

## **Court of Criminal Appeals Subject Matter Jurisdiction Topics**

### ***Ex Parte Derosier***

No. PD-1510-15

Case Summary written by Katherine Mendiola, Articles Editor.

JUDGE RICHARDSON filed the dissenting statement.

Defendant was charged with multiple counts of indecency with a child. As part of a plea bargain, he pleaded no contest to a misdemeanor offense of a terroristic threat. The additional claims of indecency with a child were dismissed and the defendant was charged only on the terroristic threat charge. Twelve years later, defendant argued that the court lacked subject matter jurisdiction on the basis that the terroristic threat was not a lesser-included offense of the crime charged. The state reasoned that because the defendant accepted the judgment under the plea-bargain arrangement, the defendant cannot collaterally attack the judgment.

Should the Court have granted the State's petition for review?

Justice Richardson filed his dissenting opinion on the basis that the Court left several questions unaddressed by refusing to grant the State's petition. According to Justice Richardson, this case could fall under prior precedent, *Kirkpatrick v. State*, 279 S.W.3d 324, 328–29 (Tex. Crim. App. 2009), which granted a court jurisdiction despite a defective indictment as long as the indictment was facially valid and that the state intended to charge the defendant with a felony or misdemeanor for which the court has jurisdiction. Further, Justice Richardson expounded on many issues the Court left unaddressed, such as: if the court did in fact lack jurisdiction, should the defendant be granted acquittal or remand? Additionally, if the court lacked jurisdiction, does the statute of limitations apply to the original charges or is the limitations period tolled? However, these questions remain unanswered based on the Court's refusal to review the State's petition.

### ***Texas v. Robinson***

No. PD-0974-15

Case Summary written by Ryley T Bennett, Staff Member.

JUSTICE NEWELL delivered the opinion of the unanimous Court.

Olin Anthony Robinson was found guilty of the third-degree felony offense of assault on a public servant and sentenced to four years imprisonment. His conviction was upheld on appeal. More than 180 days after the execution of Robinson's sentence began, on December 28, 2011, Robinson filed a motion for continuing jurisdiction community supervision ("shock probation"), which was granted. The State appealed. The court of appeals held that the trial court erred in granting the motion. The State argued that the trial court lacked jurisdiction to grant the motion because more than 180 days elapsed.

**ISSUE:** Does a court of appeals have subject-matter jurisdiction to entertain a State's appeal from a trial court's grant of shock probation? And if so, does the pendency of that State's appeal deprive the trial court of subject-matter jurisdiction to consider a motion for shock probation after the mandate has issued on that appeal?

The court started its opinion by acknowledging that the standard for determining jurisdiction is to determine whether the appeal is authorized by law. Noting that the Texas Legislature had a clear intent to afford the State the same appellate powers afforded to the federal government under 18 U.S.C. § 3731—by its adoption of Article 44.01. Texas construes the state's right-to-appeal broadly. Under Article 44.01, the court has held that the statute "clearly allows" an appeal reducing the defendant's sentence after the expiration of the trial court's plenary jurisdiction. Granting "shock probation" is a modification of judgment, which may serve to alter or modify the defendant's sentence. The court further analyzed the plain text of Article 42.12 § 6 along with 44.01(e), and also evaluated the collective intent and purpose of the legislature to truly understand the meaning of the statute. Noting that it (the court) has the ability to use either—plain meaning or legislative history—to interpret the meaning of the statute.

In conclusion, the court answered yes, and no. A State has the ability to appeal a grant of shock probation, however, the appeal stays within the proceedings of the trial court. A state may appeal an order that modifies a judgment by the imposition of "shock probation." The court reversed the judgment of the court of appeals and affirmed the trial court. The court affirmed the October 21, 2013, ruling that granted shock probation.

JUSTICE RICHARDSON, concurring, joined by JUSTICE JOHNSON.

The concurrence agreed with the majority affirming the October 21, 2013, ruling, that granted shock probation. However, the concurrence argued that mandamus was the proper way for the State to challenge a statutorily unauthorized order granting shock probation. The concurrence argued that a trial court judge exceeds his statutory authority if he grants shock probation without holding a hearing. Justice Richardson also contributed case law to establish that the court has ruled on granting shock probation without a jurisdictional issue coming into play. The concurrence worried that based on the majority decision, the State now had the ability to appeal all decisions granting shock probation, including those that were discretionary and non-reviewable.

***Davis v. State***

No. PD-1526-15

Case summary written by Christian Nisttáhuiz, Staff Member.

**PER CURIUM.**

Appellant Davis filed a motion for DNA testing in the trial court twice, and both times, the trial court failed to give him timely notice of its denial of the testing. Davis appealed the trial court's rulings, but both times, the court of appeals dismissed his case for lack of jurisdiction, holding that his notice of appeal was untimely. See *Castillo v. State*, 369 S.W.3d 196, 198 (Tex. Crim. App. 2012). Davis petitioned the court for discretionary review a second time.

Issue: Whether the court should grant Davis's petition for discretionary review after the court of appeals dismissed his case a second time based on lack of jurisdiction for an untimely notice of appeal, even though the trial court failed to give timely notice of its adverse ruling twice?

No. The court did not grant Davis's petition because the court of appeals had no jurisdiction, and stated that Davis could file a third motion in the trial court. The court also ordered the trial court and the district clerk to give Davis timely notice of its next order.

JUDGE YEARY filed a concurring opinion.

Judge Yeary emphasized that Davis could not file a timely notice of appeal because by the time he received notice of the trial court's ruling, it was too late to do so. Specifically, on April 17, 2015, the trial court signed its order denying Davis's second motion, but Davis alleged he received notice 53 days later. This delay exceeded the 30-day requirement for timely filing of a notice of appeal, and a motion for a filing extension would have likely failed. Davis asked the court to accept his untimely notice of appeal under Rule 4.2(a)(1) of the Texas Rules of Appellate Procedure, but the court stated that the rule does not apply in criminal cases, and even if it did, Davis could not prevail under it. See TEX. R. APP. P. 4.2(a)(1).

Nonetheless, Judge Yeary stated that the trial court's persistence in giving Davis untimely notice of its appealable orders, which include denials of DNA testing motions, could deprive Davis of his due process rights. Also, Judge Yeary noted that when considering whether it has appellate jurisdiction, appellate courts could justifiably take into account a trial court's "dilatatory tactics" aimed at preventing appellate review. Though Judge Yeary clarified he did not mean to accuse the trial court of dilatoriness in this case, he urged the court of appeals to consider the circumstances when making a jurisdictional decision in the event the trial court failed to provide timely notice a third time.

JUDGE ALCALA filed a dissenting opinion in which JUDGE JOHNSON joined.

Judge Alcala stated that he would grant review and would find that in this case, the "systematic failure" of providing Davis timely notice of his appealable Chapter 64 DNA testing orders deprived him of due process. He noted a potential for repetitiveness in these cases in which pro se, incarcerated individuals like Davis seek post-conviction DNA testing and receive untimely notice from trial courts. Judge Alcala suggested an amendment to the rules of appellate procedure to allow an exception for the appellate timetables in Chapter 64 proceedings similar to Rule 4.2(a)(1). This exception would allow the time period a defendant has to appeal an adverse DNA testing ruling to start running on the date the individual obtains notice or actual knowledge of the ruling, not on the date the trial court makes that ruling.

Though Davis argued for such exception or an application of Rule 4.2(a)(1) to his case, Judge Alcala stated that the court's precedent did

not allow it. Because of due process deprivation, however, Judge Alcala concluded he would grant review on the court's own motion and reset the appellate timetables to allow Davis an appeal.