To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Re: Appointed Counsel's Failure to Timely File Petition for Review in Parental-Termination Cases

Date: June 8, 2017

The Texas Supreme Court has referred the following matter to our subcommittee:

> Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel. The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

Brief summary of cases cited in the referral letter:

> *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The right to appointed counsel in parental termination cases under Tex. Fam. Code. § 107.013(a) extends to proceedings in the Texas Supreme Court, including the filing of a petition for review. The Court further recognized that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in Anders v. California, 386 U.S. 738 (1967). The Court abates the case and directs the trial court to appoint counsel within 30 days. An appellate court may refer matters to the trial court for evidence and a hearing.
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> *Bowles v. Russell*, 551 U.S. 205 (2007). The filing of a notice of appeal within the time period provided by statute is mandatory and jurisdictional, a late filing deprives the appellate court of jurisdiction, and the court may not extend the time on equitable grounds. The Court distinguishes between time limits set forth in statutes, which limit a court's jurisdiction, and those set out in a court rule, which do not.

Glidden Co. v. Aetna Cas. & Sur. Co., 291 S.W.2d 315 (Tex. 1956). Filing of an appeal bond after the time designated by court rules, even though clerk had closed office early and counsel exercised diligence in attempting to file timely, is fatal to jurisdiction. "It is well settled … that the requirement that the bond be filed within thirty days is mandatory and jurisdictional." The opinion cites to *Long v. Martin*, 247 S.W. 827 (Tex, 1923), where Court held that the late filing of a petition for writ of error was fatal to jurisdiction despite counsel's due diligence.

Ex parte Wilson, 956 S.W.2d 25 (Tex. Crim. App. 1997)(per curiam)(en banc). There is no right to counsel on discretionary review, and appellate counsel has no duty to inform a defendant of details pertinent to further review. But, if appellate counsel's action or inaction denies a defendant the opportunity to prepare and file a petition for discretionary review, that constitutes a denial of the Sixth Amendment right to effective assistance of counsel. Here, the defendant filed a post-conviction habeas. After a hearing, the trial court found to be true counsel's affidavit stating that he mailed to the defendant a copy of the opinion and a conclusion that further appeal would have no merit. This was held sufficient to protect the defendant's right to file for discretionary review.

Olivo v. State, 918 S.W.2d 519 (Tex. Crim. App. 1996). The late filing of a notice of appeal, without a motion for extension of time within the time provided by rule, deprived the court of appeals of jurisdiction. The rules of appellate procedure do not establish jurisdiction, they define the procedures to invoke the court's jurisdiction. Nonetheless, when the notice of appeal is late, the appellate court lacks jurisdiction because it has never been invoked. The court may not use Tex. R. App. P. 2(c) or 83 to create jurisdiction where none exists. The claimed deprivation of a constitutional right to effective assistance of counsel cannot confer jurisdiction where none exists.

Other relevant authorities:

TEX. CONST. art. V, § 3. JURISDICTION OF SUPREME COURT; WRITS; CLERK.
(a) The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be co-extensive with the limits of the State and its determinations shall be final except in criminal law matters. Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.
(b) The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

TEX. GOV'T CODE 22.001(a) (amended 2017). (a) The supreme court has appellate jurisdiction, except in criminal law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.

Numerous orders/cases. For much of its existence, the Texas Supreme Court has dismissed cases for want of jurisdiction when the application for writ of error or petition for review was not timely filed.

In re USAA, 307 S.W.3d 299 (Tex. 2010). Court holds that the two-year period for filing suit in the TCHRA is not jurisdictional, only mandatory, overruling prior precedent. Citing *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court recognized that it had sometimes used the word jurisdiction inexactly and, in more recent cases, the Court has been "'reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect.'" Nonetheless, the Court stated that: "And some requirements, such as a timely notice of appeal, remain jurisdictional." In support of this last statement, the Court cites *Bowles*, discussed above, which involved a statutory deadline, but also cited *In the Interest of K.A.F.*, 160 S.W.3d 923 (Tex.2005), where the Court affirmed the court of appeals' dismissal of an interlocutory appeal for want of jurisdiction when it was not filed within the 20-day deadline in the TRAPs.

In re M.S., 115 S.W.3d 534 (Tex. 2003). The Court held that the statutory right to appointed counsel embodied the right to effective assistance of counsel.

Issues for discussion:

<u>Is the deadline for filing a petition for review jurisdictional?</u> Nothing in the Texas Constitution or jurisdictional statutes specifies the time for filing a petition for review. The deadline is set only be procedural rule, Tex. R. App. P. 53.7. The United States Supreme Court held in *Bowles* that a rule deadline, unlike a statutory deadline, is not jurisdictional. The Court of Criminal Appeals has also held that a procedural rule deadline is not jurisdictional, but de facto gave it jurisdictional effect by holding that the failure to timely invoke the jurisdiction of the appellate court deprives it of jurisdiction. The Texas Supreme Court has long held that the time for filing a petition for review or application for writ of error is jurisdictional. There is a good argument that the time limit is not jurisdictional, but as discussed below, whether or not the time limit is jurisdictional, the Court has the power to amend its rules to change the time limit.

<u>What policies are implicated?</u> Finality versus fairness. If the deadline is non-jurisdictional, a petition may be filed days, months, or years after the deadline has passed, after the court of appeals' mandate has issued, after supersedeas bonds have been released, and judgments satisfied. Court of appeals' judgments would be of questionable finality, injecting uncertainty. On the other hand, the late filing of a petition for review in cases involving parental termination can deprive a parent of a child through no fault of the parent but because of ineffective assistance of counsel. This, too, though, is tempered by finality

questions, as a child's placement will be affected if a parent can challenge a decision at any time without limit.

Does it matter in deciding whether the Court can create a mechanism for late filings in situations involving ineffective assistance of counsel? If the deadline for filing a petition for review is jurisdictional, it is a jurisdictional limitation made by the Court itself through procedural rule. A rule made by the Court can be amended by the Court. Because the constitution and statutes do not impose a deadline, the Court has the ability to provide for a different deadline and procedure in parental-termination cases.

What procedures would most efficiently determine whether a petitioner should be able to make a late filing based on ineffective assistance of counsel? The subcommittee recommends that the Court adopt a special rule allowing a parent to seek leave to file a late petition for review based on ineffective assistance of counsel. Blake Hawthorne, working with the subcommittee, indicated that TRAP 4.5 provides for an analogous procedure when a party receives late notice of a court of appeals' judgment and misses the deadline for filing a petition for review. The Court has experience with this procedure and it seems to be working well. The subcommittee thus proposes new TRAP 4.6 which parallels the procedures of TRAP 4.5 in the circumstance where a petition for review is filed late in a parental-termination suit because of ineffective assistance of counsel.

How broad or narrow should the proposed rule be? The referral letter is limited to indigent parents in parental-termination cases who are entitled to appointed counsel by statute. The right to effective counsel as found by the court in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003), is derived from the statutory right to appointed counsel for indigent parents in government-initiated proceedings. The right of indigent parents to counsel for petitions for review announced in *In the Interest of P.M.* is also purely statutory. The subcommittee accordingly limited proposed TRAP 4.6 to situations where an indigent parent has a statutory right to appointed counsel in parental-termination suits. The statute does not extend that right in private termination suits nor does it extend to a non-indigent parent. The subcommittee also notes that Tex. Fam. Code § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

In our discussions, some committee members were concerned about writing a rule granting special treatment for one limited class of petitioners. Other potential petitioners may have similar claims to an extended time to file a petition for review based on statutory or constitutional rights, ineffective counsel, or other purely equitable grounds. The Court may want to consider whether Tex. Fam. Code § 107.013 supports a stand-alone rule for a particular class of petitioners or whether TRAP 4.6 would be a prelude to recognizing later that other situations present a similarly compelling reason to alter the filing time.

What should be the time limit? The subcommittee agreed there should be an ultimate time limit on that process. TRAP 4.5 currently provides for a maximum of 90 days for a party

to ask for permission to make a late filing when there is late notice of the court of appeals' judgment. The subcommittee adopted the same time limit for new TRAP 4.6. Ninety days more than doubles the time for the indigent parent to invoke the court's jurisdiction. Some indigent parents have communication issues with counsel and the courts because they are incarcerated or for other reasons. The rule provides extra time but also places a cut off to balance the concerns that delay and uncertainty will adversely impact placement of the child.

What should the standard be? The subcommittee determined that ineffective assistance of counsel was too broad a standard and, because it is fact-based, could require the Supreme Court to refer the matter to the trial court for evidentiary hearing, further slowing the process. The proposed rule provides a more objective test: whether appointed counsel failed to timely file a petition for review. The indigent parent would also have to state that the parent either requested that a petition be filed or that counsel failed to inform the parent of the right to file. This would eliminate situations where the parent affirmatively told counsel not to proceed.

What is the effect of filing an *Anders* brief? The Court recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief, even one not technically styled as a petition for review, as the filing of a petition for review. That is the clerk's office current procedure as well. The subcommittee was reluctant to cite case law in the proposed rule so opted to include the discussion in a comment.

4.6. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) Additional Time to File Petition for Review. An indigent parent with a statutory[1] right to appointed counsel in a parental-termination suit[2] may move for additional time to file a petition for review if the parent's appointed counsel failed to file the petition timely.

(b) Contents of Motion. The motion for additional time must state that appointed counsel failed to timely file a petition for review and that either (1) the indigent parent instructed the appointed counsel to file a petition for review or (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review.

(c) Where and When to File. A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days[3] after the following: (1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.[4]

(d) Order of the Court. The court must grant the motion if the motion for additional time was timely filed, appointed counsel for the indigent parent did not timely file a petition for review, and either (1) the indigent parent instructed the appointed counsel to file a petition for review or (2) the appointed

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[1] Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

[2] TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

[3] This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

[4] The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

counsel failed to inform the indigent parent of the right to file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

2016 WL 1274748

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Texas.

In the Interest of P.M., a Child

NO. 15–0171
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Opinion delivered: April 1, 2016

Synopsis

Background: The Department of Family and Protective Services sued to terminate mother's parental rights. The 362nd District Court, Denton County, Robert Bruce McFarling, J., terminated parental rights. Mother appealed. The Court of Appeals, 2013 WL 5967037, reversed and remanded. On remand the District Court terminated parental rights. Mother appealed. The Court of Appeals, 2014 WL 8097064, affirmed. Counsel for mother sought to withdraw.

[Holding:] The Supreme Court held that as a matter of first impression, indigent mother's right to counsel included the right to counsel to bring a petition for review in the Supreme Court.

Ordered accordingly.

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Attorneys and Law Firms

Andrew Monty Lloyd, Lloyd & DuPuy, PLLC, Denton TX, for Other interested party.

Elizabeth Ann Bell Nielsen, Nielsen Family Law, Denton TX, for Petitioner.

Lillian Adams, Denton TX, pro se.

Matthew Jeffrey Whitten, Denton County District, Denton TX, for Respondent.

Opinion

PER CURIAM

***1** Section 107.013(a) of the Texas Family Code [1] provides that "[i]n a suit filed by a governmental entity ... in which termination of the parent-child relationship ... is requested, the court shall appoint an attorney ad litem to represent the interests of ... an indigent parent...." The issue before us is whether this right to appointed counsel extends to proceedings in this Court, including the filing of a petition for review. We hold that it does and direct the trial court to appoint counsel for petitioner (hereinafter, "mother").

1 All statutory references are to the Texas Family Code unless otherwise noted.

The proceedings in this case have been extensive. There have been two trials and two appeals, the clerk's record is over 1,100 pages, and the reporter's record is thirty-six volumes. To fully explain the circumstances and issues involved in the case, we attach the court of appeals' memorandum opinions. For present purposes, we briefly describe the procedural background of the case and then focus on the involvement and withdrawal of counsel.

The case began in 2011, when the Department of Family and Protective Services sued to terminate mother's relationship with her then five-year-old daughter because of mother's alleged use of methamphetamine and abuse by the child's father. After a bench trial, the court ordered termination, finding that mother had endangered her daughter and that termination was in the child's best interest. [2] The court of appeals concluded that mother had been improperly denied a jury and reversed and remanded for a new trial. [3] In the second trial, the jury found, as the court had before, that mother had endangered her daughter and that termination of the parental relationship was in the child's best interest. On a second appeal, the court of appeals affirmed. [4]

2 *See* TEX. FAM. CODE § 161.001(1)(D), (E), (2).

3 *In re P.L.G.M.,* No. 02–13–00181–CV, 2013 WL 5967037, at *5 (Tex.App.—Fort Worth Nov. 7, 2013, no pet.) (mem.op.) [Appendix A].

4 *In re P.M.,* No. 02–14–00205–CV, 2014 WL 8097064, at *34 (Tex.App.—Fort Worth Dec. 31, 2014) (mem. op.) [Appendix B].

Attorneys appointed by the trial court represented mother through both trials and appeals, before the attorney in the second appeal moved to withdraw. The court of appeals abated the case and referred the motion to the trial court for a hearing to determine whether there was good cause for withdrawal and whether new counsel should be appointed. Mother and the lawyer both told the trial court that they did not want their relationship to continue. Without giving a reason, the trial court recommended that the lawyer be allowed to withdraw. The trial court's only findings were that mother remained indigent and still wished to pursue her appeal. Based on the trial court's recommendation and the record of the hearing, the court of appeals granted the motion to withdraw with an opinion explaining that the lawyer "expressed displeasure with her continued representation" of mother. Neither the trial court nor the court of appeals appears to have considered whether new counsel should be appointed. Mother moved the court of appeals for appointment of counsel, but the court of appeals simply transferred that motion to this Court.

***2** In this Court, mother's counsel moved for an extension of time to file a petition for review but reasserted her motion to withdraw, stating that she was "unable to effectively communicate with [mother] to such a degree that further representation ... is not possible," and adding that mother had "expressed on the record her desire" that the representation not continue. Mother reasserted her motion for appointment of new counsel. We abated the case to consider the issue of mother's right to counsel.

[1] Section 107.013(a)(1) states:

> In a suit filed by a governmental entity ... in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of ... an indigent parent of the child who responds in opposition to the termination or appointment....

Section 107.013(e) adds that "[a] parent who the court has determined is indigent for purposes of this section is presumed to remain indigent for the duration of the suit and any subsequent appeal" absent changed circumstances. Section 107.016(2) provides that appointed counsel

> continues to serve in that capacity until the earliest of:
>
> (A) the date the suit affecting the parent-child relationship is dismissed;

(B) the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or

(C) the date the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record.

Together, these provisions establish the right of an indigent parent to appointed counsel in the trial court and court of appeals.

We have not addressed whether a right to counsel on appeal includes a right to counsel to bring a petition for review in this Court. But we have indicated generally, in other contexts, that exhaustion of appeals includes review sought in this Court. [5] A few statutes appear to take the same view. [6] We see no reason to depart from that view here. To the contrary, the right to counsel is as important in petitioning this Court for review, and in our considering the issues, as in appealing to the court of appeals.

5 *E.g., Tex. Beef Cattle Co. v. Green,* 921 S.W.2d 203, 208 (Tex.1996) (holding that "an underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals *process* for that underlying suit has been exhausted" (emphasis added), and citing RESTATEMENT (SECOND) OF TORTS § 674 cmt. j (1977) ("If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.")); *Apex Towing Co. v. Tolin,* 41 S.W.3d 118, 119 (Tex.2001) ("When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded."); *Underkofler v. Vanasek,* 53 S.W.3d 343, 345–46 (Tex.2001) (citing *Apex Towing,* 41 S.W.3d at 121); *In re Long,* 984 S.W.2d 623, 626 (Tex.1999) (per curiam) (an injunction superseded by the district clerk automatically, by filing a notice of appeal, was not enforceable by contempt until all appeals related to the judgment were exhausted, including the denial of an application for writ of error brought by the party seeking contempt sanctions).

6 *E.g.,* TEX. BUS. ORG. CODE § 8.102(c) ("A governing person, former governing person, or delegate is considered to have been found liable in relation to a claim, issue, or matter only if the liability is established by an order, including a judgment or decree of a court, and all appeals of the order are exhausted or foreclosed by law."); TEX. FAM. CODE § 51.095(c) ("An electronic recording of a child's statement ... shall be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution."); *see also* TEX. CIV. PRAC. & REM. CODE § 34.074(c) ("[A prevailing party's action against a surety] must be brought on or before 180 days after the date all appeals are exhausted in the underlying action."); TEX. EDUC. CODE § 51.909(b) ("In this section, a person is finally convicted if the conviction has not been reversed on appeal and all appeals, if any, have been exhausted."). *But see* TEX. CODE CRIM. PROC. art. 1.051(d)(2) ("An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and postconviction habeas corpus matters: ... (2) an appeal to the Court of Criminal Appeals if the appeal is made directly from the trial court or if a petition for discretionary review has been granted....").

***3 [2] [3] [4] [5] [6]** Accordingly, we hold that the right to counsel under Section 107.013(a)(1) through the exhaustion of appeals under Section 107.016(2)(B) includes all proceedings in this Court, including the filing of a petition for review. Once appointed by the trial court, counsel should be permitted to withdraw only for good cause [7] and on appropriate terms and conditions. [8] Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California,* [9] and its progeny. [10] In light of our holding, however, an *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. [11] Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. [12] If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review. [13] In this Court, appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief. [14]

7 *See* TEX. R. CIV. P. 10.

8 TEX. R. APP. P. 6.5.

9 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

10 *In re D.A.S.,* 973 S.W.2d 296, 297, 299 (Tex.1998); *see also Kelly v. State,* 436 S.W.3d 313, 318–20 (Tex.Crim.App.2014) (setting forth duties of counsel); *In re Schulman,* 252 S.W.3d 403, 406 n. 9 (Tex. Crim. App. 2008); *Stafford v. State,* 813 S.W.2d 503, 510 n. 3 (Tex. Crim. App. 1991). In *D.A.S.,* the Court concluded that *Anders* procedures protect juveniles' statutory right to counsel on appeal in delinquency cases and so held that those procedures apply in juvenile cases. "*Anders* strikes an important balance between the criminal defendant's constitutional right to counsel on appeal and counsel's obligation not to prosecute frivolous appeals." *In re D.A.S.,* 973 S.W.2d at 297. The same is true for indigent parents in parental rights termination cases.

