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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-________________
COURT OF APPEALS CAUSE NO. 10-15-00263-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FERNANDO SMITH Appellant

v.

STATE OF TEXAS Appellee

Appeal from Coryell County

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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FILED IN
COURT OF CRIMINAL APPEALS

May 24, 2017

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Secondary Source:

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Texas Practice Series: Criminal Practice and Procedure,

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No. PD-___________________

COURT OF APPEALS CAUSE NO. 10-15-00263-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FERNANDO SMITH Appellant

v.

STATE OF TEXAS Appellee

Appeal from Coryell County

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant respectfully urges this Court to grant Appellant's Petition for Discretionary Review for the reasons given below.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument, but will present oral argument if the Court grants it.

STATEMENT OF THE CASE

Appellant's deferred adjudication for assault was revoked, and Appellant filed a notice of appeal. Appellant then filed a motion to be placed on "shock" community supervision, and the Court granted the motion and issued a judgment placing Appellant on shock community supervision. Appellant did not file a new notice of appeal. On appeal, Appellant complained, among other things, that the restitution ordered in the conditions of shock community supervision did not have a factual basis. The State argued that Appellant could not appeal a judgment granting shock community supervision, while the Court of Appeals questioned whether it had jurisdiction over the judgment granting shock community supervision since Appellant had filed a notice of appeal from the original judgment adjudicating his guilt but not from the judgment placing him on shock community supervision. Appellant responded to both issues, and the Court of Appeals ultimately issued an opinion dismissing his appeal for want of jurisdiction, holding that, while Appellant could appeal a judgment granting shock community supervision, to do so he was required to file a notice of appeal from that judgment. Appellant's petition challenges the latter holding.

STATEMENT OF PROCEDURAL HISTORY

The Tenth Court of Appeals dismissed Appellant's appeal in a published opinion delivered on April 26, 2017. *Smith v. State*, --S.W.3d--, No. 10-15-00263-

CR, 2017 WL 1573148 (Tex. App.—Waco delivered April 26, 2017). Neither party filed a motion for rehearing.

GROUND FOR REVIEW

1. When a defendant files a timely notice of appeal from a judgment adjudicating his guilt and is later placed on shock community supervision, to complain on appeal about a condition of that community supervision must he file a new notice of appeal?

   (I C.R. at 93-96; 99-100) (I Supp. C.R. at 8-9).

ARGUMENT FOR GROUND ONE

A. Importance of the Case

This Court is considering whether a defendant has the right to appeal an order granting shock community supervision.[1] *See Shortt v. State*, PD-0597-15. The Waco Court answered that question in the defendant's favor, at least when a new judgment is involved,[2] *Smith v. State*, --S.W.3d--, 10-15-00263-CR, 2017 WL 1573148, at *2 (Tex. App.—Waco Apr. 26, 2017) ("That does not mean, however, the actual judgment rendered by the trial court after granting a motion for shock probation cannot be appealed. It is a criminal judgment; and like any other criminal judgment which finds the defendant guilty and imposes a sentence, it can be appealed."), but also dismissed Appellant's appeal because, although he timely

[1] Tex. Code Crim. Proc. art. 42A.202(b) [formerly Tex. Code Crim. Proc. art. 42.12, §6(a)].

[2] In context it is not clear whether the fact that shock community supervision was granted through a new judgment is material to Waco's decision that a defendant has a right to appeal under these circumstances. With respect to when a notice of appeal must be filed to do so, the fact that a new judgment occurred was, apparently, material to Waco's decision in that respect.

