

Opinion issued October 28, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00465-CR

SAMSOM PEREZ CASIANO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 208th District Court
Harris County, Texas
Trial Court Case No. 1178978**

MEMORANDUM OPINION

We lack jurisdiction over this appeal. Appellant was sentenced on October 23, 2009. He timely filed a motion for new trial on November 10, 2009, which was within 30 days of the sentence. *See* TEX. R. APP. P. 21.4(a). Because he filed a timely motion for new trial, appellant had 90 days after the day sentence

was imposed to file his notice of appeal. *See* TEX. R. APP. P. 26.2(a). Appellant, therefore, was required to file his notice of appeal on or before January 21, 2010. The clerk's record contains a written notice of appeal filed April 15, 2010, which is 84 days beyond the required filing date.

Appellant's attorney for this appeal contends (1) the trial court took "judicial notice" that a notice of appeal was timely filed but lost; (2) appellant's actions were sufficient to advise the court of his notice of appeal; (3) the trial court gave appellant permission to file an out-of-time appeal; and (4) he was appointed to represent appellant on appeal on December 8, 2009. Appellant's attorney refers to the trial court's hearing that was held on April 21, 2010. At that time, appellant's attorney represented to the court that "there was a notice of appeal in the clerk's file. It evidently was unsigned and was never processed." The court granted appellant's attorney's request for an "out-of-time notice of appeal." The only notice of appeal in the appellate record is dated April 15, 2010, and it is unsigned.

We must determine whether the actions taken by appellant were sufficient to constitute as a notice of appeal. The Texas Rules of Appellate Procedure require a notice of appeal "must be given in writing and filed with the trial court clerk." TEX. R. APP. P. 25.2(c)(1). "Notice is sufficient if it shows the party's desire to appeal from the judgment." TEX. R. APP. P. 25.2(c)(2). An

untimely notice of appeal fails to vest the appellate court with jurisdiction to hear the case. *Slaton v. State*, 981 S.W.2d 208, 209-10 (Tex. Crim. App. 1998); *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); *Douglas v. State*, 987 S.W.2d 605, 605-06 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

A motion requesting the right to make an out-of-time appeal may be granted as part of an application for a writ of habeas corpus. *See Ex parte Garcia*, 988 S.W.2d 240, 240-41 (Tex. Crim. App. 1999). While an application for a writ of habeas corpus must be filed with the convicting trial court, which may make certain findings, the Court of Criminal Appeals is not bound by those findings for it alone has jurisdiction to grant habeas corpus relief to a defendant convicted of a felony imposing a penalty other than death. *See* TEX. CODE. CRIM. PROC. ART. 11.07 §§ 3-5 (Vernon 2005); *Torres*, 943 S.W.2d at 476 (Tex. Crim. App. 1997); *Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991) (Court of Criminal Appeals has exclusive authority to grant post conviction relief). Accordingly, we lack jurisdiction to review the trial court's preliminary denial of appellant's motion for out of time appeal. *See Guerra v. State*, No. 13-10-00045-CR, 2010 WL 3417851, at *1 (Tex. App.—Corpus Christi Aug. 31, 2010, no. pet. h.) (mem. op., not designated for publication); *Hiatt v. State*, No. 04-08-00685-CR, 2008 WL 4500236, at *1 (Tex. App.—San Antonio 2008, no. pet.) (mem. op., not designated for publication).

We therefore dismiss the appeal for lack of jurisdiction.

All pending motions are **denied as moot**.

It is so **ORDERED**.

PER CURIAM

Panel consists of Justices Keyes, Higley and Bland.

Do not publish. TEX. R. APP. P. 47.2(b).