mem. op.).

In March 2017, appellant filed a petition to amend the reformation of sentence which the trial court denied on August 14, 2017. Shortly thereafter, appellant filed his notice of appeal in this Court.

Rules 21 and 22 of the Texas Rules of Appellate Procedure provide the guidelines for filing a motion to challenge or correct a judgment in a criminal case. *See* TEX. R. APP. P. 21 (motion for new trial); 22 (motion in arrest of judgment). Under rule 21.4(a), a defendant may "file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court." TEX. R. APP. P. 21.4. Likewise, a motion in arrest of judgment must be filed no later than 30 days after the date the trial court imposes or suspends sentence in open court. TEX. R. APP. P. 22.3. The defendant must file the motion in the trial court, and it is the trial court that rules on the motion. See TEX. R. APP. P. 21.6; 21.8; 21.9; 22.3; 22.4. The deadlines set out in rules 21 and 22 have jurisdictional significance; the motions are

purely statutory remedies, and the movant must strictly adhere to the terms of the statute to take advantage of this remedy. *Drew v. State,* 743 S.W.2d 207, 223 (Tex. Crim. App. 1987). "When jurisdiction with respect to a particular matter is derived wholly from statute, the statutory provisions are mandatory and exclusive and must be complied with in all respects, and the court in exercising its particular authority is a court of limited jurisdiction." *Id.* Jurisdiction cannot be "substantially" invoked; it either attaches or it does not. *Ex parte Kirby*, 626 S.W.2d 533, 534 (Tex. Crim. App. 1981). If there is no jurisdiction, "the power of the court to act is as absent as if it did not exist." *Ex parte Caldwell*, 383 S.W.2d 587, 589 (Tex. Crim. App. 1964).

We lack jurisdiction when the trial court has not entered any appealable orders. *McKown v. State,* 915 S.W.2d 160, 160 (Tex. App.–Fort Worth 1996, no pet.) ("Because we find that this appeal does not concern an appealable order, we dismiss this appeal for want of jurisdiction."); *see* TEX. R. APP. P. 25.2, 26.2. And, as a general rule, we do not have jurisdiction over proceedings related to a collateral attack of a final felony conviction. *See, e.g., Olivo v. State*, 918 S.W.2d 519, 525 n.8 (Tex. Crim. App. 1996) (exclusive post-conviction remedy with regard to final felony convictions is through writ of habeas corpus); *Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991) (orig. proceeding) (court of criminal appeals is "the only court with jurisdiction in final post-conviction felony proceedings").

Here, the trial court imposed judgment on March 31, 2000. Appellant had until April 30, 2000 to file a motion for new trial or motion to reform the judgment in the trial court. In 2017, appellant filed the motion whose disposition he now attempts to appeal. Although the trial court denied his untimely motion, this is not an appealable order which this Court may review. *See Waller v. State*, 931 S.W.2d 640, 645 (Tex. App.—Dallas 1996, no pet.) (untimely amended motion for new trial was nullity). Likewise, to the extent appellant seeks a post-conviction

felony challenge, we lack jurisdiction over post-conviction writs of habeas corpus. *See Olivo*, 918 S.W.2d at 525 n.8; *Ater*, 802 S.W.2d at 243.

We dismiss this appeal for lack of jurisdiction.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47.2(b)
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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

KEVIN DION HARVEY, Appellant

No. 05-17-01369-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F99-01391-W.
Opinion delivered by Justice Bridges, Justices Myers and Schenck participating.

Based on the Court's opinion of this date, we **DISMISS** this appeal for want of jurisdiction.

Judgment entered December 21, 2017.