appealed the judgment imposing his sentence, he did not file a new notice of appeal from the judgment suspending that sentence. *Id.* at *3 ("If a defendant's motion for shock probation is granted, as in this case, and it results in a new judgment and conditions of community supervision, the appeal of the first/original judgment is moot. Any complaint about the shock probation judgment will be the subject of an appeal about that judgment. But to complain about that judgment, a defendant must file a notice of appeal directed at the new judgment."). However, in doing so, Waco departed from the Austin and San Antonio courts of appeals, which held that in this scenario a notice of appeal is timely if (and only if) filed with respect to the original judgment imposing the sentence—not the order suspending that sentence. *See Perez v. State*, 938 S.W.2d 761, 763 (Tex. App.–Austin 1997, pet. ref'd); *Dodson v. State*, 988 S.W.2d 833, 834 (Tex. App.–San Antonio 1999, no pet.).[3] Therefore, this case presents a companion question to *Shortt* and offers this Court the chance to resolve a conflict among the courts of appeals in their published opinions. Additionally, this case allows the Court to explain whether the rule governing prematurely-filed notice of appeals applies here. Tex. R. App. P. 27.1(b). Waco construed this rule too narrowly.

[3] Appellant considers the scenarios the same because he thinks that whether shock community supervision was granted through a later judgment or a later order is a distinction without a difference.

B. Background

When Appellant was placed on deferred adjudication community supervision, he was not ordered to pay any restitution. (I C.R. at 6-9). When the trial court placed him on shock community supervision, the court stated that all of Appellant's financial obligations would remain the same as they were previously. (VI R.R. at 7). In that regard, the prosecutor commented: "I don't think there was any restitution." (VI R.R. at 8). Nevertheless, Appellant was ordered to pay restitution in the amount of $2,045.00 as part of his conditions of shock community supervision. (I Supp. C.R. at 6). Thus, Appellant's primary complaint on appeal was directed at this condition.

C. Decision of the Court of Appeals

The Court of Appeals, however, questioned whether it had jurisdiction, because Appellant did not file a notice of appeal from the judgment granting shock community supervision. Appellant's response was twofold: (1) the other cases considering whether a defendant could appeal a judgment granting shock community supervision had decided that a notice of appeal was timely if filed with respect to the original judgment of conviction and not the later order granting shock community supervision, and alternatively, (2) Appellant's notice of appeal should be construed as a premature notice of appeal under Rule 27.1(b).

The Court of Appeals rejected the former argument, observing "We have not found another case that has followed either of these cases [*Perez* and *Dodson*] for this proposition." *Smith v. State*, --S.W.3d--, 10-15-00263-CR, 2017 WL 1573148, at *2 (Tex. App.—Waco Apr. 26, 2017). With respect to the latter argument, the Court stated that "We are not inclined to interpret the rule as broadly as Smith argues", and instead approved a construction of Rule 27.1(b) whereby a prematurely filed notice of appeal is one filed after the jury's verdict but before sentence is imposed. *Id*.

D. Other Courts Have Decided the Issue Differently

However, two other courts—Austin and San Antonio—have decided the issue differently than Waco, creating a conflict among the appellate courts.

1. *Perez v. State*

Perez v. State, 938 S.W.2d 761 (Tex. App.—Austin 1997, pet. ref'd) is the leading case holding that a defendant does not have the right to complain on appeal about a trial court's order granting shock probation. In that case, on September 15, 1995, the trial court assessed the defendant's punishment at ten years' imprisonment. *Id*. at 762. On February 12, 1996, the trial court suspended his sentence and placed him on shock probation. *Id*. On February 23, 1996, the defendant gave his first, and only, notice of appeal. *Id*.

The Austin Court first decided that the defendant's attempted appeal

from an order granting shock probation was not permitted by law. *Id*. at 762-763.

Next, *Perez* decided that the defendant's attempted appeal was not timely perfected because he did not file a notice of appeal with respect to the judgment imposing his sentence. *Id*. at 763. The defendant argued that his time to perfect his appeal ran from February 12, 1996, when the conditions of community supervision were imposed. *Id*. The Court rejected this argument because "the conditions of supervision were not a necessary part of the judgment in this cause." *Id*. Instead, a trial court can grant shock probation only if the court has already imposed a sentence, so the defendant's time to appeal ran from the date his sentence was imposed and not the date that sentence was suspended: "Section 6(a) requires that a court impose a sentence before it can consider a motion to suspend further execution of the sentence. Because appellant's sentence was imposed on September 15, 1995, his time to perfect an appeal ran from that date." *Id*. Thus, even "if we consider this appeal as being from the judgment of conviction, it was not timely perfected." *Id*.