11 In criminal appeals in Texas, there are two possible outcomes when an *Anders* brief is filed, both of which involve eventually granting the original appointed counsel's motion to withdraw. "Either the appellate court confirms that there are no non-frivolous grounds for appeal, thus extinguishing the appellant's constitutional right to appellate counsel, and grants the motion to withdraw, or the appellate court finds that there are plausible grounds for appeal, in which case the appellate court still grants the motion to withdraw, but remands the cause to the trial court for appointment of new appellate counsel." *Kelly,* 436 S.W.3d at 318 n. 16 (citing *Meza v. State,* 206 S.W.3d 684, 689 (Tex. Crim. App. 2006)).

12 *See Villegas v. Carter,* 711 S.W.2d 624, 626 (Tex.1986) (trial court allowed an attorney to withdraw two days before trial and refused to allow a continuance).

13 A court may abate the appeal to refer the case to the trial court for appointment of new counsel, a procedure that parallels the procedure required in criminal cases when new counsel is necessary. *See Kelly,* 436 S.W.3d at 318 n.16; *Stafford,* 813 S.W.2d at 511 ("the Court of Appeals then must abate the appeal and remand the case to the trial court with orders to appoint other counsel" to present ground for appeal).

14 *Anders,* 386 U.S. at 744–45, 87 S.Ct. 1396; *see High v. State,* 573 S.W.2d 807, 812–13 (Tex. Crim. App. 1978). In criminal appeals, the reviewing court must conduct an independent evaluation of the record to determine whether counsel is correct in determining that the appeal is frivolous. *See Stafford,* 813 S.W.2d at 511. Petitions for review ordinarily come to this Court without the underlying record, but often with an appendix incorporating numerous exhibits from the record. *See* TEX. R. APP. P. 53.2(k). Counsel should provide record citations, and, in a proper case, may choose to ask that the record be forwarded from the court of appeals. *See* TEX. R. APP. P. 54.1 ("With or without granting the petition for review, the Supreme Court may request that the record from the court of appeals be filed with the clerk of the Supreme Court.").

***4** **[7]** While an appellate court may be equipped to rule on a motion to withdraw in many instances, it may decide instead, as the court of appeals did in this case with a motion unrelated to any *Anders* claim, to refer the motion to the trial court for evidence and a hearing. An appellate court must ordinarily refer the matter of appointment of replacement counsel to the trial court. [15]

15 In criminal cases, when new counsel is required, courts of appeals would abate the appeal and direct the trial court to appoint new counsel. *See Meza,* 206 S.W.3d at 688 (discussing the appropriateness of an abatement in a case involving both a motion to withdraw and a motion to substitute new counsel, "especially given [the Code of Criminal Procedure's] elaborate mechanism for making court appointments for indigent criminal defendants").

Here, the record indicates that counsel's motion to withdraw, and mother's motion for new counsel, were not based on mere dissatisfaction with each other. We conclude that the trial court in making its recommendation, and the court of appeals in accepting that recommendation, did not abuse their discretion by allowing counsel to withdraw. Accordingly, we grant counsel's motion to withdraw and mother's motion for appointment of counsel. We direct the trial court to appoint counsel to represent mother in this Court and to report the appointment to the Court within thirty days. The case remains abated until further order.

All Citations

--- S.W.3d ----, 2016 WL 1274748, 59 Tex. Sup. Ct. J. 582

End of Document

Vernon's Texas Statutes and Codes Annotated
Family Code (Refs & Annos)
Title 5. The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship (Refs & Annos)
Subtitle A. General Provisions
Chapter 107. Special Appointments, Child Custody Evaluations, and Adoption Evaluations (Refs & Annos)
Subchapter B. Appointments in Certain Suits (Refs & Annos)
Part 1. Appointments in Suits by Governmental Entity

V.T.C.A., Family Code § 107.013

§ 107.013. Mandatory Appointment of Attorney ad Litem for Parent

Effective: September 1, 2015
Currentness

(a) In a suit filed by a governmental entity under Subtitle E [1] in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of:

(1) an indigent parent of the child who responds in opposition to the termination or appointment;

(2) a parent served by citation by publication;

(3) an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; and

(4) an alleged father who registered with the paternity registry under Chapter 160, but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful.

(a-1) In a suit described by Subsection (a), if a parent is not represented by an attorney at the parent's first appearance in court, the court shall inform the parent of:

(1) the right to be represented by an attorney; and

(2) if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court.

(b) If both parents of the child are entitled to the appointment of an attorney ad litem under this section and the court finds that the interests of the parents are not in conflict and that there is no history or pattern of past or present family

violence by one parent directed against the other parent, a spouse, or a child of the parties, the court may appoint an attorney ad litem to represent the interests of both parents.

(c) Repealed by Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), § 11.

(d) The court shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence in accordance with Rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence under this section. The court may consider additional evidence at that hearing, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent.

(e) A parent who the court has determined is indigent for purposes of this section is presumed to remain indigent for the duration of the suit and any subsequent appeal unless the court, after reconsideration on the motion of the parent, the attorney ad litem for the parent, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances.

Credits

Added by Acts 1995, 74th Leg., ch. 751, § 15, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 561, § 3, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 821, § 2.11, eff. June 14, 2001; Acts 2003, 78th Leg., ch. 262, § 1, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 268, § 1.06, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 526, § 1, eff. June 16, 2007; Acts 2011, 82nd Leg., ch. 75 (H.B. 906), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), §§ 2, 11, eff. Sept. 1, 2013; Acts 2015, 84th Leg., ch. 128 (S.B. 1931), § 1, eff. Sept. 1, 2015.

Footnotes

1 V.T.C.A., Family Code § 261.001 et seq.

V. T. C. A., Family Code § 107.013, TX FAMILY § 107.013

Current through Chapters effective immediately through Chapter 34 of the 2017 Regular Session of the 85th Legislature

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127 S.Ct. 2360
Supreme Court of the United States

Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.

No. 06–5306.
|
Argued March 26, 2007.
|
Decided June 14, 2007.

Synopsis
Background: State prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to reopen appeal period. The United States District Court for the Northern District of Ohio, Donald C. Nugent, J., granted motion, and prisoner appealed. After initially issuing show-cause order questioning timeliness of appeal, the Court of Appeals granted in part and denied in part a certificate of appealability (COA). The United States Court of Appeals for the Sixth Circuit, 432 F.3d 668, dismissed. Petition for certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] Court of Appeals lacked jurisdiction over appeal, and

[2] Court would no longer recognize the unique circumstances exception to excuse an untimely filing of a notice of appeal, overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

Affirmed.

Justice Souter, filed dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer joined.

****2361 *205** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14–day extension under certain conditions, see 28 U.S.C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14–day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal—though filed in reliance upon the District Court's order—deprived the Sixth Circuit of jurisdiction. Pp. 2362 – 2367.

(a) The taking of an appeal in a civil case within the time prescribed by statute is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 *(per curiam)*. There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, *e.g., Kontrick v. Ryan,* 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867, and those based on court rules, which do not, see, *e.g., id.,* at 454, 124 S.Ct. 906. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097, and *Scarborough v. Principi,* 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363. And when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Ibid.* The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 2363 – 2366.

(b) Bowles' reliance on the "unique circumstances" doctrine, rooted in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 ***206** *(per curiam)*, and applied in *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 *(per curiam),* is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 2366 – 2367.

432 F.3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting ****2362** opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 2367.

Attorneys and Law Firms

Paul Mancino, Jr., Cleveland, Ohio, for Petitioner.

William P. Marshall, Chapel Hill, NC, for Respondent.

Malcolm L. Stewart, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.

William P. Marshall, Chapel Hill, NC, Marc Dann, Attorney General of Ohio, Elise W. Porter, Acting Solicitor General, Stephen P. Carney, Robert J. Krummen, Elizabeth T. Scavo, Columbus, OH, for Respondent Harry Russell, Warden.

Paul Mancino, Jr., Paul Mancino, III, Brett Mancino, Cleveland, Ohio, for Petitioner.

Opinion

Justice THOMAS delivered the opinion of the Court.

In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice—even ***207** though filed in reliance upon a District Court's order—deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15-years-to-life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days—until February 27—to file his notice of appeal. Bowles filed his notice on February 26—within the 17 days allowed by the District Court's order, but after the 14–day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F.3d 668, 673 (C.A.6 2005) (citing *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). The court also noted that Courts of Appeals ***208** have uniformly held that Rule 4(a)(6)'s 180–day period for ****2363** filing a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F.3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180–day period in that same Rule," *id.,* at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U.S. 1092, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006), and now affirm.

II

[1] According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30–day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

> "(6) **Reopening the Time to File an Appeal.**
>
> "The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered,* but only if all the following conditions are satisfied:
>
> "(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> "(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

***209** "(C) the court finds that no party would be prejudiced." (Emphasis added.) [1]

1 The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14–day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) *(per curiam)* (internal quotation marks omitted); [2] accord, *Hohn v. United* ****2364** *States,* 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres* ***210** *v. Oakland Scavenger Co.,* 487 U.S. 312, 314–315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder,* 434 U.S., at 264, 98 S.Ct. 556. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough v. Pargoud,* 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed. 824 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction"); *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction"). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, *e.g., Atkins v. Medical Dept. of Augusta Cty. Jail,* No. 06–7792, 2007 WL 1048810 (C.A.4, Apr.4, 2007) *(per curiam)* (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 6 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals"). In fact, the author of today's dissent recently reiterated that "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, *e.g.,* ... § 2107 (providing that notice of appeal in civil cases must be filed 'within thirty days after the entry of such judgment')." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (majority opinion of SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., *inter alios*).

2 *Griggs* and several other of this Court's decisions ultimately rely on *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson's* use of the term "jurisdictional." *Post,* at 2367 (opinion of SOUTER, J.). Even in our cases criticizing *Robinson,* however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra,* at 2364 – 2365, and have even pointed to § 2107 as a statute deserving of jurisdictional treatment, *infra,* at 2364 – 2365. Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.

Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we held that failure to comply with the time ***211** requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that "[n]o statute ... specifies a time limit for

filing a complaint objecting to the debtor's discharge." 540 U.S., at 448, 124 S.Ct. 906. Rather, the filing deadlines in the Bankruptcy Rules are " 'procedural rules adopted by the Court for the orderly transaction of its business' " that are " 'not jurisdictional.' " *Id.,* at 454, 124 S.Ct. 906 (quoting *Schacht v. United States,* 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970)). Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," 540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const., Art. III, § 1), it was improper for courts to use "the term 'jurisdictional' to describe emphatic time prescriptions in rules of court," 540 U.S., at 454, 124 S.Ct. 906. See also *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam).* As a point of contrast, ****2365** we noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906. [3] Nor do *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), or *Scarborough v. Principi,* 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), aid petitioner. In *Arbaugh,* the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505, 126 S.Ct. 1235. *Scarborough,* which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief ... ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413, 124 S.Ct. 1856.

3 At least one Federal Court of Appeals has noted that *Kontrick* and *Eberhart* "called ... into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States v. Sadler,* 480 F.3d 932, 935 (C.A.9 2007). That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id.*, at 936.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-promulgated ***212** rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90–day period applies to both civil and criminal cases. But the 90–day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, *e.g., Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion ... ." *Schacht, supra,* at 64, 90 S.Ct. 1555. [4]

4 The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post,* at 2369, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case ... has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

[2] Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear ***213** cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry,* 6 How., at 113, 12 L.Ed. 363. Put another way, the notion of " 'subject-matter' " jurisdiction obviously extends to " 'classes of cases ... falling within a court's adjudicatory authority,' " ****2366** *Eberhart, supra,* at 16, 126 S.Ct. 403 (quoting *Kontrick, supra,* at 455, 124 S.Ct. 906), but it is no less "jurisdictional" when Congress prohibits federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

[3] **[4]** The resolution of this case follows naturally from this reasoning. Like the initial 30–day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Curry, supra,* at 113. Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh, supra,* at 513–514, 126 S.Ct. 1235.

B

[5] Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) *(per curiam)*. There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and ***214** granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to grant the extension. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 303 F.2d 609, 611–612 (C.A.7 1962). This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.' " 371 U.S., at 217, 83 S.Ct. 283.

[6] **[7]** Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) *(per curiam),* several courts have rightly questioned its continuing validity. See, *e.g., Panhorst v. United States,* 241 F.3d 367, 371 (C.A.4 2001) (doubting "the continued viability of the unique circumstances doctrine"). See also *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting) ("Our later cases ... effectively repudiate the *Harris Truck Lines* approach ..."); *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 170, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (referring to "the so-called 'unique circumstances' exception" to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40–year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

****2367** C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking ***215** would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception petitioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.
The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

" 'Jurisdiction,' " we have warned several times in the last decade, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (same); *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 467, 127 S.Ct. 1397, 1405, 167 L.Ed.2d 190 (2007) (same). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick, supra,* at 454, 124 S.Ct. 906, sometimes even "profligate ... use of the term," *Arbaugh, supra,* at 510, 126 S.Ct. 1235.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous ***216** jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label, *Arbaugh, supra,* at 510, 126 S.Ct. 1235 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart v. United States,* 546 U.S. 12, 17–18, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam)* (same); *Kontrick, supra,* at 454, 124 S.Ct. 906 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson's* indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson's* error. See *ante,* at 2363 – 2364. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not. [1]

1 The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30–day rule of 28 U.S.C. § 2107(a) as a jurisdictional time limit. See *ante,* at 2364 (quoting *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh, Eberhart,* and *Kontrick*. My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

****2368** The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the ***217** courts of appeals mandatory, see *Arbaugh, supra,* at 514, 126 S.Ct. 1235. [2] As the Court recognizes, *ante,* at 2364 – 2365, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick, supra,* at 452, 124 S.Ct. 906 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional

treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh,* 546 U.S., at 516, 126 S.Ct. 1235. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional," ' " *id.,* at 510, 126 S.Ct. 1235 (quoting *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here. [3]

2 The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may ... extend the time for appeal upon a showing of excusable neglect or good cause." By the Court's logic, if a district court grants such an extension, the extension's propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

3 The majority answers that a footnote of our unanimous opinion in *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante,* at 2364 – 2365 ("[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906"). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30–(or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam),* decided after *Kontrick*. *Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson,* 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. Compare *ante,* at 2363 – 2364 (citing *Browder, Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) *(per curiam),* and *Hohn v. United States,* 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), with *Eberhart, supra,* at 17–18, 126 S.Ct. 403 (citing those cases as examples of the confusion caused by *Robinson's* imprecise language). *Eberhart* was followed four months later by *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which summarized the body of recent decisions in which the Court "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional," *id.,* at 510, 126 S.Ct. 1235 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14–day period of § 2107(c) as a limit on jurisdiction.

****2369 *218** The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S., at 455, 124 S.Ct. 906. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject–matter jurisdiction unless Congress says otherwise. [4]

4 The Court points out that we have affixed a "jurisdiction" label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante,* at 2364 – 2366 (citing *Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994); this Court's Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court's observation that jurisdictional treatment has had severe consequences in that context, *ante,* at 2365, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v.* ***219** *McDonough,* 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). Statutes of limitations may thus be waived, *id.,*

at 207–208, 126 S.Ct. 1675, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh, Eberhart,* and *Kontrick,* an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) *(per curiam),* and *Thompson v. INS,* 375 U.S. 384, 387, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) *(per curiam),* we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved District Court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we ****2370** uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14–day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante,* at 2366, and inconsistency with a time-limit-as-jurisdictional rule. [5] But eliminating those precedents underscores what ***220** has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh* 's summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional." ' " *Arbaugh,* 546 U.S., at 510, 126 S.Ct. 1235 (quoting *Scarborough,* 541 U.S., at 414, 124 S.Ct. 1856). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante,* at 2363 – 2364, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante,* at 2364 – 2365. By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

5 With no apparent sense of irony, the Court finds that " '[o]ur later cases ... effectively repudiate the *Harris Truck Lines* approach.' " *Ante,* at 2366 (quoting *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs,* see *Houston,supra,* at 282, 108 S.Ct. 2379, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart*. See n. 3, *supra*.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases, [6] are jettisoned in a ruling for which the leading justification is *stare decisis,* see *ante,* at 2363 – 2364 ("This Court has long held ...").

6 Three, if we include *Wolfsohn v. Hankin,* 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964) *(per curiam)*.

II

We have the authority to recognize an equitable exception to the 14–day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge. [7] ***221** Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964 ed.), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.' " *Thompson, supra*, at 385, 84 S.Ct. 397. Thompson relied on that statement in filing a notice of appeal within 60

days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60–day time limit for filing a ****2371** notice of appeal, Rule 73(a) (1964 ed.), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." 375 U.S., at 387, 84 S.Ct. 397.

7 As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, Natural Law, in Collected Legal Papers 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a District Court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late, and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement? [8]

8 Nothing in *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), requires such a strange rule. In *Osterneck,* we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.,* at 179, 109 S.Ct. 987. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck's* language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

***222** Under *Thompson,* it would be no answer to say that Bowles's trust was unreasonable because the 14–day limit was clear and counsel should have checked the judge's arithmetic. The 10–day limit on post-trial motions was no less pellucid in *Thompson,* which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U.S.C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56–57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's ***223** lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from ****2372** the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the Federal Rules and then off to the courthouse to check the docket. [9] This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

9 At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But as Bowles's lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rules App. Proc. 6(b)(2)(B), 10(b), and 11, which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

All Citations

551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428, 68 Fed.R.Serv.3d 190, 07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352

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155 Tex. 591
Supreme Court of Texas.

