

Opinion issued July 28, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00848-CR

NO. 01-20-00849-CR

THE STATE OF TEXAS, Appellant

V.

CALEB RODRIGUEZ, Appellee

**On Appeal from the 351st District Court
Harris County, Texas
Trial Court Case Nos. 1600295 and 1600296**

MEMORANDUM OPINION

Appellee Caleb Rodriguez pleaded guilty to two counts of the first-degree felony offense of sexual assault of a child under fourteen years of age, and the trial court assessed his punishment at sixty years' imprisonment on each count, to run

concurrently.¹ *See* TEX. PENAL CODE §§ 22.021(a)(1)(B)(iii), (a)(2)(B), (b)(1), (e), 12.32(a). Rodriguez filed notices of appeal. He then filed motions for new trial, which the trial court granted. Because we lack jurisdiction to hear Rodriguez’s appeals, we dismiss his appeals for want of jurisdiction.

Appellant, the State of Texas, appeals from the trial court’s orders granting new trials. In a single issue, the State contends that the trial court lacked subject-matter jurisdiction to grant new trials because it lost plenary power before issuing the rulings. We reverse the trial court’s orders granting new trials in these causes, and we remand to the trial court for further proceedings.

Background

A grand jury indicted Rodriguez for two counts of the first-degree felony offense of sexual assault of a child under fourteen years of age. According to the two indictments, Rodriguez allegedly sexually assaulted one child in 2011 and another child in 2013. Rodriguez pleaded guilty to both counts. At the hearing on punishment, both of the children—now young women—testified about the effect of Rodriguez’s sexual abuse of them. Rodriguez elected for the trial court to assess punishment, and the court sentenced him to sixty years’ imprisonment on each count,

¹ Rodriguez was charged with these two counts in separate trial court cause numbers. Trial court cause number 1600295 corresponds to appellate cause number 01-20-00848-CR. Trial court cause number 1600296 corresponds to appellate cause number 01-20-00849-CR.

to run concurrently. The trial court imposed Rodriguez's sentences in open court on December 10, 2020. Rodriguez filed notices of appeal on December 15, 2020.

On January 8, 2021, Rodriguez filed a motion for new trial on punishment in each case. Rodriguez argued that the evidence was factually insufficient to support the trial court's sixty-year sentences, he did not knowingly waive his right to witness testimony, his guilty plea was involuntary, and the sixty-year sentences constituted cruel and unusual punishment. To support his motions, Rodriguez attached letters written by himself and people claiming to know him through church. The trial court set a hearing on the motions for February 5, 2021.

The trial court continued the February 5 hearing because the prison in which Rodriguez was incarcerated at the time lacked videoconferencing abilities to allow him to attend the hearing via videoconference. The trial court reset the hearing to February 19, but this hearing was also continued due to "an unprecedented hard freeze" in Houston on February 15 that closed the criminal district court building and required the trial court to operate on "a skeletal and limited basis for the entire week of February 15–19, 2021." Additionally, Rodriguez was unable to appear at the February 19 hearing due to difficulties in transferring him to the Harris County Jail to attend the hearing. Before continuing the hearing scheduled for February 19, the trial court determined, without objection from the parties, that good cause existed

to continue the hearing to a time when Rodriguez could be present. The hearing was continued to March 5, 2021.

On March 4, the day before the hearing, Rodriguez filed amended motions for new trial on punishment. On March 5, the trial court held the hearing on Rodriguez's motions for new trial. The only witness to testify at the hearing was Rodriguez's trial counsel who had represented him through the punishment phase of trial. Counsel testified that he and Rodriguez decided to have the then-presiding judge assess punishment in each case, and he believed the sixty-year sentences were excessive. Rodriguez requested that the trial court grant a new trial based on the excessiveness of the punishment.

Among other things, the State responded that the trial court had already lost jurisdiction to rule on the motions for new trial. Rodriguez conceded that the trial court generally has only seventy-five days to rule on motions for new trial, but he argued that the Texas Supreme Court's Thirty-Third Emergency Order Regarding the COVID-19 State of Disaster ("Thirty-Third Emergency Order") granted "some leeway" for the trial court to rule on the motions. *See* 629 S.W.3d 179 (Tex. 2021) (Order) (effective January 14, 2021). The trial court requested briefing from the parties on the issue.

