

NO. 07-12-0430-CV
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL A
NOVEMBER 29, 2012

PATRICK MORGAN, APPELLANT
V.
HONORABLE FELIX KLEIN, APPELLEE

FROM THE 154TH DISTRICT COURT OF LAMB COUNTY;
NO. 4182; HONORABLE FELIX KLEIN, JUDGE

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

ORDER ON MOTION FOR REINSTATEMENT

By opinion dated October 18, 2012, this Court dismissed Appellant's attempted appeal from the denial of a "bill of review" for non-payment of the filing fee. Pending before this Court is Appellant's *Motion for Reinstatement* of the appeal based upon the late filing of an affidavit of indigence.¹ For the following reasons, we deny the motion.

¹The deadline for challenging the dismissal via motion for rehearing was November 2, 2012. TEX. R. APP. P. 49.1. Implying a motion for extension of time in which to file a rehearing under *Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997), we consider the pending motion timely and address it.

On October 2, 2012, Appellant filed a *Notice of Appeal* complaining about the trial court's denial of a "bill of review" in trial court cause number 4182. Appellant's conviction for aggravated assault in that case was addressed by this Court and affirmed in 2006. See *Morgan v. State*, No. 07-06-0052-CR, 2006 Tex. App. LEXIS 10000 (Tex.App.—Amarillo Nov. 16, 2006, no pet.). That conviction became final and Appellant is not entitled to a second appeal from that conviction.

A bill of review is an equitable proceeding and an independent cause of action to set aside a civil judgment that is no longer appealable or subject to challenge. See *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926-27 (Tex. 1999). See also TEX. R. CIV. P. 329b(f). It has no application to a criminal proceeding and it is not a proper procedure for challenging a criminal conviction. The proper vehicle for seeking post-conviction review of a challenged judgment in a criminal proceeding is by way of a *writ of habeas corpus* filed pursuant to article 11.07 of the Texas Code of Criminal Procedure. Even if we were to construe Appellant's "bill of review" proceeding as an application for a writ of habeas corpus, this Court has no jurisdiction over post-conviction writs of habeas corpus in felony cases. See TEX. CODE CRIM. PROC. ANN. art. 11.07 (WEST SUPP. 2012); *Board of Pardons & Paroles ex rel. Keene v. Court of Appeals for Eighth Dist.*, 910 S.W.2d 481, 483 (Tex.Crim.App. 1995).

Furthermore, even if we were to grant Appellant's *Motion for Reinstatement* and accept his late filed affidavit of indigence, we would still lack jurisdiction to afford him any relief. An appellate court has jurisdiction to hear an appeal only if it is from a final judgment, *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001), and we have jurisdiction to consider immediate appeals of interlocutory orders only if a statute

explicitly provides appellate jurisdiction. *Stary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998). Therefore, an order denying Appellant “bill of review” relief would not invoke our jurisdiction. *Self v. State*, 122 S.W.3d 294 (Tex. App.—Eastland 2003, no pet.); *Diaz v. State*, No. 07-10-00328-CV, 2011 Tex. App. Lexis 1985, at *3 (Tex. App.—Amarillo Jan. 21, 2011, pet. ref’d) (mem. op.) (not designated for publication).

Consequently, Appellant’s notice of appeal challenging the denial of a bill of review from his criminal conviction is not a cognizable claim subject to review. Remaining convinced that dismissal of this proceeding by opinion and judgment dated October 18, 2012, was proper, we deny Appellant’s *Motion For Reinstatement*.

Patrick A. Pirtle
Justice