The GLIDDEN COMPANY et al., Petitioners,
v.
The AETNA CASUALTY and SURETY COMPANY, Respondent.

No. A-5632.
|
June 6, 1956.

Action by materialmen against surety on bond furnished by contractor who contracted for construction of a housing project for a city housing authority. The District Court, Taylor County, J. R. Black, J., rendered judgment for materialmen and surety appealed and materialmen cross appealed. The Eastland Court of Civil Appeals, Eleventh Supreme Judicial District, 283 S.W.2d 440, reformed and remanded the District Court judgment and materialmen brought error. The Supreme Court, Walker, J., held that where surety's appeal bond was not filed within 30 days after entry of judgment by trial court, its appeal from an adverse judgment should have been dismissed on materialmens' motion even though a diligent effort to file it on the thirtieth day was made, but was unsuccessful because clerk's office closed earlier that day than usual.

Judgment reversed and cause remanded with instructions to dismiss appeal.

Attorneys and Law Firms

***592** ****316** Spafford, Spafford, Freedman, Hamlin, Gay & Russell, Dallas, for glidden co.

Gibson, Ochsner, Harlan, Kinney & Morris, Amarillo, for Crowe-Gulde Cement Co.

McMahon, Springer, Smart & Walter, Abilene R. T. Bailey and Wm. L. Richards, Dallas, for respondent.

Opinion

WALKER, Justice.

Petitioners, who supplied materials to the contractor for the construction of a housing project for the Housing Authority of the City of Borger, recovered judgment in the trial court against respondent, the surety on the contractor's performance and payment ****317** bond, for the value of all materials furnished by them. The Court of Civil Appeals concluded that the rights of ***593** the parties are governed by the provisions of Art. 5160, Tex.Rev.Civ.Stat.1925, as amended, Vernon's Ann.Civ.St. art. 5160, and reformed the judgment to allow petitioners to recover only for materials which were furnished within ninety days of the filing of their verified claims with the county clerk. 283 S.W.2d 440. Since respondent's appeal bond was not filed within the period of thirty days prescribed by Rule 356, Texas Rules of Civil Procedure, it is our opinion that the Court of Civil Appeals should have sustained petitioners' motion to dismiss the appeal.

The judgment of the trial court was rendered and entered on September 29th, and no motion for new trial was filed. Local counsel for respondent received the appeal bond by registered mail during the morning of October 29th, which was the last day for filing same. About four o'clock that afternoon, Dallas counsel telephoned to inquire whether the bond had been received and filed. Upon termination of that conversation, the local attorney telephoned the district clerk's office, but received no answer. He then drove to the courthouse, which was some fifteen blocks from his office, for the purpose of filing the bond. Although he reached the clerk's office before five o'clock, which was the usual closing time, the office was locked and neither the clerk nor any of the deputies could be found in the courthouse.

Counsel attempted to reach the clerk by telephone at the latter's residence some five times during the late afternoon and evening, but no one answered. He did not try to contact the district judge, who was recovering from an operation and was not in condition to transact business. Nor was any effort made to reach one of the several deputy clerks, because counsel did not know how to locate them.

Shortly after eight o'clock the following morning, counsel returned to the clerk's office and delivered the bond to a deputy clerk, who stamped the same with a file mark showing October 30th as the date of filing. Counsel explained that he had attempted to file the bond before the usual closing time the previous afternoon and had found the office locked. He was informed that the clerk had left town the day before and had instructed the deputies to close early if they desired, and that they had closed the office and gone home a few minutes after four o'clock. Counsel then suggested that under the circumstances the bond should be filed as of October 29th, and the file mark which had been stamped on the bond was thereupon changed in ink, under direction of the clerk, to show that date.

***594** Petitioners filed motions in the trial court to correct the record with respect to the date of filing of the appeal bond, and after a hearing an order was entered by that court finding that while the bond shows a filing date of October 29th, the same was in fact delivered to the clerk the following day. Petitioners then filed in the Court of Civil Appeals motions to dismiss the appeal, which were overruled without a written opinion. In response to requests for findings of fact with reference to the filing of the bond, the appellate court simply found that the facts set forth in an affidavit of the local attorney filed in that court are true. The essential facts stated in such affidavit are set out above.

[1] **[2]** Respondent argues that the Court of Civil Appeals determined that it had jurisdiction of the appeal, and that such ruling is final and cannot be questioned in this Court. Courts of Civil Appeals undoubtedly have the power, upon affidavit or otherwise, to ascertain such facts as may be necessary to the proper exercise of their jurisdiction. Art. 1822, Tex.Rev.Civ.Stat.1925. Whether an appeal bond was filed on or before thirty days after the date of rendition of judgment or order overruling the motion for new trial, is a question of fact properly determinable by such courts. Woodrum Truck Lines v. Bailey, Tex.Com.App., 57 S.W.2d 92. A finding by the Court of Civil Appeals in the present case, supported by some evidence, that the appeal bond was filed on or before October ****318** 29th, would not be subject to review in this Court.

[3] But no such finding has been made. As the case comes to us, the intermediate appellate court has found, in effect, that respondent attempted to file the bond on October 29th and would have done so if the clerk's office had remained open until the usual closing hour, and that the bond was actually delivered to the clerk the following day. We think it is also proper to supply by implication, in support of the court's action in overruling the motions to dismiss the appeal, a finding that respondent used reasonable diligence to file the bond on October 29th. Whether these facts are sufficient to confer jurisdiction upon the Courts of Civil Appeals is a question of law which may be determined by this Court.

[4] Rule 356 requires that the appeal bond be filed within thirty days after the date of rendition of judgment or order overruling the motion for new trial. A paper is deemed to have been filed when it is delivered into the custody of the proper official, to be kept by him among the papers in his office subject to such ***595** inspection by interested parties as may be permitted by law. Beal's Adm'r v. Alexander, 6 Tex. 531; Holman v. Chevaillier's Adm'r, 14 Tex. 337; Rowney v. Rauch, Tex.Civ.App., 258 S.W.2d 371 (writ ref.). Respondent cites Gonzalez v. Vaello, Tex.Civ.App., 91 S.W.2d 904 (writ dis.), where a petition forwarded by mail was held to have been filed on the day it was placed in the box in the clerk's office designated for the reception of his mail, although the clerk was not in his office that day and did not go to the office until two days later. That decision may well be sound, because the petition was subject to the custody and control of the clerk as soon as it was placed in his mail box. In the present case, however, the bond remained in the custody and subject to the control of counsel for respondent until it was delivered to the clerk on the morning of October 30th. If respondent had countermanded previous instructions at any time prior to such delivery, the bond would not have been filed. We are unable to find any rational basis for saying that the bond was filed before it was delivered to the clerk.

[5] **[6]** The use of diligence to file the bond within the prescribed period, and the reasons for failure to do so, would be material considerations if compliance with the rule could be waived or excused or if the time of filing might be extended. It is well settled, however, that the requirement that the bond be filed within thirty days is mandatory and jurisdictional, and that the time prescribed cannot be dispensed with or enlarged by the courts for any reason. Bruce v. San Antonio Music Co., Tex.Civ.App., 165 S.W.2d 243 (writ ref.); El Paso & N. E. R. Co. v. Whatley, 99 Tex. 128, 87 S.W. 819. Since no discretion is lodged in any court to excuse delay, even of one day in filing the bond, the reasons for the delay, even though sufficient to justify the exercise of discretion in aid of the appeal, are not material. See Labansat v. Cameron County, Tex.Civ.App., 143 S.W.2d 94 (no writ); Long v. Martin, 112 Tex. 365, 247 S.W. 827. The case last cited holds that delay in filing the petition for writ of error is fatal to the jurisdiction of this Court although counsel used the utmost diligence to file the petition in time.

[7] The application of these established principles to the facts of this case as determined by the Court of Civil Appeals compels the conclusion that the appeal bond was not filed in time, and that the Court of Civil Appeals did not acquire jurisdiction of the appeal.

The judgment of the Court of Civil Appeals is reversed and ***596** the cause is remanded to that court with instructions to dismiss the appeal.

All Citations

155 Tex. 591, 291 S.W.2d 315

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956 S.W.2d 25
Court of Criminal Appeals of Texas,
En Banc.

Ex parte David Wayne WILSON.

No. 72759.
|
Nov. 5, 1997.

On petition for habeas corpus relief from the Harris County District Court, Jan Krocker, J., the Court of Criminal Appeals held that: (1) appellate counsel is not required to advise defendant as to merits of discretionary review, and (2) appellate counsel's conduct adequately protected defendant's right to file petition for discretionary review.

Petition denied.

Baird, J., dissented with opinion in which Overstreet, J., joined.

Attorneys and Law Firms

***26** Sandra K. Foreman, Huntsville, (State Counsel for Offenders), for appellant.

Lynn P. Hardaway, Assistant District Attorney, Baldwin Chin, Assistant District Attorney, Houston, Matthew Paul, State's Attorney, Austin, for State.

Before the court en banc.

OPINION

PER CURIAM.

After a trial before the court, Applicant was convicted of aggravated assault. The court found one of the enhancement allegations to be true and assessed punishment at confinement for twenty years. The Court of Appeals affirmed the conviction. *Wilson v. State*, No. 01–92–01224–CR, 1993 WL 542176 (Tex.App.—Houston [1st], delivered December 30, 1993). In August, 1995, Applicant filed this application for a post-conviction writ of habeas corpus in accord with Article 11.07, V.A.C.C.P. Applicant claims that under *Ex parte Jarrett*, 891 S.W.2d 935 (Tex.Cr.App.1995), his appellate attorney deprived him of the opportunity to file a petition for discretionary review.

FACTS

Applicant alleges that his attorney did not inform him that the Court of Appeals had affirmed his conviction. He also claims counsel failed to advise him about the merits and possible advantages and disadvantages of pursuing discretionary review as required by *Jarrett.* In response, appellate counsel filed an affidavit that he had mailed a copy of the Court of Appeals' opinion to Applicant after the conviction was affirmed. Counsel stated he told Applicant he would not represent him any further because Applicant had filed a grievance against him and because counsel did not believe a petition for discretionary review would have any merit. Counsel asserted that he "did not have the type of correspondence or conversations contemplated by Ex parte Jarrett," but that *Jarrett* was decided almost ten months after Applicant's

conviction was affirmed. The trial court found the facts asserted in counsel's affidavit to be true. Counsel's affidavit raises the issue of retroactivity of *Jarrett.*

EX PARTE JARRETT

[1] **[2]** We begin our retroactivity analysis with *Jarrett.* In *Jarrett* this Court held that an appellate attorney has a duty to explain the meaning and effect of an appellate court decision, to express professional judgment about possible grounds for review, and to discuss advantages and disadvantages of further review. *Jarrett,* 891 S.W.2d at 940, 944. Despite attaching these duties to appellate counsel, this Court reaffirmed its decision in *Ayala v. State*, 633 S.W.2d 526 (Tex.Cr.App.1982), that a defendant has no constitutional right to counsel for pursuing discretionary review, even though a defendant has a right to prepare and file a petition for discretionary review. *Jarrett,* 891 S.W.2d at 939. Closer analysis of *Jarrett* shows the duties imposed on appellate counsel overstep the bounds of the right to counsel on direct appeal because no such right exists for pursuing discretionary review. However, the ultimate holding in *Jarrett* is still correct. If appellate counsel's action or inaction denies a defendant his opportunity to prepare and file a petition for discretionary review, that defendant has been denied his sixth amendment right to effective assistance of counsel. *Jarrett,* 891 S.W.2d at 939.

Counsel's duty as set out in *Jarrett* originates from two related sources: Article 26.04, V.A.C.C.P., as amended in 1987, and *Ex parte Axel*, 757 S.W.2d 369 (Tex.Cr.App.1988). We relied on Art. 26.04 by deciding that the point at which a defendant should be informed of the disposition of the appeal and what step comes next is part of the direct appeal process. However, we then extended ***27** the direct appeal process into the discretionary review area by requiring counsel to give advice pertaining to the merits of discretionary review as if appellate counsel's duties were analogous to those in *Axel.*

[3] **[4]** This Court's reliance on Art. 26.04 and *Axel* is misplaced because these concern an appeal one has of right. Attendant to an appeal of right is a right to counsel. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Texas accords defendants an appeal of right. See Article 44.02, V.A.C.C.P. However, the scope of the right to counsel is governed by the right to which it attaches. It makes sense that counsel on direct appeal must inform a defendant of the result of the appeal. However, since a defendant has no further right to counsel, it makes no sense to require counsel to discuss the merits of what the defendant would include in a petition for discretionary review. A defendant given an appeal of right is entitled to counsel who must inform the defendant, in accord with *Axel,* of the right to appeal, including expressing professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal. *Axel,* 757 S.W.2d at 374. Counsel must advise a defendant of rights pertaining to direct appeal. That is why in *Axel* this Court found the attorney to have been ineffective *on appeal.* In contrast, because a defendant has no right to counsel for pursuing discretionary review, appellate counsel has no constitutional or statutory duty to give advice to a defendant pertaining to the merits of discretionary review. Counsel may not deny a defendant the right or opportunity to avail himself of discretionary review, but counsel need not discuss the merits of such review because a defendant has no right to counsel for discretionary review.

The scope of the duty attached to counsel is governed by the right to which that duty attaches. The right to counsel on an appeal of right, under Art. 26.04, ends with the conclusion of the direct appeal. That means counsel on appeal must inform a defendant of the result of the direct appeal and the availability of discretionary review. But, because there is no right to counsel on discretionary review, the duty of counsel ends there. While it may be wiser to give more complete information to a defendant, it is neither constitutionally nor statutorily required.

In *Jarrett* this Court erroneously analogized the duties of appellate counsel after the court of appeals has decided a case, to that of the trial attorney in *Axel* after the defendant has been sentenced. In *Axel* this Court explained that the trial attorney continues as counsel for appellate purposes, unless he affirmatively withdraws, *because* the defendant has a right

to counsel on appeal. This Court decided that trial counsel has a duty to protect a defendant so that he can exercise that right to appeal. In contrast, according to *Ayala,* a defendant has no right to counsel for pursuing discretionary review. Thus, *Jarrett* was based on the incorrect premise that the duties imposed by *Axel* on a trial attorney turned appellate attorney, because a defendant has a right to counsel on appeal, were analogous to those of an appellate attorney for a process for which a defendant has no right to counsel. Those duties set out in *Axel* stem from the interdependent rights to counsel and appeal. Because there is no right to counsel on discretionary review, the appellate attorney has no duty to inform a defendant of details pertinent to further review.

We overrule *Jarrett* to the extent it held that an appellate attorney has an obligation to inform a defendant of anything other than the fact that his conviction has been affirmed and he can pursue discretionary review on his own. This information sufficiently protects a defendant's right to file a petition for discretionary review. Counsel has no other constitutional obligations because a defendant has no right to counsel for purposes of discretionary review.

[5] In the instant case the trial court found appellate counsel's affidavit to be true. In that affidavit counsel stated that he mailed Applicant a copy of the Court of Appeals' opinion and informed Applicant that he did not believe a petition for discretionary review would have any merit. This is sufficient to protect Appellant's right, if he desired, ***28** to file a petition for discretionary review. Accordingly, relief is denied.

MEYERS, J., not participating.

BAIRD, Judge, dissenting.

This habeas corpus petition presents a single question: whether the rule announced in *Ex parte Jarrett,* 891 S.W.2d 935 (Tex.Cr.App.1994), is retroactive. However, the majority avoids the retroactivity issue by overruling *Jarrett* "to the extent it held that an appellate attorney has an obligation to inform a defendant of anything other than the fact that his conviction has been affirmed and he can pursue discretionary review on his own." *Ante* at 27. Because the majority does not resolve the issue presented and fails to recognize the true holding of *Jarrett,* I dissent. [1]

1 As noted in the dissents in *Ex parte McJunkins,* 926 S.W.2d 296, 298 (Tex.Cr.App.1996), and *Anson v. State,* 1997 WL 621305, 959S.W.2d 203 (Tex.Cr.App. No. 741–96, delivered October 8, 1997), a majority of this Court, with an ever increasing frequency, decides cases by resolving issues that are not properly before the Court. By doing so, the parties are misled into believing the Court will resolve the issue it agreed to hear and deprived the opportunity to brief the issue which is ultimately decided. Today, a majority of the Court continues this disturbing trend.

I.

In *Jarrett, supra,* the applicant contended counsel's failure to advise an appellant of the court of appeals' decision, the right to petition this Court for discretionary review and the plausible grounds and possible merit of such a petition constituted ineffective assistance of counsel. In *Jarrett,* we set forth the duties of appellate counsel following the decision of the court of appeals:

> Pursuant to Rule 91 *appellate counsel* has a duty to notify the appellant of the actions of the appellate court and to *consult with and fully advise* the appellant of the *meaning and effect of the opinion of the appellate court.* Finally, although appellate counsel has *no duty to file a petition for discretionary review, Ayala,* 633 S.W.2d. at 528, *appellate counsel* does have the duty, under art. 26.04, to *advise the appellant of the possibility of review by this Court as well as expressing his*

> *professional judgment as to possible grounds for review and their merit, and delineating the advantages and disadvantages of any further review.* [2]

2 All emphasis supplied unless otherwise indicated.

Id., 891 S.W.2d at 940.

The majority purports to agree with *Jarrett* to the extent appointed appellate counsel has the duty to inform his indigent client of the intermediate court's decision and of the defendant's right to file a petition for discretionary review *pro se.* This, says the majority, is the "ultimate holding of *Jarrett* " which, they hold is still correct. *Ante* at 26. However, the majority argues *Jarrett* 's requirement that appellate counsel render advice regarding possible grounds for review goes beyond what is statutorily or constitutionally required of appellate counsel. *Ante* at 26. *Their rationale is grounded exclusively in their position that there is no "right" of discretionary review by this Court* and, therefore, appellant has no right to the assistance of counsel for the purpose of discretionary review. *Ante* at 26.