So, under *Perez*'s reasoning, a defendant could attack the conditions of community supervision imposed through shock probation[4] by filing a timely notice of appeal from the judgment imposing, not suspending, the sentence.

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[4] The Austin Court was willing to entertain the characterization of Perez's appeal as not technically being one from shock probation, but rather, as being an appeal from the original judgment, as modified by the conditions of community supervision later imposed. *Perez v. State*,

2. *Dodson v. State*

The San Antonio Court followed *Perez*'s reasoning. In *Dodson v. State*, 988 S.W.2d 833 (Tex. App.—San Antonio 1999, no pet.), the defendant was sentenced on May 19, 1998. *Id*. at 833. His trial counsel timely filed motions for shock probation, but the hearing occurred on November 17, 1998—seemingly just outside the statutory period. *Id*. at 834. Thus, the trial court denied the motions, and the defendant's "counsel immediately sought to appeal these decisions." *Id*.

Dodson first observed that no appeal lies from an order denying shock probation. *Id*. at 834. In response to the defendant's argument that "these appeals concern the court's perceived lack of jurisdiction rather than the denial of [an order requesting shock probation]", the Court decided the defendant had not timely perfected his appeal: "However, as the time to invoke appellate jurisdiction expired thirty days following imposition of the sentences, we, too, are without authority to consider the matter." *Id*. (citing *Perez*).

Unlike *Dodson* and *Perez*, Appellant timely perfected his appeal from the

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938 S.W.2d 761, 763 (Tex. App.—Austin 1997, pet. ref'd); *See* George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure*, 43B Tex. Prac., Criminal Practice And Procedure § 55:25 (3d ed.) ("A later order suspending execution of that sentence and placing the defendant on community supervision does not alter calculation of the timeliness of notice of appeal. The original sentence is in no sense incomplete or ambiguous but rather simply subject to modification."). Of course, because the Court had already held that no appeal may be taken from an order granting shock probation, the Court could not decide that the right to appeal such an order did exist, but the notice of appeal must be filed from the date that the sentence that was suspended was imposed.

date of the original sentence. (I C.R. at 93-96; 99-100). Under those opinions, Appellant should be able to complain about the judgment granting shock probation. But Waco declined to follow them, resulting in Appellant's appeal being dismissed.

E. Professors Dix and Schmolesky Cite *Perez*

In their treatise, Professors Dix and Schmolesky observe that

> In a "shock community supervision" situation, the time for perfecting appeal has been held to run from the time the sentence of incarceration is imposed. A later order suspending execution of that sentence and placing the defendant on community supervision does not alter calculation of the timeliness of notice of appeal. The original sentence is in no sense incomplete or ambiguous but rather simply subject to modification.
>
> George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure*, 43B Tex. Prac., Criminal Practice And Procedure § 55:25 (3d ed.) (footnotes omitted).

The professors cite to *Perez* for this proposition. Thus, *Perez*, *Dodson*, and Professors Dix and Schmolesky are in accord.

F. Waco's Departure

Waco parted ways with these authorities by holding that a defendant must file a timely notice of appeal from the later judgment suspending the sentence:

> If a defendant's motion for shock probation is granted, as in this case, and it results in a new judgment and conditions of community supervision, the appeal of the first/original judgment is moot. Any complaint about the

> shock probation judgment will be the subject of an appeal about that judgment. But to complain about that judgment, a defendant must file a notice of appeal directed at the new judgment.
>
> Smith, 2017 WL 1573148, at *3.