After the hearing, Rodriguez filed a trial brief arguing that the Thirty-Third Emergency Order expressly authorized the trial court to "modify or suspend any and

all deadlines and procedures,” including the seventy-five-day deadline to rule on a motion for new trial. *See* TEX. R. APP. P. 21.8(a). Rodriguez argued that the COVID-19 pandemic and “serious freezing weather” delayed the new trial hearing, and the trial court had the authority to rule on the motions more than seventy-five days after sentencing.

The State filed a response to Rodriguez’s motions for new trial after the hearing. The State argued that the trial court lacked jurisdiction to rule on the motions under Texas Rule of Appellate Procedure 21. Under that rule, the State argued, the trial court had seventy-five days after imposing a sentence to rule on a timely-filed motion for new trial or the motion is deemed denied by operation of law and the trial court loses jurisdiction to rule on the motion. The State disagreed with Rodriguez that the Thirty-Third Emergency Order authorized the trial court to expand its jurisdiction.

On March 10, 2021, the trial court issued a lengthy written order granting new trials on punishment in both cases. The court determined that good cause existed to extend the hearing date and the deadline to rule on the motions for new trial. The order stated that a new presiding judge was sworn in after the court imposed Rodriguez’s sentences, Rodriguez timely filed motions for new trial on punishment, and the trial court attempted to hold a hearing on the motions within seventy-five days after sentencing but was unable to do so for various logistical reasons, including

the freezing event that caused the criminal court to operate on a limited basis for the week of February 15, 2021. The court relied on the Thirty-Third Emergency Order permitting district courts to “modify or suspend any and all deadlines and procedures” to extend its deadline to rule on the motions for new trial. The State appealed.

Rodriguez’s Appeals

Rodriguez filed notices of appeal in these cases. After reviewing the record on appeal, the Clerk of this Court notified Rodriguez of the Court’s intent to dismiss his appeals for want of jurisdiction. *See* TEX. R. APP. P. 37.1 (requiring appellate clerk to notify parties of any defect in notice of appeal so defect can be remedied, if possible). According to the record on appeal, Rodriguez had signed a “Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession” in each case stating that “in exchange for the [S]tate giving up [its] right to trial, [Rodriguez] agree[d] to waive any right of appeal which [he] may have.” Pursuant to his plea bargain, the trial court’s certifications of Rodriguez’s right of appeal stated that Rodriguez’s cases are “plea-bargain case[s], and [Rodriguez] has NO right of appeal” in either case. The Clerk of the Court requested a written response from Rodriguez regarding the Court’s jurisdiction over his appeals.

Both parties responded to the Clerk’s notice. Rodriguez “agree[d] with the procedural recitation included within the [Clerk’s] notice” and took the “position

that the only matter on appeal at this time is the State’s appeal of the Trial Court’s ruling granting Motions for New Trial.” Rodriguez concluded that “it would be proper for the Court to dismiss the Notices of Appeal that were filed before the Trial Court granted [Rodriguez’s] Motions for New Trial.” The State did not disagree that this Court lacked appellate jurisdiction to consider Rodriguez’s appeals, and it emphasized its right to appeal the new trial rulings. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(3).

The parties have briefed only the State’s issues on appeal. Neither party has briefed any issue regarding Rodriguez’s appeals.

Article 44.02 of the Code of Criminal Procedure generally governs a criminal defendant’s right of appeal. TEX. CODE CRIM. PROC. art. 44.02; *Griffin v. State*, 145 S.W.3d 645, 646 (Tex. Crim. App. 2004). When a defendant enters a guilty plea and “the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney,” the defendant may only appeal with the trial court’s permission except on matters raised by written motion prior to trial. TEX. CODE CRIM. PROC. art. 44.02; *see* TEX. R. APP. P. 25.2(a)(2); *Griffin*, 145 S.W.3d at 646, 647–48. Moreover, regardless of whether the defendant and the State agree on punishment, a defendant can waive the right of appeal when the State gives consideration for this waiver, thus making the waiver voluntary, knowing, and intelligent. *Carson v. State*, 559 S.W.3d 489, 492–95 (Tex. Crim. App. 2018).