The argument erroneously assumes that *Jarrett* recognized a "right" of discretionary review by this Court. Nothing could be further from the truth. It is axiomatic that there is no "right" of discretionary review by this Court. In *Ayala v. State,* 633 S.W.2d 526, 528 (Tex.Cr.App.1982), this Court held "*Discretionary review by the Court of Criminal Appeals is not a matter of right,* but of sound judicial discretion." *See also,* Texas Constitution, art. V, § 5; and, Tex.R.App. P. 66.2. Furthermore, in *Jarrett* we specifically stated: "Though *there is no right to have discretionary review granted* by this Court, we have held that due to the very fact that the provision exists *there is a right to make a request* to this Court." *Id.,* 891 S.W.2d at 940.

The right secured by *Jarrett* is the *right to petition* this Court for review, not the actual right of review itself. Counsel's duty to advise appellant of the possibility of review by this Court as well as his duty to express ***29** professional judgment as to possible grounds for review and their merit, and the advantages and disadvantages of further review, are more firmly rooted in law than the majority recognizes.

II.

Our holding in *Jarrett* was based upon our decisions of *Ayala,* 633 S.W.2d 526, and *Ex parte Axel,* 757 S.W.2d 369 (Tex.Cr.App.1988). In *Ayala,* this Court recognized there is no right to either discretionary review itself, or counsel for the purpose of such review, but that as long as the procedure existed, there is an affirmative right to request review by this Court.

The issue in *Axel* is analogous to the issue presented in *Jarrett,* except that *Axel* dealt with trial counsel's duty to advise his client of the merit of seeking a direct appeal. Additionally, we relied on the Legislature's intent, manifest in the unambiguous language and plain meaning of Tex.Code Crim. Proc. Ann. art. 26.04, which requires appointed appellate counsel to represent his client until *appeals* are exhausted, and former Tex.R.App. P. 91 (1986, repealed 1997), [3] which provides for post-appeal notification of appellant of the appellate proceedings. In *Axel,* we carefully explained:

3 Current version of former Tex.R.App. P. 91 (1986, repealed 1997) found in Tex.R.App. P. 48.1, eff. Sept. 1, 1997.

> Representation by trial counsel does not terminate at end of trial—if that means when a jury has returned its final verdict on punishment. The sentencing proceeding is a critical part of trial, requiring assistance from trial counsel, and similarly thereafter the determination to give notice of appeal. Informing a defendant of his right to appeal is part

> and parcel of also further advising him along lines of the [ABA] Standards ... in order to make a decision whether to take an appeal.
> *Id.,* 757 S.W.2d at 373.

Just as trial counsel is responsible for representing a defendant during the procedural gap between sentencing and the decision to appeal, appellate counsel has a duty to represent a defendant until an informed decision whether to file a petition for discretionary review is made. On rehearing in *Jarrett,* Judge Meyers discussed the minimal advice an objectively reasonable appellate attorney must provide a defendant whose only remaining concern is whether to seek review by this Court. Judge Meyers explained:

> we do not mean to hold, of course, that appellate attorney must continue as advocates for their clients through the discretionary review process itself, but it is after all, a critical part of an attorney's job to help his client make decisions of substantial legal significance.
>
> As we held on original submission, it is the *professional duty of an appellate lawyer* to explain the meaning and effect of an appellate court decision in his client's case, to acquaint his client with available options for further review of the case, and to assist his client with the decision whether to seek such review.

Id., 891 S.W.2d at 944 (Op. on Reh'g). This is so because the judgment of an intermediate appellate court in a criminal case does not become final at once. Tex.Code Crim. Proc. Ann. arts. 42.045, 44.45(a); and former Tex.R.App. P. 86(a) (1986, repealed 1997). [4] Therefore,

4 Current version of former Tex.R.App. P. 86 (1986, repealed 1997) found in Tex.R.App. P. 18, eff. Sept. 1, 1997.

> the rendition of a judgment does not immediately exhaust the appellate process. During the entire period of time between the rendition of an opinion by the appellate court and the date upon which it becomes final, therefore, the *appellate lawyer still represents his client and remains under a duty to provide him with satisfactory legal counsel.*
> *Jarrett,* 891 S.W.2d at 944 (Op. on Reh'g). This comports with the requirements of art. 26.04 that appointed appellate counsel continue his representation of appellant until appeals are exhausted.

Specifically, the majority attacks *Jarrett* 's reliance on art. 26.04 and *Axel* as "... misplaced because [they] concern *an appeal one has of right.*" *Ante* at 26. This contention ***30** mischaracterizes the issue before us because as discussed earlier, the "right" protected in *Jarrett* is the "right" to petition this Court for review, *NOT* a "right" of discretionary review itself. In *Jarrett,* we properly relied on the language of art. 26.04(a), which provides:

> Whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. An attorney appointed under this subsection *shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel.*

Even though this Court has construed limitations to counsel's duty as prescribed by art. 26.04, particularly that counsel has no duty to file a petition for discretionary review, there is nothing within the plain meaning of art. 26.04(a) to indicate the Legislature intended to discharge appellate counsel of all duties to his client with regard to appellant filing a petition for discretionary review *pro se.* In fact, art. 26.04(a) by its own language charges appointed appellate counsel with an expansive duty to his indigent client that is not limited to his client's first appeal of right. Of particular significance to both *Jarrett* and the present case is art. 26.04's mandate that an appointed attorney represent his client "*until ... appeals [plural] are exhausted. ...*" [5]

5 On the issue of what stage "appeals" are effectively exhausted, Judge Teague's concurrence and dissent in *Ayala v. State,* 633 S.W.2d at 532 is particularly insightful:

> ... the State of Texas, through its Legislature, has indicated a State policy to provide legal assistance throughout the course of *a criminal "appeal," which I believe includes the filing of a petition for discretionary review.*

In *White v. State,* 543 S.W.2d 366, 368 (Tex.Cr.App.1976), Roberts, J., who wrote the plurality opinion for the Court, stated in part:

> Our research reveals that the word "appeal" has not been construed in Texas by an appellate court having criminal jurisdiction since 1840. In that year, in *Republic v. Smith,* Dallam 407, the Supreme Court of the Republic of Texas defined an appeal (quoting Blackstone) as "a complaint to a superior court of injustice done by an inferior one." Mr. Black gives a similar definition. Black's Law Dictionary, *supra,* at 124 (citations and footnote omitted).
>
> Following these definitional guidelines, it seems clear that a petition for certiorari, like a writ of error in Texas practice, *is an "appeal," albeit a discretionary one* (citations omitted). To say that review by certiorari does not constitute an appeal is to make a distinction without substance, since such a review necessarily involves an attempt to persuade a superior court to correct the error of a lower court.

Likewise, to hold discretionary review by this Court does not constitute an "appeal," is to make a distinction without substance. Although this Court held in *Ayala,* 633 S.W.2d at 527, "... the Fourteenth Amendment does not require a state to provide indigents with the services of counsel in seeking discretionary review beyond the first step of appeal," it is unrealistic to argue that discretionary review, when granted, is not an "appeal." In his dissent in *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982), Justice Marshall correctly points out the importance of the last level of appeal:

> Particularly where a criminal conviction is challenged on constitutional grounds, *permissive review in the highest state court may be the most meaningful review a conviction will receive.* Moreover, where a defendant seeks discretionary review, the assistance of an attorney is vital.

III.

The majority's decision to overrule *Jarrett* is disturbing because not only is *Jarrett* well-grounded in Texas law, but it is helpful and beneficial to all parties. When granted, discretionary review by this Court is the ultimate appeal which oftentimes serves as the only and final lynchpin of justice in a criminal case. *See,* Tex. Const. art. V, § 5.[6] To believe otherwise would obviate the discretionary review function of this Court and render meaningless not only petitions for discretionary review, but the very work we do as Judges for this Court. In order to preserve the significance of discretionary review, appellants must be afforded meaningful access ***31** to this important procedure. This meaningful access requires not only that appellant know of his right to petition this Court for review, but understand the significance of discretionary review and be aware of all possible grounds for review and their potential merit.

6 Art. V, § 5, in relevant part, provides:

> The Court of Criminal Appeals shall have *final appellate jurisdiction* coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatsoever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law. (Emphasis supplied.)

Under *Jarrett,* the appellant has meaningful access to his right to seek discretionary review by this Court; appointed appellate counsel discharges his legal, professional and ethical duties to zealously represent his client until his client's appeals are exhausted; the number of frivolous and faulty petitions for discretionary review to this Court are reduced; the State does not waste time answering frivolous petitions; and, the limited resources of this Court are spent focused on meritorious petitions.

Pro se appellants should not be expected to possess the legal knowledge necessary to prepare thoughtful and meritorious petitions for discretionary review when our case law is replete with examples of petitions which were refused because appellate *attorneys* failed to comply with the rules of appellate procedure. *See, Degrate v. State,* 712 S.W.2d 755 (Tex.Cr.App.1986) (any petition which fails to set forth adequate reasons for this Court to exercise its discretion to review a court of appeals' opinion is subject to summary refusal); *Pumphrey v. State,* 689 S.W.2d 466 (Tex.Cr.App.1985) (petition not prepared in conformity with the rules will by summarily refused); *Delgado v. State,* 687 S.W.2d 769 (Tex.Cr.App.1985) (failure of counsel to comply with rules will cause this Court to summarily refuse petition for discretionary review that has been filed on behalf of appellant).

The problems facing *pro se* appellants seeking discretionary review are the same as those faced by unrepresented appellants on direct appeal. The Supreme Court in *Evitts v. Lucey,* 469 U.S. 387, 395–96, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985), explained the unrepresented appellant on direct appeal faces a disadvantage in perfecting his appeal of right because it is "... an adversary proceeding that—like a trial—is governed by *intricate rules that to a layperson would be hopelessly forbidding." Id.,* 469 U.S. at 396, 105 S.Ct. at 836. Likewise, in his dissent in *Peterson v. Jones,* 894 S.W.2d 370, 378 (Tex.Cr.App.1995), Judge Maloney expressed concern that an indigent appellant is not automatically entitled to assistance of court-appointed counsel to file a petition for discretionary review, and the court therefore has no ministerial statutory duty to authorize payment for the services appellate counsel performed in filing petitions for discretionary review:

> This Court granted approximately eleven percent of the petitions for discretionary review disposed in 1994. *The chances that a petition will be granted are reduced when an indigent defendant, unfamiliar with the procedural requirements and substantive law, files a petition without the assistance of counsel.* Texas Rule of Appellate Procedure 200 lists the "character of reasons" for which this Court may grant review. Each requires a firm grasp of the legal and factual aspects of the case for which review is sought, a knowledge of relevant procedural and substantive law, and access to current Court of Criminal Appeals and courts of appeals decisions. In the unlikely event that this Court grants review of a pro se petition, only then would the trial court appoint an attorney to represent the indigent. (Internal citation omitted.)

Further, Judge Meyers, in his opinion on rehearing in *Jarrett,* explained:

> it is, after all, a *critical part of an attorney's job to help his client make decisions of substantial legal significance. And, at the moment a client learns his criminal conviction has been affirmed, there can be no decision of greater legal significance or of more pressing importance than whether to seek further review. It is not enough just to know that such review may be available.* Before making a decision whether to follow this course one must also know the mechanics of discretionary review, appreciate the legal issues involved, and possess an ability to assess the likelihood of success. These skills are the professional tools of lawyers, and it is entirely appropriate that a person who is actually represented by legal counsel look to his ***32** attorney for professional advice on this subject.

Id., 891 S.W.2d at 944 (Op. on Reh'g). As such, *Jarrett* 's requirement that appellate counsel render advice to his client regarding the possible merit or lack of merit of filing a petition for discretionary review serves to preserve the integrity of appellant's right to file a petition.

Perversely, the majority admits while "the right to counsel on an appeal of right, under 26.04, ends with the conclusion of the direct appeal ... *it may be wiser to give more complete information to a defendant,* [although] it is not constitutionally or statutorily required." *Ante* at 27. This statement is evidence the majority recognizes the disadvantage an uninformed *pro se* petitioner faces. Yet, they are willing to disregard his plight.

The majority suggests there was no authority for this Court to require appellate counsel advise the appellant regarding the possible merit or lack of merit of filing a petition for discretionary review. This is simply not true. It is well established that federal law provides only the *minimum* standards and States are free to require more from appointed counsel.

In *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), which held counsel has no duty to file a petition for discretionary review, Chief Justice Rehnquist explained: "We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review." In fact, absent any law to the contrary, this Court has specific authority to promulgate its own rules regarding its discretionary powers of review. Tex.Code Crim. Proc. Ann. art. 44.33(a), in pertinent part, provides: "The

Court of Criminal Appeals shall make rules of posttrial and appellate procedure as to the hearing of criminal actions not inconsistent with the Code." Additionally, Tex.Code Crim. Proc. Ann. art. 44.45(c), concerning review by the Court of Criminal Appeals provides: "The Court of Criminal Appeals may promulgate rules pursuant to this article." [7] Thus, not only are states free to require more from appointed appellate counsel than federal laws require, the authority to do so is vested in this Court.

7 In *Davis v. State,* 721 S.W.2d 857, 858 (Tex.Cr.App.1986), this Court explained:

> Articles 44.33(a) and 44.45(c) authorize this Court to make rules of posttrial and appellate procedure for hearing criminal actions not inconsistent with remaining provisions of the Code of Criminal Procedure, *including promulgating rules to implement its discretionary review jurisdiction, power and authority.* In 1981 this Court did indeed adopt and promulgate Rules of Post Trial and Appellate Procedure in Criminal Cases. (Internal citation omitted.)

See also, Herrin v. State, 668 S.W.2d 896, 897 (Tex.App.—Dallas 1984) (holding Court of Criminal Appeals has rule-making authority to enlarge the time for filing a petition for discretionary review).

IV.

There is nothing wrong with our decision in *Jarrett.* To the contrary, as the majority concedes, *Jarrett* mandated the "wiser [practice] to give more complete information to a defendant." *Ante* at 27. Nevertheless, rather than follow the established precedent of this Court which they, themselves regard as sound, the majority chooses to overrule *Jarrett* in order to deny *pro se* appellant's meaningful access to this Court, a result which is beneficial to the State.

Judges are charged with a duty to follow and uphold laws which they recognize as sound and "wise," and attorneys have legal, professional and ethical duties, exclusive of constitutional requirements, to see that their clients are sufficiently informed about the status of their cases so as to make decisions of substantial legal significance. For an appellant there can be no decision more critical than whether to seek review of their case by the State's highest court. Because the majority fails in its duty to uphold law and encourages indifferent representation of indigent criminal defendants in Texas, I dissent.

OVERSTREET, J., joins this opinion.

All Citations

956 S.W.2d 25

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918 S.W.2d 519
Court of Criminal Appeals of Texas,
En Banc.

Jesus OLIVO, Appellant,
v.
The STATE of Texas, Appellee.

No. 0442–95.
|
March 27, 1996.

Defendant was convicted in the Criminal District Court, No. 3, Dallas County, Mark Tolle, J., of murder, and he appealed. The Court of Appeals, 894 S.W.2d 58, dismissed appeal due to defendant's failure to file timely notice of appeal and failure to file motion for extension of time to appeal. Defendant petitioned for discretionary review. The Court of Criminal Appeals, Meyers, J., held that timely filing of motion for extension of time to appeal was jurisdictional requirement.

Affirmed.

Clinton and Overstreet, JJ., concurred in the result.

***520** Appeal from Criminal District Court No. 3, Dallas County; Mark Tolle, Judge.
Petition for Discretionary review from Court of Appeals, 4th Supreme Judicial District.

Attorneys and Law Firms

John H. Hagler, Dallas, for appellant.

Lori L. Ordiway, Assist. Dist. Atty., Dallas, Robert A. Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

MEYERS, Judge.

[1] Appellant was convicted of murder, and the jury assessed punishment at forty years of confinement. Appellant's notice of appeal was due to be filed on June 27, 1994. Appellant filed his notice of appeal on July 12, 1994, the fifteenth day after it was due. Appellant's motion for extension of time, styled a "Motion for Leave to File Late Notice of Appeal," was filed on September 27, 1994. The Court of Appeals dismissed the appeal for lack of jurisdiction. *Olivo v. State,* 894 S.W.2d 58 (Tex.App.—San Antonio 1994). We granted Appellant's petition for discretionary review to address the following ground:

> The Court of Appeals erred in holding that the court lacked jurisdiction to entertain this appeal when the notice of appeal was filed within the fifteen day grace period but the motion for leave to file the late notice of appeal was filed after the expiration of the fifteen day grace period.

The Court of Appeals held that a late notice of appeal may be considered timely filed, and thus invokes the appellate court's jurisdiction, if (1) it is filed within fifteen days of the last day allowed for filing, (2) a motion for extension of time is filed within fifteen days of the last day allowed for filing the notice of appeal, and (3) the motion for extension of time is granted by the appellate court. Id. at 59 (citing Tex.R.App.Pro. 41(b)(2); [1] and Charles v. State, 809 S.W.2d 574 (Tex.App.—San Antonio 1991, no pet.)). The court noted it had previously held that compliance with the first two requirements is jurisdictional. citing Charles, 809 S.W.2d at 576

1 In criminal cases Rule 41(b) provides:

> (1) Appeal is perfected when notice of appeal is filed within thirty (fifteen by the state) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
>
> (2) An extension of time for filing notice of appeal may be granted by the court of appeals if such notice is filed within fifteen days after the last day allowed and within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension.

