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No. PD-0710-18

In the

Court of Criminal Appeals

Of the State of Texas

JESSE GALINDO DELAFUENTE

v.

The State of Texas

Review from the Opinion of the 10th Court of Appeals

No. 10-16-00376-CR

Appeal from Cause No. 2016-419-C1

In the 19th District Court

Of McLennan County, Texas

Petition for Discretionary Review

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TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

JESSE GALINDO DELAFUENTE, hereinafter referred to as Petitioner, petitions the Court to review the judgment dismissing his appeal in appellate cause number 10-16-00376-CR.

Statement Regarding Oral Argument

Oral argument is requested in this matter.

Statement of the Case

Petitioner was convicted of evading arrest in a motor vehicle and sentenced to ten years prison. Petitioner timely appealed his conviction, alleging, *inter alia*, Michael Morton Act violations. While his appeal was pending, Petitioner was released on so called "shock probation". As a precautionary measure, Petitioner filed a second notice of appeal more than thirty days after the suspension of his sentence via probation. The court of appeals held that appellant's second notice of appeal was untimely and dismissed his appeal for want of jurisdiction.

Petitioner contends that the court of appeals failed to follow this Court's precedent and that the issue of the proper timing of appeals in cases involving shock probation is an issue of such importance that it needs to be further clarified by this Court.

Statement of Procedural History

The Court of Appeals rendered its decision dismissing Petitioner's appeal on June 27, 2018. No motion for rehearing was filed. Petitioner filed a motion for extension of time to file a petition for discretionary review on July 11, 2018. That motion was granted on July 11, 2018, and the deadline to file a petition for discretionary review was extended to August 27, 2018.

Grounds for Review

1. Following this Court's recent decision in *Shortt v.State*, when an appellant timely files a notice of appeal to appeal his conviction, must he file an additional notice of appeal to maintain his appeal of the conviction if the trial court later signs an order or judgment permitting "shock" probation?

Argument

A. Summary of Argument

Although Petitioner has only ever wanted to appeal his conviction (the guilt/innocence phase of trial), the Court of Appeals incorrectly concluded that he was required to file an additional notice of appeal within thirty days after the trial court signed a document permitting shock probation in this case. This case gives this Court the chance to answer the questions posed near the end of this Court's recent *Shortt v. State* opinion when the Court asked what should happen if an Appellant wants to appeal his conviction but is later granted shock probation. *Shortt v. State*, 539 S.W.3d 321, 326-27 (Tex. Crim. App. 2018). Discretionary review should also be granted in this case because the Court is currently considering the related case of

State v. Smith dealing with shock probation and the timing of notices of appeal. *Smith v. State*, 518 S.W.3d 641 (Tex. App.—Waco 2017, pet. granted). These cases together present this Court with a chance to give clarity to litigants in the future so that they may file a notice of appeal at the appropriate time in shock probation cases.

B. Argument on Ground for Review Number One

> "A wizard is never late, Bilbo Baggins. Nor is he early. He arrives precisely when he means to."
>
> -The wizard Gandalf, *The Lord of the Rings: The Fellowship of the Ring*, motion picture directed by Peter Jackson (2001).

Granting discretionary review in this case would allow the Court of Criminal Appeals to help appellants in shock-probation cases file their notices of appeal "precisely when [they] mean to" unlike the current situation where appellants are sometimes too early or too late and subject to contradictory and confusing holdings by the courts of appeals.

1. Applicable Law

A party may only appeal a certain issue if the legislature has granted permission. *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993). A notice of appeal must be filed within thirty days after the sentence is imposed or suspended or after the trial court enters an appealable order. Tex. R. App. P. 26.2. The time to invoke appellate jurisdiction generally expires with the right to file a

notice of appeal. *Dodson v. State*, 988 S.W.2d 833,834 (Tex. App.—San Antonio 1999).

In February of 2018 in the *Shortt* case, this Court held that a defendant may appeal from a judicial decision granting shock probation. *Shortt*, 539 S.W.3d at 327. Also in *Shortt*, this Court noted that the Court would one day need to deal with a situation like that in the instant case:

> Of course, construing it this way is not without its potential anomalies. For example, what if the defendant has already filed a notice of appeal, and thereby set the appellate timetable in motion, with respect to the original judgment that imposed an un-probated sentence? Does the later order granting "shock" community supervision somehow supersede the written judgment, so that a new notice of appeal must be filed which commences the appellate timetable anew? This could present a problem. … To avoid this confusion, we could hold that the appeal from the order granting "shock" community supervision is independent of the appeal from the original written judgment—a separate appeal of the order suspending the *execution* of the sentence, with its own appellate timetable, but subject to being consolidated with the appeal from the original written judgment.
>
> *Id.*

