Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00725-CR

Anthony **HERRERA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR4101
Honorable Steven C. Hilbig, Judge Presiding[1]

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: July 22, 2020

MOTION TO WITHDRAW GRANTED; DISMISSED FOR WANT OF JURISDICTION

Appellant Anthony Herrera entered a plea of no contest to theft of property with a value greater than $2,500 and less than $30,000. The trial court deferred a finding of guilt, placed Herrera on community supervision for three years, and ordered Herrera to pay restitution in the amount of $18,200. The State later moved to revoke his community supervision, alleging Herrera violated the terms of his community supervision by, inter alia, failing to report to his supervision officer.

[1] Senior Judge, sitting by assignment.

At the first hearing on the motion to revoke, Herrera entered a plea of "true" to violating this condition. The State and Herrera agreed to reset the hearing for thirty days in exchange for Herrera's agreement to report weekly to his supervision officer and make a partial payment of $12,000 in restitution by April 8, 2019. If Herrera complied with these terms, he would be given an additional two weeks to pay the remaining restitution owed and either continue his community supervision or receive a reduced misdemeanor punishment.

On July 30, 2019, the trial court held a second hearing where the State reported that Herrera failed to comply with the agreed terms and requested revocation. The trial court revoked Herrera's community supervision, adjudicated him guilty, sentenced him to two years' confinement, and assessed court costs.

On August 14, 2019, Herrera petitioned for a writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure, alleging his original trial counsel in his underlying theft case was ineffective. On October 18, 2019, Herrera also filed a pro se "Motion for Appeal," stating he was appealing "the cause in #2017CR4101." That motion arrived in an envelope postmarked on September 26, 2019.[2]

Herrera's court-appointed attorney filed a brief containing a professional evaluation of the record in accordance with *Anders v. California*, 386 U.S. 738 (1967). Counsel asserts this court lacks jurisdiction over the appeal because Herrera's notice of appeal was untimely. Counsel further asserts that in the event this court has jurisdiction, the appeal has no merit. Counsel also provided Herrera with a copy of the brief and informed him of his right to review the record and file his own brief. *See Nichols v. State*, 954 S.W.2d 83, 85–86 (Tex. App.—San Antonio 1997, no

[2] The envelope also included two letters dated September 13, 2019 and September 25, 2019. Both letters reference Herrera's post-conviction writ proceeding.

writ); *Bruns v. State*, 924 S.W.2d 176, 177 n.1 (Tex. App.—San Antonio 1996, no writ). Herrera did not file a pro se brief.

After reviewing the record, we agree with appointed counsel that Herrera's notice of appeal is untimely. "A timely notice of appeal is necessary to invoke a court of appeals's jurisdiction." *Taylor v. State*, 424 S.W.3d 39, 43 (Tex. Crim. App. 2014). Rule 25.2 of the Texas Rules of Appellate Procedure provides that a party can perfect an appeal in a criminal case by timely filing a sufficient notice of appeal. TEX. R. APP. P. 25.2. The notice is timely if it is "filed within thirty days after the day sentence is imposed or suspended, or within ninety days after sentencing if the defendant timely files a motion for new trial." *Taylor*, 424 S.W.3d at 43 (citing TEX. R. APP. P. 26.2(a)(1)). In general, a notice is deemed filed when it is physically delivered to and received by the trial court clerk. *Id.* The mailbox rule, as codified in Rule 9.2(b), stands as an exception to the physical-delivery requirement and provides that a document is deemed timely filed "if it was sent to the proper clerk through the United States Postal Service; placed in a properly addressed, stamped envelope; and deposited in the mail on or before the last day of filing." *Id.* (citing TEX. R. APP. P. 9.2(b)) (internal quotation marks omitted). In cases involving pro se prisoners, a pro se prisoner's pleading is considered timely filed "at the time the prison authorities duly receive the document to be mailed." *Id.* at 44; *Campbell v. State*, 320 S.W.3d 338, 344 (Tex. Crim. App. 2010) (holding pleadings of pro se inmates shall be deemed filed when they are delivered to prison authorities).

The record shows Herrera's sentence was imposed on July 30, 2019, and no motion for new trial was filed. As a result, Herrera's notice of appeal was due by August 29, 2019. *See Taylor*, 424 S.W.3d at 43; TEX. R. APP. P. 26.2(a)(1). Herrera's pro se "Motion to Appeal" was postmarked on September 26, 2019 and file-stamped on October 18, 2019. Nothing in the appellate record shows he delivered his notice of appeal to prison authorities by August 29, 2019.

See Taylor, 424 S.W.3d at 44; *Campbell*, 320 S.W.3d at 344. Even the September 26, 2019 postmark date is more than thirty days after sentence was imposed. *See Taylor*, 424 S.W.3d at 43–44; *Campbell*, 320 S.W.3d at 344; TEX. R. APP. P. 9.2(b)(2)(A) (providing that postmark date is "conclusive proof" of the date of mailing). We therefore conclude Herrera's notice of appeal is untimely, leaving us without jurisdiction over this appeal.[3] *See Taylor*, 424 S.W.3d at 43.

Based on the foregoing, we grant appellate counsel's request to withdraw and dismiss the appeal for want of jurisdiction.

Beth Watkins, Justice

DO NOT PUBLISH

[3] We note that Herrera's envelope was addressed to the trial judge, which does not constitute a "properly addressed" envelope "sent to the proper clerk" in accordance with the plain language of Rule 9.2(b). *See Turner v. State*, 529 S.W.3d 157, 159 (Tex. App.—Texarkana 2017, no pet.) (holding envelope addressed to trial judge failed to comply with plain language of Rule 9.2). We further note that to the extent Herrera is seeking review of his post-conviction writ of habeas corpus proceeding, this court does not have jurisdiction over such proceedings. TEX. CODE CRIM. PROC. ANN. art 11.07; *see Bd. of Pardons & Paroles ex rel. Keene v. Court of Appeals for Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) ("Jurisdiction to grant post conviction habeas corpus relief on a final felony conviction rests exclusively with" the Texas Court of Criminal Appeals); *Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991) (noting the Texas Court of Criminal Appeals is "the only court with jurisdiction in final post-conviction felony proceedings."); *Ex parte Alexander*, 685 S.W.2d 57, 60 (Tex. Crim. App. 1985) ("It is well established that only the Court of Criminal Appeals possesses the authority to grant relief in a post-conviction habeas corpus proceeding where there is a final felony conviction.").