Each time a trial court enters a judgment of guilt, it must also enter a certification of the defendant's right of appeal. TEX. R. APP. P. 25.2(a)(2), (d). We must dismiss an appeal if the appellate record does not include a certification showing that a defendant has a right of appeal. TEX. R. APP. P. 25.2(d).

The record indicates that, although the parties did not agree on a punishment recommendation, the State waived its right to a trial as consideration for Rodriguez's waiver of his right of appeal. *See Carson*, 559 S.W.3d at 496 (holding that State provided consideration by waiving its right to jury trial in exchange for defendant's waiver of right of appeal, and thus defendant's waiver was voluntary, knowing, and intelligent). Rodriguez's signed plea papers expressly state that "in exchange for the [S]tate giving up [its] right to trial, [Rodriguez] agree[d] to waive any right of appeal which [he] may have." *See id.* The trial court's certifications of Rodriguez's right of appeal in each case reflect that Rodriguez has no right of appeal.

Because the State provided consideration for Rodriguez's waiver of his right of appeal in each case, we conclude that Rodriguez knowingly and voluntarily waived his right of appeal. We therefore hold that we lack jurisdiction over Rodriguez's appeals, and we dismiss them for want of jurisdiction.

Jurisdiction

In its sole issue, the State argues that the trial court lost plenary power before ruling on the motions for new trial, and therefore the trial court lacked jurisdiction to grant new trials.

A. Standard of Review and Governing Law

Jurisdiction, or plenary power, refers to a court's authority to hear a controversy and to make decisions that are legally binding on the parties involved. *State v. Dunbar*, 297 S.W.3d 777, 780 (Tex. Crim. App. 2009). Without jurisdiction, the court has no power to act. *Id.* Whether a trial court had subject-matter jurisdiction is a question of law that we review de novo. *Tiscareno v. State*, 608 S.W.3d 434, 437 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd).

A trial court generally retains plenary power over a criminal prosecution for thirty days after imposing or suspending a sentence in open court. TEX. R. APP. P. 21.3, 21.4(a); *State v. Davis*, 349 S.W.3d 535, 537 (Tex. Crim. App. 2011); *Ex parte Matthews*, 452 S.W.3d 8, 13 (Tex. App.—San Antonio 2014, no pet.). During these thirty days, a criminal defendant may file a motion for new trial, including on punishment only. TEX. R. APP. P. 21.3, 21.4(a); *Davis*, 349 S.W.3d at 537. If no party files a motion for new trial, the trial court's plenary power expires thirty days after sentencing. TEX. R. APP. P. 21.4(a); *Ex parte Matthews*, 452 S.W.3d at 13.

A timely-filed motion for new trial extends the trial court’s plenary power to rule on the motion up to seventy-five days after sentencing. TEX. R. APP. P. 21.8(a), (c); *Ex parte Matthews*, 452 S.W.3d at 13. The trial court must rule on the motion during this seventy-five-day period or the motion will be deemed denied when the seventy-five days expires. TEX. R. APP. P. 21.8(a), (c); *Montelongo v. State*, 623 S.W.3d 819, 823 (Tex. Crim. App. 2021) (“Obviously, a motion for new trial is overruled when the trial court enters an order overruling the motion,” but motion “can also be overruled by operation of law without any action on the trial court’s part”). After the “motion for new trial is overruled by operation of law, the trial court loses jurisdiction to rule upon it.” *Montelongo*, 623 S.W.3d at 823 (quoting *State v. Moore*, 225 S.W.3d 556, 566–67 (Tex. Crim. App. 2007)) (internal quotation marks omitted); see *Ex parte Matthews*, 452 S.W.3d at 13 (“After its plenary power over a cause expires, the trial court generally lacks the authority to take any action in the cause.”). An order entered by a trial court without authority is void. *Ex parte Alexander*, 685 S.W.2d 57, 60 (Tex. Crim. App. 1985) (concluding that only Court of Criminal Appeals had authority to grant defendant’s requested relief in habeas proceeding, and thus trial court order granting such relief was void and should be vacated).