The fact that there are two separate proceedings resulting in two separate judgments seems to have troubled the lower court, *Id*. at *1, n. 1 ("This case is, however, the only case we have been able to find in which there was effectively a new sentencing hearing and an entirely new and complete judgment signed by the trial court rather than merely an order that suspended the sentence set out in the prior judgment and enunciated the conditions of community supervision. This makes the issues cleaner and easier to address and very different from the issue as addressed in *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808, 2015 WL 2250152 (Tex. App.–Dallas May 12, 2015, pet. granted)"), and may be the reason the court differed from *Perez*, since *Perez* involved a later order rather than a judgment.[5] But it is unclear why this distinction should make a difference when, whether by order or judgment, the result is the same: the suspension of the earlier sentence and the placement of the defendant on shock community supervision. Moreover, Waco's statement that the appeal of the first judgment will

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[5] Although *Perez* does not state whether a hearing was held nor whether Article 42.12, Section 6(c) required such a hearing at that time, *Perez*, 938 S.W.2d at 762, Article 42.12, Section 6(c), at least as it applies to this case, does not permit a judge to grant a motion for shock community supervision without holding a hearing. Tex. Code Crim. Proc. 42.12, §6(c).

be moot, *Id*. at *3, cannot be right: if true, it means that no defendant can complain about the decision to convict him or adjudicate his guilt when a judge signs a new judgment granting shock community supervision. The effect of Waco's reasoning will be to immunize, in these cases, a judge's earlier decision from review. Finally, *Perez* and *Dodson* are better reasoned: the original judgment is complete, subject to modification, so the notice of appeal must be timely filed with respect to the original judgment, not a later modification. It makes no difference that, here, the judge signed a new judgment—depriving a defendant of his right to appeal based on that elevates form or substance. The new judgment was simply a modification of the old one, just as a new order would have been a modification of the older judgment.

G. Premature Notice of Appeal

Appellant also asked the lower court to treat his notice of appeal as a prematurely-filed notice of appeal under Texas Rule of Appellate Procedure 27.1(b). That rule provides that

> In a criminal case, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court. But a notice of appeal is not effective if filed before the trial court makes a finding of guilt or receives a jury verdict.
>
> Tex. R. App. P. 27.1(b).

Waco rejected Appellant's invitation, citing *Franks v. State*, 219 S.W.3d 494 (Tex. App.—Austin 2007, pet. ref'd), which held that, "under Rule 27.1(b), a prematurely filed notice of appeal is one that is filed in the time period after the jury's verdict and before sentence is imposed." *Id*. at 497. However, that holding is incomplete in light of the text of the rule: after all, a prematurely filed notice of appeal will also be one that is "filed between conviction and *suspension* of sentence". Tex. R. App. P. 27.1(b) ("a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is…suspended in open court"). The text of the rule does not prohibit that reading, and in fact demands it, since a notice of appeal may be premature either with respect to the imposition or the suspension of sentence (or another appealable order, for that matter). Tex. R. App. P. 27.1(b).

Thus, leaving aside appealable orders as not relevant to this case, a prematurely filed notice of appeal, is either one that is filed between conviction and the imposition of sentence, *Franks*, 219 S.W.3d at 497, or one that is filed between conviction and the suspension of sentence. Tex. R. App. P. 27.1(b).

In this case, Appellant's notice of appeal was filed after his conviction but before his sentence was suspended. (I C.R. at 93-96; 99-100) (I Supp. C.R. at 8-9). Therefore, his notice of appeal can be treated as a prematurely filed notice of appeal to avoid forfeiture, which is disfavored, of his right to appeal. Tex. R. App.

P. 27.1(b); *see Kirk v. State*, 454 S.W.3d 511, 515 (Tex. Crim. App. 2015) (because "rescinding an order granting a new trial outside the seventy-five-day time limit" could deprive a defendant of his ability to appeal, when the rescission occurs outside that time limit "the rescinding order shall be treated as an 'appealable order'" and "[i]f the defendant previously filed a notice of appeal with respect to the trial court's judgment of conviction, that notice shall be treated as a prematurely filed notice of appeal with respect to the rescinding order, and the defendant will be entitled to appeal, not only the trial court's decision to rescind the order granting a new trial but also any issue that he could have appealed if the motion for new trial had never been granted.") (footnotes omitted); *Dallas County v. Sweitzer*, 881 S.W.2d 757, 762 (Tex. App.—Dallas 1994, writ denied) ("We give the Rules of Appellate Procedure liberal construction, particularly as they relate to filing a notice of appeal…A technical application of the rules should not defeat the right to appeal…Where doubt exists about a rule's meaning, we resolve the issue to sustain rather than to defeat the appeal.") (citations omitted).