2. Analysis

The instant case describes the situation this Court predicted above in *Shortt*. Sadly, the Tenth Court of Appeals declined to follow this Court's suggestion and required Petitioner to file a new notice of appeal within thirty days after the judicial decision granting shock probation. *Delafuente v. State*, No. 10-16-00376-CR, 2018 Tex. App. LEXIS 4765 (Tex. App.—Waco June 27, 2018) (mem. op., not designated

for publication). The court of appeals required this second notice of appeal, even though Petitioner did not seek to appeal any issues regarding his shock probation, but simply wanted to persist in his appeal of his conviction.

In the end, there can be only one judgment

Citing its opinion in the *Smith* case, the Tenth Court of Appeals found that because the document granting shock probation was called a "judgment" rather than an "order," they need not follow this Court's guidance in *Shortt*. *Id*.

Previously, Texas Code of Criminal Procedure 42.12(6), specified:

> "…the jurisdiction of a court imposing a sentence requiring imprisonment in the Texas Department of Criminal Justice for an offense…continues for 180 days from the date the execution of *the* sentence actually begins. Before the expiration of 180 days from the date the execution of *the* sentence actually begins, the judge of the court that imposed such sentence may…suspend further execution of *the* sentence and place the defendant on community supervision under the terms and conditions of this article.

Tex. Code Crim. Proc. Aann. art. 42.12 (West 2016)(emphasis added). That section, entitled "Continuing Court Jurisdiction in Felony cases", contemplates that when a court suspends the execution of a sentence it does so as part of the continuum of sanctions available to it. Only one sentence is issued. Therefore, when a trial court suspends execution of incarceration post-judgment its action is simply an *order* of the trial court, not a separate judgment.

As this Court opined while interpreting Section 6 in *Shortt*, the statute contemplates that:

> "…shock community supervision will be granted pursuant to an order on a motion…well after the written judgment has been entered". The statutory scheme does not contemplate that the trial court enter a new judgment, but simply that it grant or deny the motion pursuant to its continuing jurisdiction to consider, and if appropriate, grant, community supervision."
>
> *Shortt* at 324.

Simply put, trial courts may respond to motions by granting or denying them. They do not issue judgments in response to such motions. The fact that the document granting shock probation in this case was called a "judgment" rather than an "order" should not make a dispositive difference. That is especially true in this case, where the Petitioner only seeks to appeal issues related to his conviction, rather than his sentence.

This Court went a long way toward clarifying appeals related to shock probation in *Shortt*, but defendants need additional clarity on when to properly file their notices of appeal. Petitioner asks this Court to grant discretionary review in this case and to follow the Court's suggestion near the end of *Shortt*. Because Petitioner timely filed a notice of appeal after his conviction, no additional notice of appeal should be necessary if Petitioner does not seek to appeal his grant of shock probation. Petitioner asks that this Court find that the Court of Appeals has jurisdiction and to remand this matter back to the Court of Appeals for the justices to consider Petitioner's grounds for appeal set out in his brief previously filed in the court of appeals.

Prayer for Relief

For the reasons stated herein, Petitioner prays that this Court grant this petition, and upon reviewing the judgment entered below, remand this case to the Court of Appeals to review Petitioner's grounds for appeal.

Respectfully submitted,

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I hereby certify that a true and correct copy of the above and foregoing document has been sent via Electronic Mail to Abel Reyna, Criminal District Attorney for McLennan County, and the Office of the State Prosecuting Attorney on August 27, 2018.

/s/ Robert G. Callahan, II
Robert G. Callahan, II
Attorney for Petitioner

I certify that this document Appellant's Brief was prepared with Microsoft Word 2016, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contains 1,628 words.

/s/ Robert G. Callahan, II
Robert G. Callahan, II
Attorney for Petitioner

Appendix

See attached copy of the opinion of the Court of Appeals in this matter.

IN THE
TENTH COURT OF APPEALS

No. 10-16-00376-CR

JESSE GALINDO DELAFUENTE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2016-419-C1

MEMORANDUM OPINION

In this appeal, Jesse Galindo Delafuente, challenges his conviction for evading arrest or detention with a vehicle. *See* TEX. PENAL CODE ANN. § 38.04 (West 2016). The record reflects that the trial court entered its original judgment of conviction on October 31, 2016, which indicated that appellant received a ten-year prison sentence. On November 8, 2016, appellant filed his notice of appeal, challenging the October 31, 2016 judgment.