B. Analysis

The State contends that the trial court lacked jurisdiction to grant Rodriguez's motions for new trial more than seventy-five days after sentencing, and therefore the new trial orders are void. Rodriguez does not dispute that a trial court's plenary power ordinarily lapses seventy-five days after a sentence is imposed when a defendant timely files a motion for new trial. However, Rodriguez argues that the Thirty-Third Emergency Order, which issued under the authority of Government Code section 22.0035(b), authorized the trial court to extend the time to rule on his motions for new trial.

The trial court sentenced Rodriguez on December 10, 2020. The seventy-fifth day after sentencing was February 23, 2021. The trial court's orders granting new trials found that good cause existed to continue the hearing on the motions for new trial until March 5 based primarily on logistical issues in obtaining Rodriguez's appearance at the hearings, including a winter storm that closed the criminal district courts in Harris County during the week of February 15, 2021. The trial court signed the new trial orders on March 10, 2021. The trial court expressly relied on the Thirty-Third Emergency Order permitting district courts to "modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order" to extend the time to rule on the motions for new trial after the seventy-five-day deadline.

Government Code section 22.0035(b) authorizes the Texas Supreme Court to “modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor.” TEX. GOV’T CODE § 22.0035(b). An order under this section is valid for ninety days unless the chief justice of the supreme court renews the order. *Id.*

On March 13, 2020, the Texas Supreme Court issued the First Emergency Order Regarding the COVID-19 State of Disaster. 596 S.W.3d 265 (Tex. 2020) (Order) (effective March 13, 2020). The chief justice of the court has periodically renewed the emergency order as required by the Government Code. *See* TEX. GOV’T CODE § 22.0035(b). The Thirty-Third Emergency Order was in effect on February 23, 2021, the seventy-fifth day after the trial court imposed Rodriguez’s sentences. *See* 629 S.W.3d at 182 (stating that order “is effective immediately” on January 14, 2021, date on which order issued). On March 10, 2021, when the trial court signed the new trial orders, the Thirty-Sixth Emergency Order Regarding the COVID-19 State of Disaster (“Thirty-Sixth Emergency Order”) was in effect. *See* 629 S.W.3d 897 (Tex. 2021) (Order) (effective March 5, 2021).

As with the prior emergency orders, both of these emergency orders expressly stated that “Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic,” and the orders expressly issued under Government Code section 22.0035(b). Thirty-

Third Emergency Order, 629 S.W.3d at 179; Thirty-Sixth Emergency Order, 629 S.W.3d at 897; *see* TEX. GOV'T CODE § 22.0035(b) (authorizing modification or suspension of procedures in court proceeding affected by declared disaster). Both emergency orders also include the following provision, which is in dispute here:

3. 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—without a participant's consent:
 - a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order

Thirty-Third Emergency Order, 629 S.W.3d at 179–80; Thirty-Sixth Emergency Order, 629 S.W.3d at 897.

The Court of Criminal Appeals recently opined on whether this provision authorizes trial courts to extend jurisdictional deadlines. *In re State ex rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021) (orig. proceeding). In *Ogg*, the trial court relied on this provision to grant a defendant's request for a bench trial over the State's refusal to consent to the defendant's waiver of his right to a jury trial. *Id.* at 362. The Code of Criminal Procedure grants the State the right to consent to a defendant's waiver of a jury trial. *Id.* at 363 (quoting TEX. CODE CRIM. PROC. art. 1.13(a)). The court of appeals denied mandamus relief to the State, but the Court of Criminal Appeals conditionally granted mandamus relief. *Id.* at 362–63. In construing the provision in dispute here and section 22.0035(b) of the Government Code, the court

stated that neither provision authorizes trial courts to modify substantive rights because the provision refers only to procedural matters. *Id.* at 364. The court stated:

This language giving a court the power to modify or suspend “deadlines and procedures” presupposes a pre-existing power or authority over the case or the proceedings. A court may extend a deadline or alter a procedure that would otherwise be part of the court proceedings. It does not suggest that a court can create jurisdiction for itself where the jurisdiction would otherwise be absent or that a judge could create authority to preside over proceedings over which the judge would otherwise be barred from presiding. . . .

