COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00447-CR

SEAN MONSON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 5 OF DENTON COUNTY
TRIAL COURT NO. F-2013-1848-D

MEMORANDUM OPINION[1]

In his sole issue on appeal, Appellant Sean Monson complains that the trial court reversibly erred by failing to rule on his motion for shock probation filed after the appellate record was filed in this court. While we have jurisdiction over the trial court's judgment to which Appellant's notice of appeal pertains, we do

[1]*See* Tex. R. App. P. 47.4.

not have subject matter jurisdiction to review the trial court's later refusal to rule on his motion for shock probation. We therefore dismiss this appeal.

PROCEDURAL HISTORY

On January 29, 2015, Appellant pled guilty to intoxication manslaughter in exchange for a ten-year sentence, probated for ten years. The trial court accepted and followed the bargain, suspending imposition of Appellant's sentence of ten years' confinement and placing him on ten years' community supervision. Less than sixteen months later, the State filed a motion to revoke Appellant's community supervision, alleging several violations of his community-supervision conditions. Appellant pled true to some of the allegations. On September 1, 2016, the trial court found all the State's allegations true, revoked Appellant's community supervision, and sentenced him to ten years' confinement. The sentence was set to commence the following day. Appellant filed a timely motion for new trial and a timely notice of appeal. The reporter's record was filed on January 3, 2017, and the clerk's record was filed on January 5, 2017.

DISCUSSION

In his sole issue, Appellant challenges only the trial court's failure to rule on his motion for shock probation. Article 42A.202 of the code of criminal procedure provides,

> (a) For the purposes of this article, the jurisdiction of a court imposing a sentence requiring imprisonment in the Texas Department of Criminal Justice for an offense other than a state jail

> felony continues for 180 days from the date the execution of the sentence actually begins.
>
> (b) Before the expiration of the 180-day period described by Subsection (a), the judge of the court that imposed the sentence described by that subsection may, on the judge's own motion, on the motion of the attorney representing the state, or on the written motion of the defendant, suspend further execution of the sentence and place the defendant on community supervision under the terms and conditions of this chapter . . . .

Tex. Code Crim. Proc. Ann. art. 42A.202(a)–(b) (West 2018).

On February 23, 2017, Appellant filed a motion for imposition of shock probation in the trial court, which the trial court expressly did not rule on. Instead, on the proposed order Appellant provided, the trial court wrote, "This case is on appeal, therefore all trial court proce[e]dings are abated[.] I will not be signing this order. It can remain in the file unsigned." Appellant filed a written objection to the trial court's refusal to rule on February 24, 2017.

As the State points out in its brief, the trial court's refusal to rule on a motion for shock probation is not appealable. *Houlihan v. State*, 579 S.W.2d 213, 215–16 (Tex. Crim. App. 1979); *Basaldua v. State*, 558 S.W.2d 2, 5 (Tex. Crim. App. 1977).

In the interest of justice, however, we note that both parties incorrectly contend that the trial court's 180-day period for granting shock probation has expired. The trial court's 180 days to rule on a motion for shock probation began on September 2, 2016, *see* Tex. Code Crim. Proc. Ann. art. 42A.202(a), and stopped running on January 5, 2017, the day the trial court's record was filed in this court, *see* Tex. R. App. P. 25.2(g) ("Once the record has been filed in the

appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate-court mandate."); *State v. Robinson*, 498 S.W.3d 914, 921 (Tex. Crim. App. 2016) (harmonizing the shock-probation statute with article 44.01(e) of the code of criminal procedure and holding that when the State filed its notice of appeal, the 180-day timeline was stayed, and when the appellate court's mandate issued, the timeline began running again); *see also Ex parte Macias*, 541 S.W.3d 782 (Tex. Crim. App. 2017) (relying on rule 25.2(g), article 44.01, and *Robinson* to hold that "the trial court was correct in concluding that it lacked jurisdiction over the case because the appellate mandate had not yet issued" (footnote omitted)), *cert. denied*, 2018 WL 1070549 (U.S. Apr. 16, 2018) (No. 17-7896).

By our calculations, more than 50 days will remain on the 180-day clock when the trial court simultaneously receives our mandate and reacquires jurisdiction over the case. *See* Tex. R. App. P. 25.2(g). We see no impediment to Appellant seeking a ruling on his motion for shock probation in the trial court at that time.

CONCLUSION

Because Appellant's sole issue does not challenge the trial court's judgment but instead complains of an unappealable order, we dismiss this appeal.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: WALKER, MEIER, and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: May 17, 2018