

Opinion issued July 21, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00039-CR

RICHARD A. DUNSMORE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 412th Judicial District Court
Brazoria County, Texas
Trial Court Case No. 56910**

MEMORANDUM OPINION

On October 8, 2010, the trial court found that appellant had violated the terms of his community supervision and issued judgments adjudicating appellant guilty of the offenses of sexual assault (trial court case number 56909) and attempted sexual assault (trial court case number 56910). Appellant was sentenced to seven years'

imprisonment with the sentences to run concurrently.¹ On June 23, 2015, the trial court issued a “Nunc Pro Tunc Judgment Adjudicating Guilt” in case number 56910 purporting to correct the offense listed in the judgment. On January 19, 2016, appellant, acting pro se, filed a notice of appeal from the nunc pro tunc judgment and a motion for new trial. We dismiss the appeal for lack of jurisdiction.

Nunc pro tunc judgments are separate, appealable orders. *See Blanton v. State*, 369 S.W.3d 894, 903–04 (Tex. Crim. App. 2012). However, we cannot exercise jurisdiction over an appeal without a timely filed notice of appeal. *See* TEX. R. APP. P. 26.2(a); *see also Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998); *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). The time for perfecting an appeal from a judgment begins to run on the day that sentence is imposed or an appealable order is entered. *See* TEX. R. APP. P. 26.2(a); *Lair v. State*, 321 S.W.3d 158, 159 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d). Here, the trial court signed the nunc pro tunc judgment adjudicating guilt on June 23, 2015. Appellant’s notice of appeal filed 210 days later on January 19, 2016, was untimely to perfect an

¹ Appellant attempted to appeal his conviction, claiming that the trial court erred in denying his motion to withdraw his guilty pleas. On April 12, 2012, this Court dismissed appellant’s attempted appeals for lack of jurisdiction because appellant did not appeal the trial court’s refusal of his request to withdraw his guilty plea when the trial court first imposed its deferred adjudication order and, thus, his appeals were untimely. *See Dunsmore v. State*, Nos. 01–10–00981–CR & 01–10–00982–CR, 2012 WL 1249418 (Tex. App.—Houston [1st Dist.] April 12, 2012, pet. ref’d) (mem. op, not designated for publication).

appeal of the nunc pro tunc judgment. *See* TEX. R. APP. P. 26.2 (notice of appeal must be filed 30 days after sentence is imposed or 90 days after sentence is imposed if defendant timely files motion for new trial); *McClain v. State*, No. 01-14-00728-CR, 2015 WL 4767916, at *1 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, no pet.) (mem. op., not designated for publication) (dismissing untimely appeal of nunc pro tunc judgment for lack of jurisdiction).

In his notice of appeal, appellant claims that the untimely filing was due to no fault of his own and requests that this Court grant him an out-of-time appeal. But this Court lacks jurisdiction to grant an out-of-time appeal. *See Slaton*, 981 S.W.2d at 210 (holding that if appeal is not timely perfected, court of appeals does not obtain jurisdiction to address merits of appeal and court may take no action other than to dismiss appeal; court may not suspend rules to alter time for perfecting appeal); *Olivo*, 918 S.W.2d at 522-23. Article 11.07 of the Texas Code of Criminal Procedure vests complete jurisdiction over postconviction relief from final felony convictions in the Texas Court of Criminal Appeals. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2015). Appellant's remedy is to seek an out-of-time appeal from the Texas Court of Criminal Appeals by application for writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure. *See Ater v. Eight Court of Appeals*, 802 S.W.2d 241 (Tex. Crim. App. 1991) (out-of-time appeals in felony cases are governed by article 11.07 of the Texas Code of Criminal Procedure);

Conroy v. State, No. 03-15-00480-CR, 2015 WL 5783395, at *1 (Tex. App.—Austin Oct. 2, 2015, no pet.) (mem. op, not designated for publication) (“[T]he Texas Court of Criminal Appeals is the only court with jurisdiction to consider a motion for an out-of-time appeal.”).

Accordingly, we dismiss the appeal for want of jurisdiction and dismiss any pending motions as moot.

PER CURIAM

Panel consists of Justices Higley, Bland, and Massengale.

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