* * * *

If the Supreme Court’s Emergency Order were really intended to permit trial courts to enlarge their own jurisdiction and to permit trial judges to enlarge the types of proceedings over which they have authority, we would expect a provision to explicitly say so.

Id. at 364–65 (internal citations omitted).

Rodriguez argues that the trial court merely extended a deadline or altered a procedure that would otherwise be part of the court proceedings, and therefore the trial court could extend the deadline under *Ogg*’s interpretation of the emergency order provision. He argues that the trial court attempted to diligently rule on the new trial motions within seventy-five days of sentencing but was prevented from doing so by the pandemic and the winter storm.

However, the seventy-five-day deadline to rule on a motion for new trial is not procedural in nature. This deadline is jurisdictional and, after it expires, the trial court loses authority to act in the case. *See Montelongo*, 623 S.W.3d at 823. The trial court impermissibly attempted to “create jurisdiction for itself where the jurisdiction

would otherwise be absent” *See Ogg*, 618 S.W.3d at 364. Moreover, neither the emergency order nor *Ogg* authorizes a trial court to extend its jurisdiction when it is prevented from issuing a timely ruling despite diligently attempting to meet a jurisdictional deadline. “If the Supreme Court’s Emergency Order were really intended to permit trial courts to enlarge their own *jurisdiction* . . . , we would expect a provision to explicitly say so.” *Id.* at 365 (emphasis added).

At least two of our sister courts have similarly concluded that the disputed provision in the emergency order does not authorize a trial court to extend jurisdictional deadlines. *See, e.g., State v. Bronson*, 627 S.W.3d 520, 522 (Tex. App.—Texarkana 2021, no pet.); *State v. Temple*, 622 S.W.3d 592, 595–96 (Tex. App.—Houston [14th Dist.] 2021, pet. ref’d). In these two appeals, our sister courts considered whether the provision authorized trial courts to suspend execution of a defendant’s sentence and place the defendant on community supervision—known as “shock probation”—more than 180 days after the defendant begins serving the sentence. *Bronson*, 627 S.W.3d at 521; *Temple*, 622 S.W.3d at 594. This 180-day limit is jurisdictional in nature. *Bronson*, 627 S.W.3d at 521, 522; *Temple*, 622 S.W.3d at 594; *accord State v. Robinson*, 498 S.W.3d 914, 919 (Tex. Crim. App. 2016). Relying on *Ogg*, the courts held that the emergency order does not authorize trial courts to extend the 180-day jurisdictional deadline to order shock probation. *Bronson*, 627 S.W.3d at 522; *Temple*, 622 S.W.3d at 595.

We hold that the trial court lacked subject-matter jurisdiction to enter the March 10, 2021 orders granting new trials in these two cases. Because the trial court lacked authority to enter the new trial orders, the orders are void. *See Ex parte Alexander*, 685 S.W.2d at 60; *Temple*, 622 S.W.3d at 595–96; *see also State v. Sadakhoun*, No. 07-05-0435-CR, 2006 WL 3246262, at *1 (Tex. App.—Amarillo Nov. 9, 2006, no pet.) (mem. op., not designated for publication) (holding that order granting motion for new trial was void because it issued after motion was overruled by operation of law and, thus, after trial court lost jurisdiction to act upon motion).

We sustain the State’s sole issue.

Conclusion

We dismiss Rodriguez’s appeals for want of jurisdiction. We reverse the trial court’s orders granting new trials in these causes, and we remand these causes to the trial court with instructions to reinstate the judgments of conviction and the sentences.

April L. Farris
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

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