Appellant observes that other courts of appeals have held that a notice of appeal filed within the fifteen-day grace period invokes ***521** jurisdiction even without an accompanying motion for extension of time. See *Sanchez v. State,* 885 S.W.2d 444 (Tex.App.—Corpus Christi 1994, no pet.); *Boulos v. State,* 775 S.W.2d 8 (Tex.App.—Houston [1st] 1989, pet. ref'd). Appellant urges this Court to adopt the reasoning set out in those opinions, specifically, that jurisdiction is authorized by Tex.R.App.Pro. 2(b) [2] and 83 [3] . Appellant points out that the Texas Supreme Court has adopted a liberal policy in allowing appellants to amend appeal bonds and cash deposits in lieu of bonds. See *Linwood v. NCNB Texas,* 885 S.W.2d 102 (Tex.1994); *Grand Prairie Indep. Sch. Dist. v. Southern Parts,* 813 S.W.2d 499 (Tex.1991). Appellant maintains that a similarly liberal policy should be adopted by this Court to protect a defendant's right to appeal and right to effective assistance of counsel. See Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

2 Rule 2(b) provides:

> Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Provided, however, that nothing in this rule shall be construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure.

3 Rule 83 provides:

> A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

The State counters that the San Antonio Court of Appeals correctly applied the clear language of Rule 41(b)(2). The State maintains that *Sanchez* and *Boulos* erroneously relied on Rules 2(b) and 83 to suspend the requirements of Rule 41(b)(2). The State notes that another court of appeals has rejected the holdings of *Sanchez* and *Boulos.* See *Jones v. State,* 900 S.W.2d 421 (Tex.App.—Texarkana 1995, no pet.). The State seeks to distinguish the Texas Supreme Court cases relied on by Appellant because they involve amendments to timely filed defective appellate instruments. Finally, the State argues that Evitts v. Lucey is distinguishable because the present case involves appellate jurisdiction.

In *Boulos* the court was faced with a situation similar to the present case. The court observed it had options other than dismissal for lack of jurisdiction, which it may deem appropriate in a particular case. *Boulos,* 775 S.W.2d at 9. The court held the exercise of its jurisdiction was authorized by Rules 2(b) and 83. *Ibid.* (citing *Jiles v. State,* 751 S.W.2d 620, 621 (Tex.App.—Houston [1st] 1988, pet. ref'd)).

In *Jiles* there was no written notice of appeal. The court in *Jiles* recognized that this Court had held in *Shute v. State,* 744 S.W.2d 96 (Tex.Cr.App.1988), that a court of appeals does not err in dismissing an appeal for lack of jurisdiction when there is no written notice of appeal. However, the Court of Appeals sought to distinguish *Shute* because this Court in *Shute* did not discuss whether a court of appeals could follow some other course of action. *Jiles,* 751 S.W.2d at 621. The Court of Appeals held it was authorized to accept jurisdiction under Rules 2(b) and 83. *Ibid.*

The court in *Sanchez,* like those in *Boulos* and the present case, was faced with a notice of appeal filed within the fifteen-day grace period but an untimely motion for extension of time. The Court of Appeals stated that the filing of the notice of appeal within the fifteen-day period necessarily implied a proper request for extension of time under Rule 41(b)(2). *Sanchez,* 885 S.W.2d at 445. The Corpus Christi Court of Appeals observed:

> The rules of appellate procedure, as embodied by rule 83 and rule 2(b), favor a policy of having the Texas courts of appeals address cases on their merits, rather than allowing the courts to close their doors to appellants who, through no fault ***522** of their own, fail to find their way successfully through the labyrinth of procedure.

Id. at 446.
The court held that the filing of the notice of appeal within the fifteen-day grace period vested that court with jurisdiction and that the lack of a timely filed motion for extension of time was curable under Rule 83, as the lack of a timely motion for extension of time was a procedural irregularity. *Ibid.*

We disagree with the Corpus Christi Court of Appeals' characterization of the lack of a timely filed motion for extension of time to file notice of appeal. It is not a mere procedural irregularity; it is a jurisdictional defect.

[2] **[3]** A timely notice of appeal is necessary to invoke a court of appeals' jurisdiction. *Rodarte v. State,* 860 S.W.2d 108 (Tex.Cr.App.1993); *Shute,* 744 S.W.2d 96. A defendant's notice of appeal is timely if filed within thirty days after the day sentence is imposed or suspended in open court, or within ninety days after sentencing if the defendant timely files a motion for new trial. Rule 41(b)(1). Rule 41(b)(2) allows for an exception: A court of appeals may grant an extension of time to file notice of appeal if the notice is filed within fifteen days after the last day allowed and, within the same period, a motion is filed in the court of appeals reasonably explaining the need for the extension of time.

Therefore, we agree with the San Antonio and El Paso Courts of Appeals that a late notice of appeal may be considered timely so as to invoke a court of appeals' jurisdiction if (1) it is filed within fifteen days of the last day allowed for filing, (2) a motion for extension of time is filed in the court of appeals within fifteen days of the last day allowed for filing the notice of appeal, and (3) the court of appeals grants the motion for extension of time. *Jones,* 900 S.W.2d at 422; *Olivo,* 894 S.W.2d at 59; *Charles,* 809 S.W.2d at 576. When a notice of appeal is filed within the fifteen-day period but no timely motion for extension of time is filed, the appellate court lacks jurisdiction. *Charles,* 809 S.W.2d at 576.

In considering Appellant's argument urging reliance on Rule 2(b), we first observe that the Texarkana Court of Appeals rejected the contention that Rule 2(b) allows a court faced with a situation similar to the present case to acquire jurisdiction. In doing so, the court cited Rule 2(a), which provides:

> These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals, the Court of Criminal Appeals or the Supreme Court as established by law.

Jones, 900 S.W.2d at 423.

In *Shute* and *Rodarte,* we held that a court of appeals has no jurisdiction without a timely, written notice of appeal pursuant to Rules 40(b)(1) and 41(b)(1). In *Garza v. State,* 896 S.W.2d 192 (Tex.Cr.App.1995), we held that a court of

appeals has no authority to summarily reconsider and correct or modify its opinion or judgment beyond the fifteen-day period provided in Tex.R.App.Pro. 101 after a petition for discretionary review is filed, because at that point exclusive jurisdiction rests with this Court. If the Court of Appeals in *Jones* was correct in suggesting that Rule 2(a) prevents a court from using Rule 2(b) to suspend an appellate rule time limit as that would improperly extend the court's jurisdiction, then Rule 2(a) would also prevent Rules 40(b)(1), 41(b)(1), and 101 from *limiting* a court of appeals' jurisdiction. Moreover, under this interpretation, Rule 2(a) would prevent Rule 41(b)(2) from *extending* a court of appeals' jurisdiction even if a notice of appeal and motion for extension of time were filed in compliance with Rule 41(b)(2).

[4] **[5]** Jurisdiction concerns the power of a court to hear and determine a case. *Ex parte Watson,* 601 S.W.2d 350, 351 (Tex.Cr.App.1980). Jurisdiction is the right of a court to adjudicate the subject matter in a given case. *Garcia v. Dial,* 596 S.W.2d 524, 527 (Tex.Cr.App.1980). A court of appeals' jurisdiction is comprised of subject matter jurisdiction and personal jurisdiction, that is, jurisdiction over a specific appeal involving specific litigants. Cf. *Id.* (discussing jurisdiction of the subject matter and jurisdiction over the person in the trial context). Establishment ***523** of jurisdiction by law and invocation or attachment of jurisdiction in accordance with procedural rules are two distinct concepts.

Examples of laws that establish jurisdiction of courts of appeals are Tex. Const. Art. V, § 1 (courts in which judicial power is vested), Tex. Const. Art. V, § 6 (courts of appeals); V.T.C.A. Gov't Code §§ 21.001 (inherent power and duty of courts), 22.220 (civil jurisdiction), 22.201 (courts of appeals districts), 22.221 (writ power), 73.001–73.002 and 22.202(i) (transfer of courts of appeals' cases); and Articles 4.01 (courts with criminal jurisdiction) and 4.03 (courts of appeals), V.A.C.C.P.

[6] This Court's rulemaking authority is found in Tex. Const. Art. V, § 31(c)[4], V.T.C.A. Gov't Code 22.108[5], and Article 44.33(a), V.A.C.C.P.[6] The Rules of Appellate Procedure do not establish courts of appeals' jurisdiction; they provide procedures which must be followed by litigants to invoke the jurisdiction of the courts of appeals so a particular appeal may be heard. Consequently, Rule 2(a) does not prohibit a court of appeals from using Rule 2(b) to suspend the time limits imposed by Rule 41(b).[7] However, that does not end our examination of the role of Rule 2(b).

4 Article V, § 31(c), provides, "The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law."

5 Section 22.108 provides in part:

(a) The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The court of criminal appeals may promulgate a comprehensive body of rules of posttrial, appellate, and review procedure in criminal cases and from time to time may promulgate a specific rule or rules of posttrial, appellate, or review procedure in criminal cases or an amendment or amendments to a specific rule or rules.

6 Article 44.33 provides in part, "The Court of Criminal Appeals shall make rules of posttrial and appellate procedure as to the hearing of criminal actions not inconsistent with this Code."

7 In *Garza* one of the defendant's arguments was that Rule 2(b) permits an appellate court to suspend the operation of Rule 101 and take additional time to render its opinion. We observed that the Court of Appeals did not purport to invoke Rule 2(b), so the defendant's argument was inapplicable. *Garza,* 896 S.W.2d at 194. We also stated, "However, Rule 2(a) specifically states that the Rules 'shall not be construed as to *extend* or limit the jurisdiction of the courts of appeal....' (emphasis added)." *Ibid.* Our mention of Rule 2(a) was dicta, because we concluded that the defendant's argument was inapplicable. Moreover, in *Garza* this Court did not explain how Rule 2(a) affected the defendant's argument.

[7] **[8]** A court has jurisdiction to determine whether it has jurisdiction. *Ex parte Paprskar,* 573 S.W.2d 525, 527 (Tex.Cr.App.1978), *overruled on other grounds, Weiner v. Dial,* 653 S.W.2d 786, 787 n. 1 (Tex.Cr.App.1983). "Jurisdiction of a court must be legally invoked, and when not legally invoked, the power of the court to act is as absent as if it did not exist." *Ex parte Caldwell,* 383 S.W.2d 587, 589 (Tex.Cr.App.1964). When a notice of appeal, but no motion for extension

of time, is filed within the fifteen-day period, the court of appeals lacks jurisdiction to dispose of the purported appeal in any manner other than by dismissing it for lack of jurisdiction. In that instance, a court of appeals lacks jurisdiction over the purported appeal and, therefore, lacks the power to invoke Rule 2(b) or Rule 83 in an effort to obtain jurisdiction of the case. Consequently, a court of appeals may not utilize Rule 2(b) or Rule 83 to create jurisdiction where none exists. *Garza,* 896 S.W.2d at 194; *Charles,* 809 S.W.2d at 576; see *Jones v. State,* 796 S.W.2d 183, 187 (Tex.Cr.App.1990) (Rule 83 does not cure a notice of appeal that is not in compliance with Rule 40(b)(1)).

[9] We next turn to Appellant's reliance on Texas Supreme Court cases dealing with appeal bonds and cash deposits in lieu thereof. The Texas Supreme Court has held, pursuant to Rule 83:

> [A] court of appeals may not dismiss an appeal when the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity ***524** to correct the error. *If the appellant timely files a document* in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.

Grand Prairie Indep. Sch. Dist., 813 S.W.2d at 500 (emphasis added). In *Linwood* the appellant filed a notice of appeal, however he should have filed a cost bond. The appellant eventually filed a cost bond, although it was late. The Supreme Court held that the appellant should have been given an opportunity to correct the error by substituting the correct instrument, which the appellant did by filing the cost bond. *Linwood,* 885 S.W.2d at 103. The Supreme Court observed that the notice of appeal was timely filed. *Ibid.*

The liberal policy of the Supreme Court that Appellant would have this Court follow concerns the substitution of a correct instrument for an incorrect instrument, *which has been timely filed.* The civil courts have distinguished a timely filed defective instrument from the failure to timely file an instrument, such as a motion for extension of time. See *Ludwig v. Enserch Corp.,* 845 S.W.2d 338 (Tex.App.—Houston [1st] 1992, no writ) (a court of appeals lacks jurisdiction when the cost bond is not timely filed and a motion to extend the filing period for the cost bond has not been filed within the fifteen-day grace period); see also *B.D. Click Co. v. Safari Drilling Corp.,* 638 S.W.2d 860 (Tex.1982) (court of appeals has no authority to consider a motion for extension of time to file the record if the motion is not filed within the fifteen-day period); *Ballard v. Portnoy,* 886 S.W.2d 445 (Tex.App.—Houston [1st] 1994, no writ) (Rule 46f permits a court of appeals to allow an appellant to amend defects in a bond, but it does not authorize a court of appeals to permit the filing of an out-of-time bond); *El Paso Sharky's Billiard Parlor, Inc. v. Amparan,* 831 S.W.2d 3 (Tex.App.—El Paso 1992, writ denied) (cost bond filed thirteen days after it was due, without a corresponding motion for extension of time filed within the fifteen-day period, did not invoke the court of appeals' jurisdiction).

In the present case, Appellant's notice of appeal was late. Appellant did not timely file a motion for extension of time to file the notice of appeal. Consequently, even if this Court were to adopt the policy espoused in civil appeals, Appellant still failed to invoke the jurisdiction of the Court of Appeals.

In any event, we have previously rejected the approach suggested by Appellant. In *Jones,* 796 S.W.2d 183, the defendant pleaded guilty and was sentenced pursuant to a plea agreement. He filed a notice of appeal that did not comply with Rule 40(b)(1). *Id.* at 185. After the time expired to file a notice of appeal, the defendant filed an amended notice of appeal in compliance with Rule 40(b)(1), by specifying the matters raised in his pretrial motion and stating the court granted permission to appeal. *Id.* at 185–86. The court of appeals relied on Rule 83 and held that the appeal was properly before that court. *Id.* at 186. This Court disagreed and reasoned that Rule 40(b)(1) is a restrictive rule, regulating the extent of the grounds upon which a defendant can appeal. *Ibid.* The method of regulation is the nature of the notice of appeal filed by an appellant. *Ibid.* The notice of appeal invokes a court of appeals' jurisdiction. *Ibid.* If an appellant wishes to appeal a matter restricted by Rule 40(b)(1), then the notice of appeal must comply with that rule. *Ibid.* In *Jones* the defendant did not file a notice of appeal that would have permitted him to appeal the matter he sought to raise. *Id.* at 187. We further held that Rule 83 did not cure the defect. *Ibid.*

[10] We have recognized differences between civil and criminal cases in attachment of jurisdiction in the trial context.

> Unlike in civil cases where personal jurisdiction over a party may be had merely by that party's appearance before the court, Rule 120, Vernon's Texas Rules of Civil Procedure, criminal jurisdiction over the person cannot be conferred upon the district court solely by the accused's appearance, but requires the due return of a felony indictment, or the accused's *personal* affirmative waiver thereof and the return ***525** of a valid felony information upon complaint.

Garcia v. Dial, 596 S.W.2d at 527. In criminal cases, "[j]urisdiction cannot be 'substantially' invoked; it either attaches or it does not." *Drew v. State,* 743 S.W.2d 207, 223 (Tex.Cr.App.1987). Therefore, we decline to adopt the civil appellate approach urged by Appellant.

[11] Finally, we turn to *Evitts v. Lucey,* relied on by Appellant. In *Evitts v. Lucey* the defendant's counsel timely filed a notice of appeal, but counsel neglected to file a statement of appeal, containing information about the appeal, as required by the Kentucky Rules of Appellate Procedure. The appellate court dismissed the appeal due to the lack of a statement of appeal. The defendant, Lucey, then sought federal habeas corpus relief, which was granted by the United States District Court and upheld by the Sixth Circuit Court of Appeals. The United States Supreme Court agreed Lucey was entitled to relief because he was deprived of effective assistance of counsel on appeal and was therefore denied due process. *Evitts v. Lucey,* 469 U.S. at 397, 105 S.Ct. at 837, 83 L.Ed.2d at 831.

In conjunction with its discussion of *Evitts v. Lucey,* the Court of Appeals in *Jiles* reasoned:

> When a procedural rule setting jurisdictional time limits conflicts with sixth amendment rights, the Court of Criminal Appeals has held that "the procedural rule must yield to the superior constitutional right." *Whitmore v. State,* 570 S.W.2d 889, 898 (Tex.Crim.App.1978). Thus, in *Whitmore,* the trial court had a duty to grant a motion for new trial that was filed after the trial court had lost jurisdiction because a vital sixth amendment right would otherwise have been lost. Rules 83 and 2(b) expressly allow the same result for the appellate courts that *Whitmore* requires of the trial courts.

Jiles, 751 S.W.2d at 622.

In this Court's *Jones* case, the defendant argued that *Evitts v. Lucey* authorized the court of appeals to waive the Rule 40(b)(1) defect in the notice of appeal, but we concluded *Evitts v. Lucey* was distinguishable. *Jones,* 796 S.W.2d at 187. We stated that the appellate rule involved in *Evitts v. Lucey* was not jurisdictional, but compliance with Rule 40(b)(1) is necessary for an appellant to avoid statutory restrictions on the right to appeal. *Id.* (citing *Evitts v. Lucey,* 469 U.S. at 389, 105 S.Ct. at 832, 83 L.Ed.2d at 825).

