

Opinion issued September 28, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00299-CR

ANDREW MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 22nd District Court
Hays County, Texas¹
Trial Court Case No. CR-16-0994-A**

MEMORANDUM OPINION

¹ Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Third District of Texas to this Court. *See* Misc. Docket No. 20-9048 (Tex. Mar. 31, 2020); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases).

Appellant, Andrew Martinez, attempts to appeal from the trial court's December 13, 2019 final judgment convicting him of the felony offense of murder. *See* TEX. PEN. CODE ANN. § 19.02. On December 16, 2019, appellant timely filed a motion for new trial. Accordingly, any notice of appeal was due to be filed with the trial court within ninety days after the entry of the final judgment, on or before March 12, 2020. *See* TEX. R. APP. P. 26.2(a)(2). Appellant's notice of appeal was untimely filed on March 13, 2020.

A timely notice of appeal is necessary to invoke an appellate court's jurisdiction. *See Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); *Lair v. State*, 321 S.W.3d 158, 159 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). If a notice of appeal is not timely filed, the appellate court lacks jurisdiction to address the merits of the case and can take no action other than to dismiss the appeal. *See Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998).

Notably, however, the Texas Rules of Appellate Procedure allow for an extension of time to file a notice of appeal where appellant, within fifteen days of the deadline to file the notice of appeal: (a) files the notice of appeal in the trial court and (b) files a motion for extension of time to file a notice of appeal, complying with Texas Rule of Appellate Procedure 10.5(b), with the appellate court. *See* TEX. R. APP. P. 26.3. Thus, in accordance with the Texas Rules of Appellate Procedure, to invoke the jurisdiction of the appellate court, appellant was required to file both his

notice of appeal with the trial court and his motion for extension of time to file his notice of appeal with the appellate court on or before March 27, 2020.

Although appellant's notice of appeal was filed with the trial court on March 13, 2020, appellant did not file a motion for extension of time to file a notice of appeal on or before March 27, 2020. *See* TEX. R. APP. P. 26.3. This Court has no authority to allow the late filing of a notice of appeal except as provided by Texas Rule of Appellate Procedure 26.3.² *See Olivo*, 918 S.W.2d at 522.

Accordingly, on September 9, 2021, this Court notified appellant that his appeal was subject to dismissal for lack of jurisdiction and directed appellant to show cause why the appeal should not be dismissed. On September 9, 2021, appellant submitted a response to our notice. In his response, appellant concedes that his notice of appeal was untimely filed on March 13, 2020. Appellant further acknowledges that “the remedies here are quite limited if not non-existent.”

² In civil cases, the Texas Supreme Court has held that a motion for extension of time to file a notice of appeal may be implied where a party files its notice of appeal within the fifteen-day window allowed by rule 26.3. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). However, this “implied” motion for extension to file a notice of appeal has not been adopted by the Texas Court of Criminal Appeals and does not apply in criminal appeals. *See Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); *see also Lair v. State*, 321 S.W.3d 158, 160 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (Sharp, J., concurring) (concurring in dismissal of appeal for lack of jurisdiction because of untimely filed notice of appeal, “but writ[ing] separately to encourage the adoption of the holding of *Verburgt* to late-filed notices of appeal in criminal cases”).

Contemporaneously with his response to our notice, appellant filed a “Motion to Extend Time to File Notice of Appeal” on September 9, 2021, almost eighteen months after the expiration of the deadline for filing such motion. In his motion, appellant states that the motion for extension “should have been filed within fifteen days of March 12, 2020,” but was not timely filed because “counsel for the [a]ppellant miscalculated the deadline” for filing the notice of appeal. Appellant requests that we apply the authority granted to the Court by the Texas Supreme Court’s Emergency Orders Regarding the COVID-19 State of Disaster to extend the deadline for filing appellant’s motion for extension of time to file a notice of appeal.

The First Emergency Order Regarding the COVID-19 State of Disaster was entered by the Texas Supreme Court on March 13, 2020, and states, in relevant part:

Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—. . . [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted.

See Supreme Court of Texas, First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042, 596 S.W.3d 265, 265 (Tex. 2020).

In his motion for extension of time to file a notice of appeal, appellant states that the “motion to extend was not timely filed because counsel for . . . [a]ppellant miscalculated the deadline for the notice of appeal by one day and mistakenly believed the notice to be timely.”

This in no way indicates that his failure to timely file his notice of appeal and his motion for extension of time to file his notice of appeal is related in any way to the COVID-19 pandemic. *See N. Cent. Baptist Hosp. v. Chavez*, No. 04-20-00590-CV, 2021 WL 983351, at * (Tex. App.—San Antonio Mar. 17, 2021, no pet.) (mem. op.) (declining to extend deadline to file notice of appeal under Texas Supreme Court Emergency Orders where notice of appeal was not timely filed and no motion for extension of time to file notice of appeal was filed).

Absent a timely filed notice of appeal, we lack jurisdiction and cannot consider the merits of this appeal. *See Olivo*, 918 S.W.2d at 522; *Castillo v. State*, 369 S.W.3d 196, 202 (Tex. Crim. App. 2012) (concluding filing notice of appeal and motion for extension of time to file notice of appeal one day late was “enough to deprive the appellate court of jurisdiction”); *see also Arriola v. State*, No. 04-20-00206-CR, 2020 WL 5214765, at *1 (Tex. App.—San Antonio Sept. 2, 2020, no pet.) (mem. op.) (dismissing appeal for lack of jurisdiction for untimely filed notice of appeal, concluding Texas Supreme Court Emergency Orders did not extend deadline to file notice of appeal); *Jones v. White*, No. 02-20-00198-CV, 2020 WL 5666564, at *1 (Tex. App.—Fort Worth Sept. 24, 2020, no pet.) (mem. op.) (“[T]he fact of the pandemic, standing alone, is not a reasonable explanation for a missed appellate deadline.”); *Carrigan v. Edwards*, No. 13-20-00093-CV, 2020 WL 6504418, at *2 (Tex. App.—Corpus Christi-Edinburg Nov. 5, 2020, pet. denied)

(mem. op.) (“[T]he pandemic conditions do not generate a blanket excuse which can be used to extend deadlines indefinitely, especially in the absence of any specific explanation for why such extensions are warranted.”).

Accordingly, we deny appellant’s motion for extension to file his notice of appeal and dismiss the appeal for lack of jurisdiction. *See* TEX. R. APP. P. 43.2(f). We dismiss any other pending motions as moot.

Amparo Guerra
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.

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