Although Waco declined to adopt this reading of the rule that supports a defendant's right to appeal by stating, "We are not inclined to interpret the rule as broadly as Smith argues", *Smith*, 2017 WL 1573148 at *2, Appellant's interpretation is hardly broader than this Court's interpretation in *Kirk*. And if, under *Franks* and Rule 27.1(b) a prematurely filed notice of appeal must come

after conviction, *Franks*, 219 S.W.3d at 497, Tex. R. App. 27.1(b), and if, under Rule 27.1(b) the premature notice of appeal may be early with respect to the imposition or the suspension of sentence, Tex. R. App. 27.1(b), why can a defendant's notice of appeal not be considered premature if filed after he is convicted and sentenced but before he is placed on shock community supervision?

These unanswered questions deserve the attention of this Court because of the importance of the right to appeal and the apparent conflict between Waco's decision and the text of Rule 27.1(b).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant asks this Court to GRANT his Petition for Discretionary Review, and REVERSE and REMAND the case to the Tenth Court of Appeals for consideration of Appellant's three issues.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to Microsoft Word's word count tool, the relevant portions of this document contain 2,951 words.

/s/ Justin Bradford Smith
Justin Bradford Smith

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, a true and correct copy of Appellant's Petition for Discretionary Review was forwarded to the counsel below by email and/or eservice:

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APPENDIX

No. PD-________________
COURT OF APPEALS CAUSE NO. 10-15-00263-CR

TO THE COURT OF CRIMINAL APPEALS
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FERNANDO SMITH Appellant

v.

STATE OF TEXAS Appellee

Appeal from Coryell County

APPENDIX

Tab	Documents
1	*Smith v. State*: Opinion

TAB 1

Smith v. State
Opinion

2017 WL 1573148
Only the Westlaw citation is currently available.

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

Court of Appeals of Texas,
Waco.

Fernando SMITH, Appellant
v.
The STATE of Texas, Appellee

No. 10–15–00263–CR
|
Opinion delivered and filed April 26, 2017

From the 52nd District Court Coryell County, Texas Trial Court No. 20141, Honorable Trent D. Farrell, Judge

Attorneys and Law Firms

Justin Bradford Smith, for Fernando Smith.

Scott K. Stevens, Dustin H. Boyd, Charles Karakashian Jr., for the State of Texas.

Before Chief Justice Gray, Justice Davis, and Justice Scoggins

OPINION

TOM GRAY, Chief Justice

***1** Fernando Smith pled guilty to the offense of Assault by Occlusion. *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(2)(B) (West 2011). The trial court deferred a finding of guilt and placed Smith on deferred adjudication community supervision for five years. Ultimately, the trial court adjudicated Smith guilty and sentenced him to prison for five years. Five months later, the trial court granted Smith's motion for "shock probation" and returned Smith to community supervision for two years. After reviewing the record and case law, we dismiss this appeal for want of jurisdiction.

BACKGROUND

After several modifications to Smith's community supervision, including an extension of supervision for an extra year, the State filed a Motion to Adjudicate Guilt and Revoke Community Supervision. A contested hearing was held over a period of several days, and on May 29, 2015, the trial court found Smith violated three terms of his community supervision, adjudicated Smith guilty, and sentenced Smith to five years in prison. Smith timely filed a motion for new trial and a notice of appeal to this judgment. We received this notice of appeal on July 28, 2015 and docketed it as case number 10–15–00263–CR.