[12] Additionally, this Court revisited *Whitmore* in *Drew.* First, we observed that the Court in *Whitmore* was badly split. *Drew,* 743 S.W.2d at 224. Second, we pointed out that at the time of *Whitmore* the trial court retained jurisdiction until the appellate record was filed in this Court and, under the statute in effect at the time, the trial court could extend the time to file a motion for new trial on a showing of good cause. *Ibid.* Finally, we stated, "Further, and most important, the claimed deprivation of constitutional rights, federal or state, cannot confer jurisdiction upon a court where none exists anymore than parties can by agreement confer jurisdiction upon a court." *Id.* at 225. Therefore, *Evitts v. Lucey* does not lead to the conclusion that the Court of Appeals in the case at hand had jurisdiction. [8]

8 The San Antonio Court of Appeals has also held it could not rely on *Evitts v. Lucey* to allow the defendant to proceed with an appeal when the notice of appeal was filed within the fifteen-day grace period without a timely motion for extension of time. *Charles,* 809 S.W.2d at 576. In doing so, the Court of Appeals commented:

> The concerns expressed by the Supreme Court in *Evitts* are adequately addressed through safeguards contained in our Rules of Appellate Procedure. An indigent appellant may obtain a free statement of facts. Rule 53(j). Appellate courts may inquire into the absence of a statement of facts, rule 53(m), and the absence of an appellant's brief, rule 74(*l*). An appellate court may allow the late filing of a transcript or statement of facts on a showing that otherwise the appellant may be deprived of effective assistance of counsel. Rule 83. In order to provide for any unforeseen non-jurisdictional situation, an appellate court may suspend requirements and provisions of any rule in a particular case in the interest of expediting a decision or for other good cause shown, except as otherwise provided by the rules. Rule 2(b). Indeed, the rules provide for the late filing of a notice of appeal, up to a point. Rule 41(b)(2).

Id. at 576 n. 3.

We further point out that the denial of a meaningful appeal due to ineffective assistance of counsel is a proper ground for habeas corpus relief. See, e.g., *Ex parte Axel,* 757 S.W.2d 369 (Tex.Cr.App.1988). The courts of appeals in *Sanchez, Boulos,* and *Jiles* expressed concerns about delay and judicial economy, and those courts sought to avoid post-conviction relief claims. *Sanchez,* 885 S.W.2d at 445; *Boulos,* 775 S.W.2d at 9; *Jiles,* 751 S.W.2d at 622. Additionally, the El Paso Court of Appeals in *Jones,* although holding it lacked jurisdiction, stated, "Were we writing on a clean slate, we would grant an out-of-time appeal under these facts and consider the case on the merits." *Jones,* 900 S.W.2d at 423. We agree with the observation of the San Antonio Court of Appeals: "Acting in the interest of judicial economy is worthwhile. However, the exclusive post-conviction remedy in final felony convictions in Texas courts is through a writ of habeas corpus pursuant to TEX.CODE CRIM.PROC. art. 11.07. *Ater v. Eighth Court of Appeals,* 802 S.W.2d 241 (Tex.Crim.App.1991)." *Charles,* 809 S.W.2d at 576.

***526** In the present case, because no motion for extension of time was filed within the time set out in Rule 41(b)(2), in conjunction with the notice of appeal, the Court of Appeals correctly concluded it lacked jurisdiction over the appeal. Accordingly, the judgment of the Court of Appeals is affirmed.

CLINTON and OVERSTREET, JJ., concur in the result.

All Citations

918 S.W.2d 519

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112 Tex. 365
Supreme Court of Texas.

LONG et al.
v.
MARTIN.

No. 3715 *

* Rehearing denied March 7, 1923.

|
Jan. 31, 1923.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by M. E. Martin against H. A. Long and others. Judgment for plaintiff was affirmed by Court of Civil Appeals (234 S. W. 91), and defendants bring writ of error. Writ and petition dismissed.

Attorneys and Law Firms

****828** ***365** Bullington, Boone, Humphrey & Hoffman, of Wichita Falls, and W. L. Eason, of Waco, for plaintiffs in error.

***367** Fitzgerald & Hatchett, of Wichita Falls, for defendant in error.

Opinion

GREENWOOD, J.

The Court of Civil Appeals affirmed the judgment of the trial court in this case on the 25th day of May, 1921. and overruled a motion for rehearing on October 12, 1921. On the thirty-first day thereafter, on November 12, 1921, the petition for writ of error was filed by the clerk of the Court of Civil Appeals.

***368** Plaintiffs in error seek to sustain this court's jurisdiction to review the judgment of the Court of Civil Appeals, on a petition filed after the lapse of more than 30 days from the overruling of the motion for rehearing, on the following grounds:

First. That the order overruling the motion for rehearing was not actually entered in the minutes of the Court of Civil Appeals until less than 30 days before November 12, 1921.

Second. That the Governor of Texas, having designated November 11, 1921, as a holiday by a proclamation issued November 8, 1921, it ought to be excluded in computing the 30 days allowed for the filing of the petition for writ of error.

Third. That plaintiffs in error and their counsel used due diligence to file the petition for writ of error within 30 days from the date on which the motion for rehearing was overruled.

Notwithstanding the facts disclose that the order overruling the motion for rehearing was not entered until two or three days after its rendition, and that the Governor designated as a holiday the last day allowed for the filing of the petition

for writ of error, and that counsel for plaintiffs in error used the utmost diligence to file the petition in time, yet we have no jurisdiction to review the judgment of the Court of Civil Appeals.

[1] As repeatedly announced, a judgment of the Court of Civil Appeals is not subject to review through the exercise of the appellate jurisdiction of the Supreme Court, whenever 30 days elapse subsequent to the rendition of such judgment without the actual lodgment of a petition for writ of error with the clerk of the Court of Civil Appeals. Schleicher v. Runge, 90 Tex. 456, 39 S. W. 279; Vinson v. Carter & Bro., 106 Tex. 273, 166 S. W. 363; Henningsmeyer v. Bank, 109 Tex. 116, 195 S. W. 1137, 201 S. W. 662; Flattery v. Miller (Tex. Sup.) 212 S. W. 932.

In the case of Schleicher v. Runge, supra, the parties expressly stipulated in writing that the delay in filing the petition for writ of error was without fault on the part of the applicant, and the defendant in error consented that the petition might be treated as having been filed in due time. It was never-theless determined that the delay was fatal to the exercise of jurisdiction by the Supreme Court.

[2] **[3]** **[4]** The failure of the clerk of the Court of Civil Appeals to enter the order overruling the motion for rehearing for a few days is of no avail to extend the time for presenting the petition for writ of error. That order was rightly entered as of the day when it was pronounced. Rule 65 (142 S. W. xvi) for the Courts of Civil Appeals makes it the clerk's duty to give immediate notice by postal card upon the rendition of a judgment overruling a motion for rehearing, and further provides that even failure to receive the notice shall be no excuse for failure ***369** to take such future action as may be desired in reference to the case 'within the time prescribed by the statutes and rules.'

[5] The holiday cannot be excluded in computing the 30 days for filing the petition. Hanover Fire Ins. Co. v. Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25.

It is therefore ordered that the writ of error and the petition therefor be dismissed for want of jurisdiction.

All Citations

112 Tex. 365, 247 S.W. 827

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307 S.W.3d 299
Supreme Court of Texas.

In re UNITED SERVICES AUTOMOBILE ASSOCIATION, Relator.

No. 07–0871.
|
Argued Dec. 9, 2008.
|
Decided March 26, 2010.
|
Rehearing Denied May 7, 2010.

Synopsis

Background: Former employee brought action against employer under Texas Commission on Human Rights Act (TCHRA) alleging illegal discrimination based on his age. The County Court at Law No. 7, Bexar County, Timothy F. Johnson, J., denied employer's plea to the jurisdiction, and later entered judgment on jury's verdict awarding employee $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney fees, and prejudgment interest. Employer appealed. The San Antonio Court of Appeals, 161 S.W.3d 566, affirmed. Review was granted. The Supreme Court, 215 S.W.3d 400, reversed, concluding that the amount in controversy exceeded limit for jurisdiction in county court at law. After employee refiled his claim in the 150th Judicial District Court, Bexar County, Janet Littlejohn, J., employer filed a plea to the jurisdiction and a motion for summary judgment. The District Court, Bexar County, Gloria Saldana, J., denied the plea and the motion. Employer petitioned for writ of mandamus. The San Antonio Court of Appeals, 2007 WL 3003131, denied the petition. Employer petitioned for writ of mandamus.

Holdings: The Supreme Court, Jefferson, C.J., held that:

[1] two-year period in Texas Commission on Human Rights Act for filing suit is mandatory but not jurisdictional, overruling *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483;

[2] TCHRA's two-year statute of limitations is tolled for those cases falling within the tolling statute's savings provision for refiling of actions originally filed in the wrong court;

[3] as a matter of first impression, once an adverse party has moved for relief under the "intentional disregard" provision of the tolling statute, the nonmovant has the burden of producing information showing that he did not intentionally disregard proper jurisdiction when filing the case;

[4] former employee acted with intentional disregard of proper jurisdiction in filing the action in a county court at law; and

[5] extraordinary circumstances warranted mandamus relief.

Writ conditionally granted.

Attorneys and Law Firms

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Charles C. High Jr., Kemp Smith P.C., El Paso, TX, for Amicus Curiae Texas Association of Business.

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Daniel L. Geyser, Asst. Solicitor General, James C. Ho, Solicitor General of Texas, David S. Morales, Office of the Attorney General of Texas, Clarence Andrew Weber, First Assistant Attorney General, Greg W. Abbott, Attorney General of Texas, Austin, TX, for Amicus Curiae State of Texas.

Opinion

Chief Justice JEFFERSON delivered the opinion of the Court.

[1] [2] [3] Texas has some 3,241 trial courts [1] within its 268,580 square miles. [2] Jurisdiction is limited in many of the courts; it is general in others. *Compare* TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), *with* ***303** *id.* § 24.007–.008 (outlining district court jurisdiction); *Thomas v. Long,* 207 S.W.3d 334, 340 (Tex.2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts, [3] although that number does not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS *passim* (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*; [4] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977). Statutory county courts (of which county courts at law are one type) [5] usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not, *see, e.g.,* TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942(a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew,* 178 S.W.3d 747, 756 (Tex.2005) (Hecht, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same courtroom presides over two distinct courts. *See, e.g., Sultan,* 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable); *see also id.* at 754–55 (Hecht, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases). [6] Consider the five-step process involved in determining the jurisdiction of any particular trial court:

1 Texas Courts Online Home Page, *http://www.courts.state.tx.us/* (all Internet materials as visited March 24, 2010 and copy available in Clerk of Court's file). This figure includes municipal courts, whose jurisdiction is generally limited to criminal matters, although they may also hear certain civil cases involving dangerous dogs. *See* TEX. HEALTH & SAFETY CODE § 822.0421. It also includes statutory probate courts.

2 TEXAS ALMANAC 2010–1160 (Elizabeth Cruce Alvarez ed., Texas State Historical Association 65th ed. 2010), *available at http://www. texasalmanac.com/environment/*.

3 Those courts include district courts, criminal district courts, constitutional county courts, statutory county courts, justice of the peace courts, small claims courts, statutory probate courts, and municipal courts. They also include family district courts which, although they are district courts of general jurisdiction, have primary responsibility for handling family law matters. OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT–MATTER JURISDICTION OF THE COURTS 1, 3–18 (2008), *available at http://www.courts.state.tx.us/pubs/AR2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*.

4 In a page-and-a-half, this report explains the subject matter jurisdiction of our appellate courts. OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1–2. The remainder of the eighteen-page, dual column, single-spaced document identifies, in painstaking detail, the various jurisdictional schemes governing our trial courts. *Id.* at 3–18.

5 TEX. GOV'T CODE § 21.009(2) (" 'Statutory county court' means a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code.").

6 Section 28.053 of the Government Code, at issue in *Sultan,* was recently amended to allow appeals to the court of appeals from de novo trials in county court on claims originating in small claims court. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, section 8, 2009 Tex. Gen. Laws 4274, 4274.

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular ***304** court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).
> OFFICE OF COURT ADMINISTRATION, SUBJECT–MATTER JURISDICTION OF THE COURTS at 1.

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; *see also Continental Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 449 (Tex.1996) (voicing "concern[ ] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan,* 178 S.W.3d at 753 (Hecht, J., dissenting) (noting that Texas courts' "jurisdictional scheme ... has gone from elaborate ... to Byzantine"); *Camacho v. Samaniego,* 831 S.W.2d 804, 807 n. 4, 811 (Tex.1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), *available at http://www. courts.state.tx.us/tjc/TJC Reports/Final Report.pdf* (observing that " 'the Texas trial court system, complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society' " (quoting CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS—INTO THE TWENTY–FIRST CENTURY 17 (1993))).

Proposals to modernize this antiquated jurisdictional patchwork have failed,[7] but the Legislature has attempted to address one of its most worrisome aspects. In 1931, the Legislature passed "[a]n act to extend the period of limitation of any action in the wrong court." Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064. This statute tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. TEX. CIV. PRAC. & REM.CODE § 16.064(a). The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." *Id.* § 16.064(b). We must decide today whether the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County. Because we conclude that he did, in a way that cannot be cured by ordinary appellate review, we conditionally grant relief.

7 *See, e.g.,* Tex. S.B. 1204, 80th Leg., R.S. (2007) ("AN ACT relating to the reorganization and administration of, and procedures relating to, courts in this state, including procedures for appeals."); Tex. H.B. 2906, 80th Leg., R.S. (2007) (same).

I. Background

James Steven Brite sued USAA, his former employer, alleging that it had illegally discriminated against him based on his age, violating the Texas Commission on Human Rights Act (TCHRA). *See generally United Servs. Auto. Ass'n v. Brite,* 215 S.W.3d 400 (Tex.2007) ("*Brite I* "). He filed suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive ***305** damages and penalties, and attorney's fees and costs, as alleged on the face of the petition...." TEX. GOV'T CODE § 25.0003(c)(1). Brite asserted in his original petition that his damages exceeded the $500 statutory minimum, but he did not plead that his damages were below the $100,000 maximum. *Brite I,* 215 S.W.3d at 401. He pleaded that "[i]n all reasonable probability, [his] loss of income and benefits will continue into the future, if not for the balance of [his] natural life" and sought "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay), "the present value of unaccrued wage payments" (front pay), punitive damages, and attorney's fees. *Id.*

Before limitations expired, USAA filed a plea to the jurisdiction, contending that Brite's damage claims exceeded the $100,000 jurisdictional limit of the statutory county court, excluding interest, statutory or punitive damages, and attorney's fees and costs. USAA argued that because Brite's annual salary was almost $74,000 when he was terminated, his front pay and back pay allegations alone exceeded the county court's jurisdictional maximum. Brite opposed, and the trial court twice denied, USAA's jurisdictional plea. Shortly thereafter, Brite amended his petition to seek damages of $1.6 million, and subsequently claimed in discovery responses that " 'his lost wages and benefits in the future, until age 65, total approximately $1,000,000.00.' " *Brite I,* 215 S.W.3d at 401 (quoting discovery responses). After a jury trial, the trial court awarded Brite $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest. *Id.*

A divided court of appeals affirmed the trial court's judgment. *See United Servs. Auto. Ass'n v. Brite,* 161 S.W.3d 566, 579 (Tex.App.-San Antonio 2005, pet. granted). We reversed, concluding that the amount in controversy at the time Brite filed suit exceeded $100,000, depriving the county court at law of jurisdiction over the matter. *Brite I,* 215 S.W.3d at 402. We dismissed the underlying suit for want of jurisdiction. *Id.* at 403.

Within sixty days of our judgment dismissing the county court case, Brite refiled his claim in Bexar County district court. USAA filed a plea to the jurisdiction and moved for summary judgment asserting, among other things, that the trial court lacked subject matter jurisdiction because Brite failed to file suit within TCHRA's two-year time limit; that the tolling provision in section 16.064 of the Civil Practice and Remedies Code did not apply to TCHRA claims; and that even if it did, Brite's original suit was filed with "intentional disregard of proper jurisdiction," depriving him of that provision's protection. The trial court denied the plea and motion. The court of appeals denied relief, concluding that USAA had not established that its appellate remedy was inadequate. 2007 WL 3003131, at *1, 2007 Tex.App. LEXIS 8206, at *1–*2. USAA now petitions this Court for mandamus relief.

II. Is TCHRA's two-year period for filing suit jurisdictional?

USAA argues that TCHRA's two year deadline for filing suit is jurisdictional, precluding application of the tolling statute. But " '[j]urisdiction,' " as the United States Supreme Court has observed, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)). Nineteen years ago, in a footnote, we observed that the time period for filing a TCHRA lawsuit was "mandatory and jurisdictional." *Schroeder v. Texas Iron* ***306** *Works, Inc.,* 813 S.W.2d 483, 487 n. 10 (1991).[8] In support, we cited *Green v. Aluminum Co. of America,* 760 S.W.2d 378, 380 (Tex.App.-Austin 1988, no writ), which in turn relied on our decision in *Mingus v. Wadley,* 115 Tex. 551, 285 S.W.

1084 (1926). *Mingus* held that the requirements of the Workmen's Compensation Act were jurisdictional, and that "[t]he general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Mingus,* 285 S.W. at 1087.

8 In 1993, the limitations period was changed from one to two years. Act of May 14, 1993, 73rd Leg. R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291 (amending TEX.REV.CIV. STAT. art. 5221k, § 7.01(a)) (now codified at TEX. LAB.CODE § 21.256).

[4] **[5]** But we, like the U.S. Supreme Court,[9] have recognized that our sometimes intemperate use of the term "jurisdictional" has caused problems. Characterizing a statutory requirement as jurisdictional means that the trial court does not have-and never had-power to decide the case. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser,* 140 S.W.3d 351, 359 (Tex.2004) ("The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law."). Thus, "[n]ot only *may* an issue of subject matter jurisdiction 'be raised for the first time on appeal by the parties or by the court', a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties questioned it." *Id.* at 358 (footnote omitted).

9 *See, e.g., Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (noting that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term"); *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (observing that "[c]ourts, including this Court, it is true, have been less than meticulous" in their use of the term).

[6] In *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 76 (Tex.2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b. at 118 (1982)), we observed that " '[t]he classification of a matter as one of jurisdiction ... opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.' " Thus, "[a]lthough *Mingus* represented the dominant approach when it was decided, 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.' " *Dubai,* 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTSS § 11 cmt. e. at 113). We overruled *Mingus* "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional." *Id.* Instead, we held that " '[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.' " *Id.* at 76–77 (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)).

