

Dismissed and Opinion Filed November 18, 2021



In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00815-CR

XZAVIER JAMARR JONES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 354th Judicial District Court
Hunt County, Texas
Trial Court Cause No. 32948CR

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Carlyle
Opinion by Justice Carlyle

Xzavier Jamarr Jones appeals his August 11, 2021 conviction for aggravated assault with a deadly weapon. After trial, the jury found Mr. Jones guilty and sentenced him to forty-five years in prison. After the clerk's record was filed, we notified the parties we had concerns regarding our jurisdiction and requested letter briefs. To date, no one has responded, even though Mr. Jones has been represented by counsel on appeal, and that counsel filed a notice of appeal.

A defendant perfects his appeal by timely filing a written notice of appeal with the trial court clerk. *See* TEX. R. APP. P. 25.2(c). To be timely, the notice of appeal must be filed within thirty days after the date sentence was imposed or within ninety

days after sentencing if the defendant timely filed a motion for new trial. *See* TEX. R. APP. P. 26.2(a). The rules of appellate procedure allow the time to file a notice of appeal to be extended if the party files, within fifteen days of the filing deadline, both the notice of appeal and a motion to extend the time to file the notice of appeal. *See* TEX. R. APP. P. 10.5(b), 26.3. In the absence of a timely perfected notice of appeal, the court must dismiss the appeal. *Ex parte Castillo*, 369 S.W.3d 196, 198 (Tex. Crim. App. 2012); *Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998).

After judgment and sentence were entered on August 11, 2021, and no motion for new trial was filed, Mr. Jones’s notice of appeal was due on September 10. The order appointing counsel to represent Mr. Jones was entered on August 16, 2021, and counsel incorrectly indicated on the notice of appeal that the court entered judgment on August 16, 2021. Counsel filed the notice of appeal four days late and without motion for an extension of time on September 15, 2021.

A split of authority

If this were a civil case, this Court could imply a motion for extension of time even though one was not filed. *See Houser v. McElveen*, 243 S.W.3d 646, 646–47 (Tex. 2008) (pro se inmate filed (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997))). In the civil context, a party can obtain the fifteen day extension by providing “any plausible statement of circumstances indicating that failure to file within the [specified] period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance.” *Houser*, 243 S.W.3d at 647. The Court said

in *Verburgt*: “We hold that a motion for extension of time is necessarily implied when an appellant acting in good faith files a bond beyond the time allowed by Rule 41(a)(1), but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline under Rule 41(a)(2).” *Verburgt*, 959 S.W.2d at 617. The Court extended that principle to motions to extend time to file notice of appeal in *Houser*, 243 S.W.3d at 646–47.

But this is a criminal matter, governed by the rule the Court of Criminal Appeals laid down in *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996) (en banc), which says that in the absence of a motion for extension of time to file notice of appeal, we have no jurisdiction.¹ And on that basis, we must dismiss this appeal for want of jurisdiction.

In *Verburgt*, issued shortly after *Olivo*, and directly after discussing *Olivo*, the Supreme Court stated:

This Court has never wavered from the principle that appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal. We have repeatedly held that a court of appeals has jurisdiction over any appeal in which the appellant files an instrument in a bona fide attempt to invoke the appellate court’s jurisdiction. *Linwood v. NCNB Texas*, 885 S.W.2d

¹ The Court of Criminal Appeals has not reconsidered *Olivo*, which relied on several civil cases noting that a party had failed to file a motion for extension of time to file the notice of appeal and thus was not entitled to the extension. See *Olivo*, 918 S.W.2d at 524. By *Verburgt* and *Houser*, both of which post-date *Olivo*, the Supreme Court has abandoned the requirement that a party actually file a motion for extension by stating that courts may imply one, and thus has abandoned part of the case law the Court of Criminal Appeals relied on in deciding *Olivo*, and has gone the complete opposite way, towards, as the Supreme Court says, reflecting the policy “embodied in our appellate rules that disfavors disposing of appeals based upon harmless procedural defects,” See *Verburgt*, 959 S.W.2d at 616.

102, 103 (Tex.1994); *Grand Prairie Indep. Sch. Dist.*, 813 S.W.2d at 500. Our decisions reflect the policy embodied in our appellate rules that disfavors disposing of appeals based upon harmless procedural defects.[footnote omitted] *See Grand Prairie Indep. Sch. Dist.*, 813 S.W.2d at 500. Thus, we have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule. *See Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex.1993); *see also Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 121–22 (Tex.1991); *Gay v. City of Hillsboro*, 545 S.W.2d 765, 766 (Tex.1977).

Verburgt, 959 S.W.2d at 616–17.

Conclusion

Because appointed counsel erroneously stated in the notice of appeal that the judgment was entered on August 16, 2021, and thereafter failed to file a motion to extend time to file the notice of appeal, see TEX. R. APP. P. 10.5(b)(2), appellant’s remedy does not lie with this Court, but rather with the authority of the Texas Court of Criminal Appeals to grant an out-of-time appeal based on a writ of habeas corpus. *See Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991).

“The writ of habeas corpus is a writ of right and shall never be suspended.” TEX. CODE CRIM. PROC. art. 1.08. The Texas Code of Criminal Procedure first requires writs of habeas corpus to be filed in the trial court pursuant to Texas Code of Criminal Procedure article 11.07, § 3(b). The trial court makes findings of fact

and conclusions of law, article 11.07, § 3(c)–(d), and sends those to the Court of Criminal Appeals, which makes the final decision whether a person is entitled to habeas corpus relief, article 11.07, § 5.

In *Olivo*, the Court of Criminal Appeals stated

We further point out that the denial of a meaningful appeal due to ineffective assistance of counsel is a proper ground for habeas corpus relief. *See, e.g., Ex parte Axel*, 757 S.W.2d 369 (Tex.Cr.App.1988). . . . Additionally, the El Paso Court of Appeals in *Jones*, although holding it lacked jurisdiction, stated, “Were we writing on a clean slate, we would grant an out-of-time appeal under these facts and consider the case on the merits.” *Jones*, 900 S.W.2d at 423. We agree with the observation of the San Antonio Court of Appeals: “Acting in the interest of judicial economy is worthwhile. However, the exclusive post-conviction remedy in final felony convictions in Texas courts is through a writ of habeas corpus pursuant to Tex. Code Crim. Proc. art. 11.07. *Ater v. Eighth Court of Appeals*, 802 S.W.2d 241 (Tex. Crim. App.1991).” *Charles [v. State]*, 809 S.W.2d [574] at 576 [(Tex. App.—San Antonio 1991, no pet.)].

Olivo, 918 S.W.2d at 525 n.8.

Because the notice of appeal was untimely and because there was no motion to extend the time to file it, we lack jurisdiction, the power granted by the Texas Constitution to hear this appeal, and must dismiss this appeal.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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TEX. R. APP. P. 47.2(b)



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

XZAVIERR JAMARR JONES,
Appellant

No. 05-21-00815-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 354th Judicial
District Court, Hunt County, Texas
Trial Court Cause No. 32948CR.

Opinion delivered by Justice Carlyle.
Justices Myers and Partida-Kipness
participating.

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

Judgment entered this 18th day of November, 2021.