Five months after Smith was sentenced, and three months after the appeal was docketed, the trial court, on Smith's motion, placed Smith on community supervision, probated his five year sentence for two years, and continued the pervious terms and conditions including any monetary amounts owed.[1] A new judgment was prepared and signed by the trial court on October 14, 2015. No new notice of appeal from this judgment was filed.

1 This action is termed "shock probation" and is authorized by Article 42.12, sec. 6 of the Texas Code of Criminal Procedure. This case is, however, the only case we have been able to find in which there was effectively a new sentencing hearing and an entirely new and complete judgment signed by the trial court rather than merely an order that suspended the sentence set out in the prior judgment and enunciated the conditions of community supervision. This makes the issues cleaner and easier to address and very different from the issue as addressed in *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808, 2015 WL 2250152 (Tex. App.–Dallas May 12, 2015, pet. granted) and the first issue in the petition for discretionary review in that appeal which is currently pending before the Court of Criminal Appeals.

This case has been pending for quite some time. Briefing was completed and the appeal was placed at issue in late May of 2016. We note that in his appellate brief, Smith does not contest his conviction. Rather, he contests the amount of restitution ordered in the conditions of community supervision imposed by the trial court's October 2015 shock probation judgment and two alleged typographical "errors" in that same judgment. This is not the judgment from which Smith appealed.

NOTICE OF APPEAL

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We questioned our jurisdiction because no new notice of appeal of the "shock probation" judgment was filed. In response, Smith argues that he was not required to file a notice of appeal of the shock probation judgment citing *Perez v. State* and a later case, *Dodson v. State. See Perez v. State*, 938 S.W.2d 761, 763 (Tex. App.–Austin 1997, pet. ref'd); *see also Dodson v. State*, 988 S.W.2d 833, 834 (Tex. App.–San Antonio 1999, no pet.). In both cases, after determining the courts did not have jurisdiction of an order granting or denying shock probation, the courts determined the notices of appeal were untimely.

***2** In *Perez*, Perez was convicted and sentenced to 10 years in prison. After the trial court suspended the further imposition of the sentence and placed him on community supervision, Perez attempted to appeal one of those terms of community supervision. On appeal, the court of appeals held that if it were considering the appeal as one from the judgment of conviction, it was untimely. *Perez*, 938 S.W.2d at 763. It reasoned that the conditions of community supervision were not a necessary part of the judgment in the case because section 6(a) of article 42.12 of the Texas Code of Criminal Procedure (the shock probation statute) first required the trial court to impose a sentence before it could consider a motion to suspend the execution of the sentence. *Id.* Thus, it concluded, the time to perfect the appeal ran from the date the sentence was imposed, not from the date the defendant was informed of the conditions of community supervision. The court in *Dodson* followed *Perez.* We have not found another case that has followed either of these cases for this proposition.

Smith further argues that his notice of appeal should be considered a premature notice of appeal. *See* TEX. R. APP. P. 27.1(b). He contends that a prematurely filed notice of appeal could be one that is filed between the conviction and the suspension of the sentence. However, a prematurely filed notice of appeal has been held to be one that is filed in the time period after the jury's verdict and before sentence is imposed. *Franks v. State*, 219 S.W.3d 494, 497 (Tex. App.–Austin 2007, pet. ref'd). This holding is consistent with the Rules of Appellate Procedure. TEX. R. APP. P. 27.1(b) ("...a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court...."). We are not inclined to interpret the rule as broadly as Smith argues.