Since *Dubai,* we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." *City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex.2009). We have held that the Payday Law's 180–day period for filing a wage claim, though "a mandatory condition to pursuing the administrative cause ***307** of action," was "not ... a bar to ... [the] exercise of jurisdiction"; that the Tort Claims Act's notice provision was "a complete defense to suit but [did] not deprive the court of subject matter jurisdiction"; that the failure to comply with dismissal dates in parental rights termination cases did not deprive trial courts of jurisdiction; that the noncompliance with a mandatory notice requirement in the Fire Fighter and Police Officer Civil Service Act did not divest a hearing examiner of jurisdiction over an appeal; and that the statutory requirement that a condemnor and a property owner be "unable to agree" on damages was not jurisdictional but that a failure to satisfy the requirement would result in abatement. *City of DeSoto,* 288 S.W.3d at 398; *In re Dep't of Family & Protective Servs.,* 273 S.W.3d 637, 644 (Tex.2009); *Igal v. Brightstar Info. Tech. Group, Inc.,* 250 S.W.3d 78, 86 (Tex.2008); *Loutzenhiser,* 140 S.W.3d at 354; *Hubenak v. San Jacinto Gas Transmission Co.,* 141 S.W.3d 172, 191 (Tex.2004).

[7] **[8]** **[9]** We have been careful to emphasize, however, that a statutory requirement commanding action, even if not jurisdictional, remains mandatory. *Loutzenhiser,* 140 S.W.3d at 359 ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). And some requirements, such as a timely notice of appeal, remain jurisdictional. *See In the Interest of K.A.F.,* 160 S.W.3d 923, 928 (Tex.2005); *accord Bowles v. Russell,* 551 U.S. 205, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)

(concluding that party's "failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction"). Moreover, when elements of a statutory claim involve "the jurisdictional inquiry of sovereign immunity from suit," those elements can be relevant to both jurisdiction and liability. *State v. Lueck,* 290 S.W.3d 876, 883 (Tex.2009).

But we have never revisited our statement in *Schroeder,* even though courts have questioned whether *Schroeder* remains the law after *Dubai. See, e.g., Ramirez v. DRC Distribs., Ltd.,* 216 S.W.3d 917, 921 n. 8 (Tex.App.-Corpus Christi 2007, pet. denied) (noting that "[a]lthough the Texas Supreme Court held in *Schroeder v. Texas Iron Works* ... that exhaustion of the TCHRA's administrative remedies is mandatory and jurisdictional, several courts of appeals have questioned whether its decision in *Dubai Petroleum Co. v. Kazi* indicated a retreat from this position") (collecting cases). Most recently, although we observed that "in the past we have described a statutory time limitation in the Commission on Human Rights Act as 'mandatory and jurisdictional,' " we stated only that "those cases predate *Dubai* and dealt with a different statutory scheme than presented here." *Igal,* 250 S.W.3d at 83 n. 5 (quoting *Schroeder,* 813 S.W.2d at 486).

[10] **[11]** Today we reexamine whether section 21.256's time limit is jurisdictional. We begin with the statutory language, presuming "that the Legislature did not intend to make the [provision] jurisdictional; a presumption overcome only by clear legislative intent to the contrary." *City of DeSoto,* 288 S.W.3d at 394. The statute provides that an action "may not be brought ... later than the second anniversary of the date the complaint relating to the action is filed." TEX. LAB. CODE § 21.256. The Legislature titled the provision "Statute of Limitations," *id.,* and while such a heading cannot limit or expand the statute's meaning, TEX. GOV'T CODE § 311.024, the heading "gives some indication of the Legislature's intent," ***308** *Loutzenhiser,* 140 S.W.3d at 361; *see also Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (noting that legislative history indicated that Title VII filing deadline was intended to operate as a statute of limitations rather than jurisdictional requirement). We too have characterized the deadline as a statute of limitations, calling it a "limitation period" and noting that "[t]he statute of limitations for such action runs from the date of filing the complaint with the Commission." *Schroeder,* 813 S.W.2d at 487 n. 10. In *Schroeder,* a case that dealt primarily with "whether exhaustion of administrative remedies is a prerequisite to bringing a civil action for age discrimination in employment," the legal character of the section 21.256 deadline was not at issue. *Schroeder,* 813 S.W.2d at 484; *accord Zipes,* 455 U.S. at 395, 102 S.Ct. 1127 (stating that "[a]lthough our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute"). While the phrase "may not be brought" makes the provision mandatory, *see* TEX. GOV'T CODE § 311.016(5), the statute does not indicate that the provision is jurisdictional or that the consequence of noncompliance is dismissal. *City of DeSoto,* 288 S.W.3d at 396 (observing that statute did not contain explicit language indicating that requirement was jurisdictional nor did it provide a consequence for noncompliance); *accord Igal,* 250 S.W.3d at 84 (noting that statutory language did not indicate that statute was intended to address jurisdiction, as it merely "establish[ed] a procedural bar similar to a statute of limitations and does not prescribe the boundaries of jurisdiction"); *see also Zipes,* 455 U.S. at 394, 102 S.Ct. 1127 (noting that statutory time period for filing EEOC claim under Title VII "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts").

[12] **[13]** Our procedural rules, which have the force and effect of statutes, and our cases classify limitations as an affirmative defense. TEX.R. CIV. P. 94; *In re City of Georgetown,* 53 S.W.3d 328, 332 (Tex.2001); *see also Day v. McDonough,* 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) ("A statute of limitations defense ... is not 'jurisdictional,' hence courts are under no obligation to raise the time bar sua sponte."). While the Legislature could make the Labor Code filing deadlines jurisdictional, as it has in cases involving statutory requirements relating to governmental entities, *see* TEX. GOV'T CODE § 311.034 (providing that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity"), it has not done so here.

[14] We also consider the statute's purpose. *See Loutzenhiser,* 140 S.W.3d at 360; *Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 494 (Tex.2001). The TCHRA was enacted to "provide for the execution of the policies of Title VII of the

Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). It is "modeled after federal civil rights law," *NME Hosps., Inc. v. Rennels,* 994 S.W.2d 142, 144 (Tex.1999), and "[o]ne of the primary goals of the statute is to coordinate state law with federal law in the area of employment discrimination," *Vielma v. Eureka Co.,* 218 F.3d 458, 462 (5th Cir.2000). Thus, "analogous federal statutes and the cases interpreting them guide our reading of the TCHRA." *Quantum Chem. Corp. v. Toennies,* 47 S.W.3d 473, 476 (Tex.2001)

The United States Supreme Court has consistently construed Title VII's requirements as mandatory but not jurisdictional. ***309** *See Arbaugh v. Y & H Corp.,* 546 U.S. 500, 516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Zipes,* 455 U.S. at 393, 102 S.Ct. 1127; *see also Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (holding that equitable tolling applied to Title VII suit against federal employer); *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 349 n. 3, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (rejecting argument that time period was jurisdictional and holding that filing of class action tolled limitations under Title VII). In *Zipes,* 455 U.S. at 393, 102 S.Ct. 1127, the Court held that the timely filing of an employment discrimination complaint with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit under Title VII, a conclusion compelled by "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [the Court's] cases." In a later case, the Court decided that Title VII's 15–employee minimum was an element of the claim, rather than a jurisdictional prerequisite. *Arbaugh,* 546 U.S. at 516, 126 S.Ct. 1235. In reaching that conclusion, the Court adopted a "readily administrable bright line" rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515–16, 126 S.Ct. 1235 (footnote omitted). This is not unlike our own post-Dubai approach: we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." City of DeSoto, 288 S.W.3d at 393.

Although the Supreme Court has not addressed whether the time period for filing suit under Title VII is jurisdictional, every federal circuit that has considered the issue has held that it is not. *See Seitzinger v. Reading Hosp. & Med. Ctr.,* 165 F.3d 236, 239–40 (3d Cir.1999); *Smith–Haynie v. D.C.,* 155 F.3d 575, 579 (D.C.Cir.1998); *Truitt v. County of Wayne,* 148 F.3d 644, 646 (6th Cir.1998) ("Although *Zipes* dealt only with the time limit for filing charges of discrimination with the EEOC, its logic has been extended to the ninety-day time limit for filing suit in the district court after receipt of a right-to-sue letter.") (citations omitted); *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1161 (11th Cir.1993); *Scheerer v. Rose State Coll.,* 950 F.2d 661, 665 (10th Cir.1991); *Hill v. John Chezik Imps.,* 869 F.2d 1122, 1124 (8th Cir.1989); *Valenzuela v. Kraft, Inc.,* 801 F.2d 1170, 1174 (9th Cir.1986) (concluding that Supreme Court precedent "firmly establish[es] that the 90–day filing period is a statute of limitations subject to equitable tolling in appropriate circumstances"); *Espinoza v. Mo. Pac. R.R. Co.,* 754 F.2d 1247, 1248 n. 1 (5th Cir.1985); *Brown v. J.I. Case Co.,* 756 F.2d 48, 50 (7th Cir.1985); *Johnson v. Al Tech Specialties Steel Corp.,* 731 F.2d 143, 146 (2d Cir.1984) (noting that "[t]he Supreme Court ... has evinced a policy of treating Title VII time limits not as jurisdictional predicates, but as limitations periods subject to equitable tolling"); *see also Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 151–52, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (holding that plaintiff had not shown herself entitled to equitable tolling of filing deadline, but not rejecting equitable tolling as inapplicable to that deadline).

[15] We also consider the consequences that result from each interpretation. *Helena Chem.,* 47 S.W.3d at 495. A judgment is void if rendered by a court without subject matter jurisdiction. *Mapco,* ***310** *Inc. v. Forrest,* 795 S.W.2d 700, 703 (Tex.1990). If TCHRA's limitations period were jurisdictional, trial courts that have denied summary judgment motions based on the failure to satisfy that requirement would forever have their judgments open to reconsideration. Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm the judgments. *See, e.g., Vu v. ExxonMobil Corp.,* 98 S.W.3d 318, 321 (Tex.App.–Houston [1st

Dist.] 2003, pet. denied) (affirming summary judgment because TCHRA suit not filed until more than two years after charge of discrimination); *see also Zipes,* 455 U.S. at 397, 102 S.Ct. 1127 (observing that, if the timely filing requirement were jurisdictional, "the District Courts in *Franks* [*v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976),] and *Albemarle Paper Co. v. Moody,* 422 U.S. 405 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority," but "[w]e did not so hold"). It is preferable to "avoid a result that leaves the decisions and judgments of [a tribunal] in limbo and subject to future attack, unless that was the Legislature's clear intent." *City of DeSoto,* 288 S.W.3d at 394.

[16] In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.

II. Does the tolling statute, Tex. Civ. Prac. & Rem.Code § 16.064, apply to a TCHRA claim?

In pertinent part, section 16.064 provides:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM.CODE § 16.064(a).

USAA contends that, even if the limitations period is not jurisdictional, the tolling statute does not apply, citing a string of cases holding generally that section 16.064 does not apply to special statutory proceedings. *See, e.g., Heart Hosp. IV, L.P. v. King,* 116 S.W.3d 831, 836 (Tex.App.-Austin 2003, pet. denied); *Argonaut Sw. Ins. Co. v. Walker,* 64 S.W.3d 654, 657 (Tex.App.-Texarkana 2001, pet. denied); *Gutierrez v. Lee,* 812 S.W.2d 388, 392 (Tex.App.-Austin 1991, writ denied); *Castillo v. Allied Ins. Co.,* 537 S.W.2d 486, 487 (Tex.Civ.App.-Amarillo 1976, writ ref'd n.r.e.); *Pan Am. Fire & Cas. Co. v. Rowlett,* 479 S.W.2d 782, 783 (Tex.Civ.App.-Eastland 1972, writ ref'd n.r.e.); *Braden v. Transp. Ins. Co.,* 307 S.W.2d 655, 656 (Tex.Civ.App.-Dallas 1957, no writ); *Leadon v. Truck Ins. Exch.,* 253 S.W.2d 903, 905 (Tex.Civ.App.-Galveston 1952, no writ); *Bear v. Donna Indep. School Dist.,* 85 S.W.2d 797, 799 (Tex.Civ.App.-San Antonio 1935, writ dism'd w.o.j.).

But there are at least three problems with this approach. First, we have never ***311** endorsed the theory that section 16.064 is inapplicable to causes of action created by statute. All of those decisions were from our courts of appeals, and most predate *Dubai.* Second, those cases are based on the *Mingus* rationale, overruled in *Dubai,* that a "dichotomy [exists] between common-law and statutory actions," with mandatory statutory provisions also being jurisdictional. *Dubai,* 12 S.W.3d at 76. Post-*Dubai,* we have rejected such a distinction, adopting instead "an approach to jurisdictional questions designed to strengthen finality and reduce the possibility of delayed attacks on judgments, *regardless of whether the claim was anchored in common law or was a specially-created statutory action." City of DeSoto,* 288 S.W.3d at 394 (emphasis added).

[17] **[18]** Third, the argument conflates equitable tolling with statutory tolling. The former is a court-created doctrine, *see e.g., Taliani v. Chrans,* 189 F.3d 597, 597 (7th Cir.1999) (noting that "equitable tolling [is] the judge-made doctrine ... that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time"), that may not apply if a statutory requirement is deemed jurisdictional, *see Zipes,* 455 U.S. at 393, 102 S.Ct. 1127 (holding that "filing a timely charge of discrimination

with the EEOC is not a jurisdictional prerequisite to suit, ... but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). The latter is a legislative dictate that limitations be tolled for "*any* action" filed in the wrong court. *See* Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM.CODE § 16.064 (emphasis added).

[19] Here we must construe two statutes—one that creates a limitations period and a second that tolls it. There is no reason, absent clear legislative intent, that we should not harmonize the two. *See La Sara Grain Co. v. First Nat'l Bank,* 673 S.W.2d 558, 565 (Tex.1984) ("Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible."). Had the Legislature wanted to prohibit statutory tolling, it could have done so, but TCHRA is devoid of any such indication. *Cf.* TEX. CIV. PRAC. & REM.CODE § 74.251(a) (creating limitations period that applies "[n]otwithstanding any other law"); *Liggett v. Blocher,* 849 S.W.2d 846, 850 (Tex.App.-Houston [1st Dist.] 1993, no writ) (holding that "notwithstanding any other law" meant that statutory tolling provision did not apply to health care liability claims). Thus, absent language indicating that section 16.064 was not intended to apply to TCHRA claims, the statute of limitations is tolled for those cases falling within section 16.064's savings provision.

IV. Was Brite's first suit filed with "intentional disregard of proper jurisdiction"?

Section 16.064 will not save a later-filed claim if the first action was filed "with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). USAA contends that is what happened here, while Brite asserts that a jury must decide whether he intended to evade jurisdiction, given that he vigorously denies doing so. We agree with USAA.

Noting "[t]he importance of simplifying Court procedure," the Texas Judicial Council in 1930 drafted the tolling statute. *See* SECOND ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT, Bill No. 6, at 10–12 (1930). The Legislature made a single change—extending the refiling period from thirty to sixty days—and passed the bill. *See* Act approved Apr. 27, 1931, 42d ***312** Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064; *see also Burford v. Sun Oil Co.,* 186 S.W.2d 306, 310 (Tex.Civ.App.-Austin 1944, writ ref'd w.o.m.). In its recommendation accompanying the bill, the Council noted

> [t]hat the wrong court is frequently and in good faith chosen by capable lawyers, [as] evidenced by the hundreds of cases cited in the annotations upon the subject given in Vernon's Annotated Texas Statutes,—9 pages upon Justice Court, 17 pages upon county court and 29 pages upon district court jurisdiction.

SECOND ANNUAL REPORT, at 11. The Council explained that the Texas bill was based on a Kentucky statute that tolled limitations for actions "commenced in due time and in good faith" in a court that lacked jurisdiction. *Id.* (citing CARROLL'S KY. STAT. § 2545 (1922)). The Council stated that its bill was "like that of Kentucky in substance, but ... a definition of 'good faith' [is] supplied." *Id.* at 11–12. It is that definition that is at issue here.

[20] As we noted in *Brite I,* "[t]he jurisdictional statute for county courts at law values the matter in controversy on the amount of damages 'alleged' by the plaintiff...." *Brite I,* 215 S.W.3d at 402–03 (quoting TEX. GOV'T CODE § 25.0003(c)(1)). Here, Brite's petition omitted the statement required by our rules—that the "damages sought are within the jurisdictional limits of the court," TEX.R. CIV. P. 47(b)—and instead pleaded only that his damages exceeded $500. Brite has never contended that he was unaware of or confused about the county court's jurisdictional limitation. *See, e.g., Clary Corp. v. Smith,* 949 S.W.2d 452, 461 (Tex.App.-Fort Worth 1997, pet. denied) (noting that 16.064 did not apply because "there [was] no evidence of mistake here," as plaintiffs "have neither alleged nor presented evidence that they were unaware of the trial court's amount in controversy limits"). While such confusion would be understandable, as other statutory county courts (even those in one county adjacent to Bexar County) [10] have no such restriction, he instead argued that "the amount in controversy should not be calculated by the damages originally sued for, but instead

by the amount of damages that, more likely than not, the plaintiff would recover." *Brite I,* 215 S.W.3d at 402. We rejected that argument, concluding that "[t]he amount in controversy in this case exceeded $100,000 at the time Brite filed suit." *Id.* at 403.

10 *See* TEX. GOV'T CODE § 25.1322(a) (providing that county courts at law in Kendall County have concurrent jurisdiction with the district court); *see also* TEXAS ALMANAC 2010–11, at 221, 306.

The parties disagree about the proper standard for intentional disregard under the tolling statute, which requires that USAA "show[ ] in abatement that the first filing was made with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM.CODE § 16.064(b). Brite contends that intent is always a fact issue, inappropriate for resolution on summary judgment, while USAA asserts it has met its burden through circumstantial evidence of Brite's intent and that Brite is charged with knowledge of the law. We have never before addressed this issue.

