



NUMBER 13-17-00260-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GABRIEL LEE WHITTAKER,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 24th District Court
of Calhoun County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras**

Appellant, Gabriel Lee Whittaker, proceeding pro se, has filed a "Notice of Appeal in Habeas Corpus." We dismiss this appeal for lack of jurisdiction.

On August 27, 2015, the trial court entered a judgment adjudicating guilt whereby appellant was convicted of possession of a controlled substance with intent to deliver.

See TEX. HEALTH & SAFETY CODE ANN. § 421.112(d) (West, Westlaw through Ch. 49, 2017

R.S.). On October 3, 2016, appellant filed a writ of habeas corpus with the Texas Court of Criminal Appeals which was denied on November 2, 2016. See *Ex parte Whittaker*, No. WR-85,815-01 (Tex. Crim. App. November 2, 2016) (not designated for publication). Appellant filed a notice of appeal on March 31, 2017. In his notice of appeal, appellant asserts that the “court of appeals has jurisdiction to hear this appeal from [the] trial court’s order denying habeas corpus relief.”

On May 18, 2017, the Clerk of this Court notified appellant that it appeared that the order from which the appeal was taken was not an appealable order, and requested correction of this defect within ten days or the appeal would be dismissed. Appellant filed a brief in response stating the Court has jurisdiction and he is entitled to de novo appellate review.

This Court’s appellate jurisdiction in a criminal case is invoked by a timely filed notice of appeal. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). Absent a timely filed notice of appeal, a court of appeals does not have jurisdiction to address the merits of the appeal and can take no action other than to dismiss the appeal for want of jurisdiction. *Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998). Unless a motion for new trial has been timely filed, a notice of appeal must be filed within thirty days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order. TEX. R. APP. P. 26.2(a)(1). Where a timely motion for new trial has been filed, the notice of appeal must be filed within ninety days after the day sentence is imposed or suspended in open court. See *id.* R. 26.2(a)(2). The time within which to file the notice may be enlarged if, within fifteen days after the deadline for

filing the notice, the party files the notice of appeal and a motion complying with Rule 10.5(b) of the Texas Rules of Appellate Procedure. See *id.* R. 26.3.

Appellant's notice of appeal, filed nineteen months after sentence was imposed, was untimely, and accordingly, we lack jurisdiction over the appeal. See *Slaton*, 981 S.W.2d at 210. Appellant may be entitled to an out-of-time appeal by filing a post-conviction writ of habeas corpus returnable to the Texas Court of Criminal Appeals; however, the availability of that remedy is beyond the jurisdiction of this Court. See TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3(a) (West, Westlaw through 2015 R.S.); see also *Ex parte Garcia*, 988 S.W.2d 240, 241 (Tex. Crim. App. 1999) (per curiam). Further, to the extent that appellant might be seeking relief on the merits of his application, jurisdiction to grant post-conviction habeas corpus relief in felony cases rests exclusively with the Texas Court of Criminal Appeals. TEX. CODE CRIM. PROC. ANN. art. 11.07, § 5 (West, Westlaw through Ch. 49, 2017 R.S.); *Bd. of Pardons & Paroles ex rel. Keene v. Court of Appeals for the Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995); *In re McAfee*, 53 S.W.3d 715, 717–18 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding). Finally, to the extent that appellant may be seeking to appeal the denial of his writ of habeas corpus by the Texas Court of Criminal Appeals, we lack jurisdiction to review the decisions of that court. See TEX. CONST. art. V, § 5(a) (unless provided otherwise, the court of criminal appeals has final appellate jurisdiction in criminal cases); see also *Joseph v. State*, No. 01-17-00095-CR, 2017 WL 1326071, at *1 (Tex. App.—Houston [1st Dist.] Apr. 11, 2017, no pet. h.) (mem. op., not designated for publication) (stating that intermediate appellate courts lack jurisdiction to review decisions made by the court of criminal appeals); *Ex parte Taylor*, No. 03–16–00461–CR, 2016 WL 6407301, at *1 (Tex.

App.—Austin Oct. 28, 2016, no pet.) (mem. op., not designated for publication) (“We do not have jurisdiction to review the Court of Criminal Appeals’s denial of [the] application for writ of habeas corpus or to review the convicting court’s findings of fact and conclusions of law.”); *Ex parte Rogers*, Nos. 02–11–00333–CR, 02–11–00334–CR, 02–11–00335–CR, 2011 WL 4414708, at *1 (Tex. App.—Fort Worth Sept. 22, 2011, no pet.) (mem. op., not designated for publication) (dismissing appeal for want of jurisdiction because appellant attempted to appeal Court of Criminal Appeals’ denial of his application for writ of habeas corpus).

The appeal is DISMISSED FOR LACK OF JURISDICTION.

DORI CONTRERAS
Justice

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

Delivered and filed the
13th day of July, 2017.