APPEAL OF SHOCK PROBATION AND RELATED JUDGMENT

The State argues that regardless of whether Smith's notice of appeal is timely as to the imposition of shock probation, we do not have subject-matter jurisdiction of this appeal. [2] The standard to determine whether an appellate court has jurisdiction to hear and determine a case is not whether the appeal is precluded by law, but whether the appeal is authorized by law. *Blanton v. State*, 369 S.W.3d 894, 902 (Tex. Crim. App. 2012); *Abbott v. State*, 271 S.W.3d 694, 696–97 (Tex. Crim. App. 2008). Thus, the State's argument is that because there is no statutory authority which authorizes an appeal from the imposition of shock probation pursuant to article 42.12, section 6 of the Texas Code of Criminal Procedure, we must dismiss the appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (West 2006); *Perez v. State*, 938 S.W.2d 761, 762–63 (Tex. App.–Austin 1997, pet. ref'd) (dismissing appeal for lack of jurisdiction because defendant cannot appeal an order granting shock probation); *Pippin v. State*, 271 S.W.3d 861 (Tex. App.–Amarillo 2008, no pet.) (no jurisdiction to contest conditions of order granting shock probation or denial of); *see also Houlihan v. State*, 579 S.W.2d 213 (Tex. Crim. App. 1979) (dismissing appeal of order denying motion for shock probation); *Roberts v. State*, No. 04-10-00558-CR, 2010 Tex. App. LEXIS 8940, 2010 WL 4523788 (Tex. App.–San Antonio Nov. 10, 2010, pet. ref'd) (not designated for publication) (dismissing appeal of order altering and amending terms and conditions of shock probation); *Thursby v. State*, 05–94–01772–CR, 1997 Tex. App. LEXIS 4378, 1997 WL 472310 (Tex. App.–Dallas Aug. 20, 1997, pet. ref'd) (not designated for publication) (no ability to attack order granting shock probation on appeal of judgment revoking shock probation).

2 In conjunction with filing its brief, the State filed a motion to dismiss asserting we lack jurisdiction to consider Smith's appeal, and Smith responded to the motion. We have considered both in resolving this appeal.

The cases the State relies on to assert that no appeal may be taken from shock probation do not apply to the situation presented in this appeal. In those cases, it was the decision to grant or deny shock probation or the decision to amend the conditions of shock probation that was the subject of the appeal or an issue on appeal. Those actions of the trial court are not ones for which the statute

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authorizes an appeal. That does not mean, however, the actual judgment rendered by the trial court after granting a motion for shock probation cannot be appealed. It is a criminal judgment; and like any other criminal judgment which finds the defendant guilty and imposes a sentence, it can be appealed. *See* TEX. CODE CRIM. PROC. ANN. art. 44.02 (West 2006); TEX. R. APP. P. 26.2(a).

***3** A defendant has no way to determine if a motion for shock probation will be granted. Thus, the defendant necessarily must be cautious and file a notice of appeal if the defendant has a complaint about the trial court's first/original judgment. In this case, that is exactly what Smith did by filing a notice of appeal of the May 29, 2015 judgment.

If a defendant's motion for shock probation is granted, as in this case, and it results in a new judgment and conditions of community supervision, the appeal of the first/original judgment is moot. Any complaint about the shock probation judgment will be the subject of an appeal about that judgment. But to complain about that judgment, a defendant must file a notice of appeal directed at the new judgment.

In this proceeding, Smith took the cautious route and filed a notice of appeal on the May 29, 2015 judgment. And when his motion for shock probation was granted and a new judgment was rendered on October 14, 2015, the appeal of the May 29, 2015 judgment was rendered moot. But Smith failed to file a notice of appeal to complain about the October 14, 2015 judgment. As is evident from the briefs already on file, it is the October 14, 2015 judgment about which Smith expressly complains—specifically the amount of restitution ordered and whether the judgment contains some typographical errors.

CONCLUSION

Smith's appeal of the May 29, 2015 judgment is dismissed because that judgment was rendered moot by the October 14, 2015 judgment. We have no notice of appeal from the October 14, 2015 judgment, and the time to file a notice of appeal has long since passed. Accordingly, we have no jurisdiction of the complaints raised by Smith, and this appeal is dismissed. [3]

3 Because we dismissed this appeal on grounds other than those raised by the State in its motion to dismiss, the State's motion to dismiss is dismissed as moot.

Appeal dismissed

Motion dismissed as moot

All Citations

--- S.W.3d ----, 2017 WL 1573148

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