However, on January 5, 2017, appellant filed a "Motion for Imposition of Sentence of Shock Probation." The trial court granted appellant's request for shock probation and entered a new judgment on February 20, 2017, reflecting as such. The new judgment suspended appellant's original ten-year prison sentence and placed him on "regular probation" for ten years. Thereafter, on May 2, 2017, Appellant filed a new notice of appeal, complaining about the trial court's February 20, 2017 judgment.

As shown above, the trial court entered two judgments in this case with the February 20, 2017 judgment rendering the October 31, 2016 judgment moot. *See Smith v. State*, 518 S.W.3d 641, 644 (Tex. App.—Waco 2017, pet. granted) ("In this proceeding, Smith took the cautious route and filed a notice of appeal on the May 29, 2015 judgment. And when his motion for shock probation was granted and a new judgment was rendered on October 14, 2015, the appeal of the May 29, 2015 judgment was rendered moot."); *see also Parker v. State*, No. 01-15-00334-CR, 2015 Tex. App. LEXIS 9586, at *4 (Tex. App.—Houston [1st Dist.] Sept. 10, 2015, no pet.) (mem. op., not designated for publication) ("Thus, although this Court initially had jurisdiction over the appeal from the March 20, 2015 judgment imposing state jail confinement, that judgment was rendered moot by the July 29, 2015 judgment granting shock probation, over which we lack jurisdiction." (internal citations omitted)). Accordingly, it is of no consequence that appellant timely filed a notice of appeal with respect to the trial court's original October 31, 2016 judgment because that judgment was rendered moot when the trial court entered

its February 20, 2017 judgment. *See Smith*, 518 S.W.3d at 644; *see also Parker*, 2015 Tex. App. LEXIS 9586, at *4. Instead, we look to the trial court's February 20, 2017 judgment and the corresponding notice of appeal in analyzing this case. *See Smith*, 518 S.W.3d at 644; *see also Parker*, 2015 Tex. App. LEXIS 9586, at *4.

Pursuant to Texas Rule of Appellate Procedure 26.2(a)(1), appellant's notice of appeal was due within thirty days of February 20, 2017. *See* TEX. R. APP. P. 26.2(a)(1) ("The notice of appeal must be filed . . . within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order."). Appellant did not file his notice of appeal in this case until May 2, 2017, more than a month after it was due under Rule 26.2(a)(1). *See id.*; *see also Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016) (noting that a defendant's notice of appeal is timely if filed within thirty days after the date the sentence is imposed or suspended in open court).

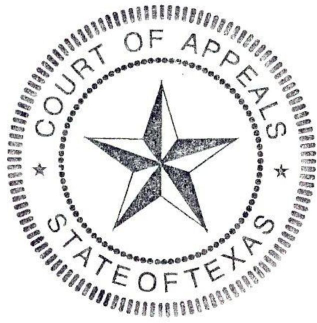
"Timely filing of a written notice of appeal is a jurisdictional prerequisite to hearing an appeal. If a notice of appeal is not timely filed, the court of appeals has no option but to dismiss the appeal for lack of jurisdiction." *Castillo v. State*, 369 S.W.3d 196, 198 (Tex. Crim. App. 2012) (internal footnotes omitted); *see Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) (noting that a timely notice of appeal is necessary to invoke a court of appeals' jurisdiction).

Because appellant filed his notice of appeal more than a month after the time it was due, we have no choice but to dismiss this appeal for want of jurisdiction. *See* TEX. R. APP. P. 26.2(a)(1); *see also Castillo*, 369 S.W.3d at 198; *Olivo*, 918 S.W.2d at 522; *Smith*, 518 S.W.3d at 644 ("Smith's appeal of the May 29, 2015 judgment is dismissed because that judgment was rendered moot by the October 14, 2015 judgment."). Accordingly, we hereby dismiss this appeal.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Dismissed
Opinion delivered and filed June 27, 2018
Do not publish
[CR25]

*(Chief Justice Gray concurs in the Court's opinion and judgment. He presents this concurring note to point out that, although the Court of Criminal Appeals in *Shortt v. State*, 539 S.W.3d 321 (Tex. Crim. App. 2018) referred to a shock probation "order," what is present in this case, as was also present in *Smith v. State*, 518 S.W.3d 641 (Tex. App.—Waco 2017, pet. granted), is two complete and different judgments of conviction signed by the trial court. This is not an attempted appeal of an order that merely grants a motion for shock probation. It is an attempted appeal of the complete, separate, and free-standing judgment of conviction and placement of defendant on community supervision-probation, which sets out the terms and conditions of that probation. With these comments and observation, he concurs in the Court's opinion. A separate opinion will not issue.)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