[21] We agree, in part, with USAA. Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it. *Cf.* ***313** *Brown v. Shores,* 77 S.W.3d 884, 889 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (Brister, J., concurring) (noting that, because "diligent-service question focuses almost entirely on the efforts and thoughts of plaintiff's counsel, so the initial burden of presenting evidence should rest there, too"; "[o]therwise, every one of these numerous cases will begin with the defendant sending a notice to depose plaintiff's counsel and a subpoena for all files").

[22] We disagree, however, that a plaintiff's mistake about the court's jurisdiction would never satisfy the requirement. Section 16.064's intent standard is similar to that required for setting aside a default judgment, *see Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (requiring new trial if defendant proves three elements, the first of which is that default was neither intentional nor due to conscious indifference), and we have held that a mistake of law may be a sufficient excuse, *Bank One, Tex., N.A. v. Moody,* 830 S.W.2d 81, 84 (Tex.1992). Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts. *See* SECOND ANNUAL REPORT, at 11; *see also* CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS–INTO THE TWENTY–FIRST CENTURY, at 17 (1993) ("No one person understands or can hope to understand all the nuances and intricacies of Texas' thousands of trial courts.").

[23] But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court—which is what happened here. *Hotvedt v. Schlumberger, Ltd. (N.V.),* 942 F.2d 294, 297 (5th Cir.1991) (refusing to apply section 16.064 because "[i]t is clear ... that errors in [an attorney's] tactical decisions were not meant to be remedied by the savings statute"); *Clary,* 949 S.W.2d at 461 (holding that "[s]ection 16.064 was not intended to remedy ... tactical decisions"); *see also Brite I,* 161 S.W.3d at 586 (Duncan, J., dissenting) (noting that "the record, taken as a whole, establishes that Brite's trial attorney filed the Original Petition with full knowledge that Brite sought far more than $100,000 in actual damages and purposefully drafted the Original Petition to conceal that fact by omitting the statement required by Rule 47(b)"). Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two year statute, is therefore barred.

V. Is USAA entitled to mandamus relief?

[24] Finally, we must decide whether mandamus relief is appropriate. Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that—rather than categorical determinations—"the adequacy of an appeal depends on the facts involved in each case." *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 469 (Tex.2008); *In re The Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136–37 (Tex.2004).

In *CSR Ltd. v. Link,* 925 S.W.2d 591, 596–97 (Tex.1996), we conditionally granted mandamus relief ordering the trial court to grant CSR's special appearance in a toxic tort case. We held that "extraordinary circumstances" (namely the enormous number of potential claimants and the most efficient use of the state's judicial resources) warranted extraordinary relief, even though it was typically unavailable for the denial of a special appearance. ***314** *CSR,* 925 S.W.2d at 596; *see also Canadian Helicopters Ltd. v. Wittig,* 876 S.W.2d 304, 308–09 (Tex.1994).

[25] **[26]** And although "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," that rule is based in part on the fact that "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice"—a justification not applicable here. *In re McAllen Med. Ctr.,* 275 S.W.3d at 465–66. USAA has already endured one trial in a forum that lacked jurisdiction (and then a subsequent appeal to the court of appeals and this Court) and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not "[t]he most efficient use of the state's judicial resources." *CSR,* 925 S.W.2d at 596; *cf. In re McAllen Med. Ctr.,* 275 S.W.3d at 466. Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[ ] by a too-strict application of our own procedural devices." *In re McAllen Med. Ctr.,* 275 S.W.3d at 467.

Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment. We are confident the trial court will comply, and our writ will issue only if it does not.

Justice JOHNSON did not participate in the decision.

All Citations

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160 S.W.3d 923
Supreme Court of Texas.

In the Interest of K.A.F., a child.

No. 04–0493.
|
Argued Feb. 16, 2005.
|
Decided April 8, 2005.
|
Rehearing Denied May 13, 2005.

Synopsis

Background: Father petitioned for involuntary termination of mother's parental rights. The 279th District Court, Jefferson County, Tom Mulvaney, J., granted petition. Following denial of her motion for new trial or to modify judgment, mother appealed. The Beaumont Court of Appeals dismissed appeal for want of jurisdiction, and mother petitioned for review.

Holdings: The Supreme Court, O'Neill, J., granted petition and held that:

[1] mother's timely filed motion to modify judgment did not extend deadline for filing notice of appeal;

[2] mother's motion for new trial did not amount to bona fide attempt to invoke jurisdiction of appellate court; and

[3] mother waived its consideration of her constitutional claims.

Affirmed.

Attorneys and Law Firms

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***924** Ronnie Jo Cohee, Richard J. Clarkson, Beaumont, for respondent Louis Faucheaux.

Rod J. Paasch, Nederland, for other interested party K.A.F.

Opinion

Justice O'NEILL delivered the opinion of the Court.

In this case, we must decide whether the rules of appellate procedure permit post-judgment motions to extend the appellate deadline for filing an accelerated appeal. We hold that they do not. We further hold that filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction. Accordingly, we affirm the court of appeals' judgment.

I

Louis Faucheaux petitioned the trial court to involuntarily terminate Susan Carroll's [1] parental rights to their daughter, K.A.F. The jury found that Carroll's rights should be terminated, and the trial court signed a final order of termination on November 3, 2003. On November 10, 2003, Carroll filed a "Motion for New Trial: Alternatively, Motion to Modify the Judgment," which the trial court denied a week later. Carroll filed a notice of appeal on January 16, 2004, seventy-four days after the trial court signed its final order.

1 In the trial court and court of appeals, Ms. Carroll was referred to as Susan Carroll Capps. In her filings in this Court, she states that she is now known as Susan Carroll; we will refer to her accordingly.

The court of appeals dismissed the appeal for want of jurisdiction, holding that, because Carroll's notice of appeal was filed more than twenty days after the judgment was signed, the notice was untimely under Texas Rule of Appellate Procedure 26.1(b), which governs accelerated appeals and applies to parental rights termination cases. 221 S.W.3d 78, ——, 2004 WL 527024, *1. We granted Carroll's petition for review to determine whether the court of appeals' dismissal was proper.

II

Texas Rule of Appellate Procedure 26.1 sets out the time to perfect an appeal in civil cases:

RULE 26. TIME TO PERFECT APPEAL

26.1. Civil Cases

The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

Tex.R.App. P. 26.1. With this rule in place, the Legislature enacted ***925** section 109.002 of the Family Code, which provides in pertinent part:

> An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The procedures

> for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.

Tex. Fam.Code § 109.002(a). Thus, rule 26.1(b) applies to an appeal in a parental rights termination case and requires that the notice of appeal be filed within twenty days after a judgment or order is signed. Tex.R.App. P. 26.1(b).

Carroll argues, however, that although rule 26.1(b) governs accelerated appeals and sets a twenty-day deadline, rule 26.1(a) should operate to extend the filing deadline to ninety days, even in an accelerated appeal, when a timely motion to modify the judgment is filed. To support her interpretation, Carroll cites rules 28.1 and 28.2, which provide that appeals from interlocutory orders and quo warranto proceedings are accelerated and that "[f]iling a motion for new trial will not extend the time to perfect the appeal." Tex.R.App. P. 28.1, 28.2. From this language, Carroll infers that filing one of the other post-judgment motions listed in rule 26.1(a), like a motion to modify the judgment, *will* extend the time to perfect an appeal from those two types of judgments. Carroll then argues that a similar rule should apply to other types of accelerated appeals and that her timely filed motion to modify the judgment thus extended the appellate deadline to ninety days.

[1] We find this argument unpersuasive for several reasons. First, the language of rule 26.1(b) is clear and contains no exceptions to the twenty-day deadline. Second, rules 28.1 and 28.2 specifically apply only to interlocutory orders and quo warranto proceedings, respectively. Finally, as discussed below, before the procedural rules were amended in 1997, it was clear that there was no exception to the accelerated-appeal deadline, and we find no indication that such a major change was intended.

Prior to 1997, the deadlines for perfecting ordinary and accelerated appeals were governed by different rules. Rule 41, governing ordinary appeals, provided:

RULE 41. ORDINARY APPEAL—WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

Former Tex.R.App. P. 41(a)(1) (1986, amended 1997). Despite the rule's specific reference to motions for new trial and requests for findings of fact and conclusions of law, the courts of appeals were almost entirely uniform in holding that *any* motion requesting a substantive change in the judgment would operate to extend the appellate timetable. *Ramirez v. Williams Bros. Constr. Co.,* 870 S.W.2d 551, 552 (Tex.App.-Houston [1st Dist.] 1993, no writ) (per curiam) (citing *U.S. Fire Ins. Co. v. State,* 843 S.W.2d 283, 284 (Tex.App.-Austin 1992, writ denied), *Miller Brewing Co. v. Villarreal,* 822 S.W.2d 177, 179 (Tex.App.-San Antonio 1991), *rev'd on other grounds,* 829 S.W.2d 770 (Tex.1992), *Home Owners Funding Corp. v. Scheppler,* 815 S.W.2d 884, 887 (Tex.App.-Corpus Christi 1991, no writ), and *Brazos* ***926** *Elec. Power Coop., Inc. v. Callejo,* 734 S.W.2d 126, 129 (Tex.App.-Dallas 1987, no writ)). *Contra First Freeport Nat'l Bank v. Brazoswood Nat'l Bank,* 712 S.W.2d 168, 170 (Tex.App.-Houston [14th Dist.] 1986, no writ).

Rule 42, which governed accelerated appeals, provided:

RULE 42. ACCELERATED APPEALS IN CIVIL CASES

(a) Mandatory Acceleration.

> (1) Appeals from interlocutory orders (when allowed by law) shall be accelerated. In appeals from interlocutory orders, no motion for new trial shall be filed....
>
> (2) Appeals in quo warranto proceedings shall be accelerated. In quo warranto, the filing of a motion for new trial shall not extend the time for perfecting the appeal....
>
> (3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed....

Former Tex.R.App. P. 42(a) (1986, amended 1997). The pre–1997 rules thus provided that, while certain post-judgment motions would extend the appellate deadlines in ordinary appeals, such motions, to the extent they were permitted to be filed at all, did not affect the twenty-day deadline for accelerated appeals.

In 1997, the rules were amended. Former rule 41 is now rule 26, and former rule 42, with the exception of the deadlines to perfect the appeals, is now rule 28. The comments to the amended rules help clarify what substantive changes were intended. The rule 26 (appellate deadlines) comment notes simply:

> This is former Rule 41. All times for perfecting appeal in civil cases—including the time for perfecting a restricted appeal—are stated. An extension of time is available for all appeals. The provisions of former Rule 41(c) regarding prematurely filed documents are moved to Rule 27. Nonsubstantive changes are made in the rule for criminal cases.

Tex.R.App. P. 26 cmt. The rule 28 (accelerated appeals) comment states:

> This is former Rule 42. A motion for new trial is now permitted in an appeal from an interlocutory order, but it does not extend the time to perfect appeal. The deadlines for filing items in an accelerated appeal are moved to other rules. *See* Rules 26.1, 35.1 [appellate record] and 38.6 [appellate briefs]. Former Rule 42(b), regarding discretionary acceleration, is omitted as unnecessary. *See* Rule 40.1. The provision in former Rule 42(c) allowing the court to shorten the time to file briefs is omitted as unnecessary. *See* Rule 38.6.

Tex.R.App. P. 28 cmt. Thus, the key changes with regard to the deadline for perfecting appeals were: (1) all deadlines for perfecting appeals in civil cases were moved to a single rule (rule 26); (2) an extension of time was made available for all appeals on proper motion to the court of appeals, *see* Tex.R.App. P. 26.3; and (3) motions for new trial could now be filed in interlocutory appeals, but, as was already the case in quo warranto proceedings, such motions would not extend the appellate deadlines.

[2] We find nothing in either the language of the amended rules or the comments thereto that would support Carroll's interpretation, which would have constituted a major change from the pre–1997 version. Significantly, the fact that former rule 42 specifically provided that filing a motion for new trial would not extend the deadline in quo warranto proceedings did *not* imply that filing other post-judgment motions would extend the deadline. Former ***927** Tex.R.App. P. 41, 42. We see no reason to read such an implication into the same language in the amended rules. In an ordinary civil appeal in which the deadline to file the notice of appeal is otherwise thirty days after the judgment or order is signed, filing one of the post-judgment motions identified in rule 26.1(a) extends the deadline to ninety days. But we hold that in an accelerated appeal, absent a rule 26.3 motion, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and filing a rule 26.1(a) motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law will not extend that deadline. Allowing such post-order motions to automatically delay the appellate deadline is simply inconsistent with the idea of accelerating the appeal in the first place. Because Carroll did not file a motion for extension of time under rule 26.3 and

her notice of appeal was not filed within twenty days after the trial court signed the final order terminating her parental rights, her notice of appeal was untimely and failed to invoke the jurisdiction of the court of appeals.

III

[3] We turn to Carroll's alternative argument that, even if her notice of appeal was untimely, her motion for new trial, which was filed within twenty days after the judgment was signed, was sufficient in itself to perfect an appeal. The court of appeals did not address this argument.

[4] Carroll relies on the well-settled proposition that a court of appeals has jurisdiction over an appeal if the appellant timely files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction. *E.g., Grand Prairie Indep. Sch. Dist. v. S. Parts Imps., Inc.,* 813 S.W.2d 499, 500 (Tex.1991); *see also Verburgt v. Dorner,* 959 S.W.2d 615, 616 (Tex.1997) (reaffirming the principle that "appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal"). In support of her specific contention that a motion for new trial can operate to perfect an appeal, Carroll cites *In re M.A.H.,* 104 S.W.3d 568, 570 (Tex.App.-Waco 2002, no pet.). There, the court held, as we do today, that the mother's motion for new trial did not extend the due date for her notice of appeal. *Id.* at 569. But a divided court held that the appellant's motion for new trial could be treated as an instrument that was filed in a "bona fide attempt" to invoke the court's jurisdiction. *Id.* That holding has been criticized by a number of other appellate courts, with whom we agree. *C. Chambers Enters. v. 6250 Westpark, LP,* 97 S.W.3d 333, 334 (Tex.App.-Houston [14th Dist.] 2003, pet. denied); *In re J.N.W.,* 2003 WL 21255637 (Tex.App.-Tyler 2003, no pet.); *Lane v. Burkett,* No. 13–04–290–CV, 2004 WL 1687913 at *1 (Tex.App.-Corpus Christi July 29, 2004, no pet.).

In *Grand Prairie,* we held that a court of appeals may not dismiss an appeal in which the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity to correct the error, as long as the instrument was timely filed in a bona fide attempt to invoke the appellate court's jurisdiction. 813 S.W.2d at 500. Filing a motion for new trial, however, simply does not qualify as such an attempt. As the dissent noted in *In re M.A.H.,*

> [S]eldom, if ever, could a motion for new trial be intended to invoke [the court of appeals'] jurisdiction, because the express purpose of a motion for new trial is just that, to have the trial court order a new trial, not to obtain appellate review of the judgment. Even if ... a motion for new trial was a necessary predicate to bring an issue on appeal, the motion for new trial would have ***928** been properly characterized as a prerequisite to an appeal, not an effort to invoke appellate jurisdiction.

104 S.W.3d at 571 (Gray, J., dissenting); *see also Besing v. Moffitt,* 882 S.W.2d 79, 82 (Tex.App.-Amarillo 1994, no writ) (filing a request for findings of fact and conclusions of law insufficient to perfect an appeal under *Grand Prairie*). Though there are myriad reasons why a party might file a motion for new trial, we fail to see how invoking the court of appeals' jurisdiction could reasonably be considered one of them. Indeed, because filing a motion for new trial *extends* the deadline to file a notice of appeal in most civil cases, Tex.R.App. P. 26.1(a), a motion for new trial logically cannot also serve as a *substitute* for a notice of appeal.

[5] We conclude that a motion for new trial is not an instrument that may be considered a bona fide attempt to invoke the appellate court's jurisdiction under the *Grand Prairie* and *Verburgt* line of cases. We therefore hold that, although Carroll's motion for new trial was timely filed and preserved her request for a second chance in the trial court, it did not operate to timely perfect her appeal.

IV

[6] Finally, Carroll raises two constitutional issues should we hold, as we have, that her appeal was untimely. First, Carroll contends she received ineffective assistance of counsel and should be allowed to pursue an out-of-time appeal. Second, she argues section 109.002 of the Family Code, which provides that appeals in parental rights termination cases shall be accelerated and governed by the rules of appellate procedure for accelerated appeals, is unconstitutional as applied. However, Carroll waived these arguments by failing to raise them in the court of appeals.

After the court of appeals informed Carroll that her appeal was untimely, she filed a "Brief on the Issue of Jurisdiction" in the court of appeals. She also filed a motion for rehearing after the court dismissed her appeal. In none of her filings with the court of appeals did Carroll raise any constitutional arguments. We have held that the rules governing error preservation must be followed in cases involving termination of parental rights, as in other cases in which a complaint is based on constitutional error. *In re B.L.D.,* 113 S.W.3d 340, 350–51 (Tex.2003) (fundamental-error doctrine does not apply to procedural preservation rules, nor does due process require appellate review of unpreserved complaints in parental rights termination cases); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry,* 46 S.W.3d 857, 861 (Tex.2001) (failure to assert constitutional claim in trial court bars appellate review of claim). While Carroll's constitutional complaints relate to her appeal and therefore could not have been asserted in the trial court, she was required to raise them in the court of appeals in order to preserve error. Because she did not, her constitutional complaints are waived.

* * * * * *

We hold that, when an appeal is accelerated, the deadline for filing a notice of appeal under Texas Rule of Appellate Procedure 26.1(b) is twenty days after the judgment or order is signed, and the post-judgment motions listed in Texas Rule of Appellate Procedure 26.1(a) will not operate to extend the appellate deadline. We also hold that filing a motion for new trial does not constitute a bona fide attempt to invoke the court of appeals' jurisdiction for purposes of perfecting an appeal. Accordingly, we affirm the court of appeals' judgment dismissing the appeal for want of jurisdiction.

All Citations

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