Juvenile Law Case Summaries

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An untimely notice of appeal was not corrected by showing a late notice of the order appealed from [In re M.M.] (01-4-49).

On October 31, 2001, the San Antonio Court of Appeals held that a late notice of appeal was not corrected by an effort to show that counsel did not receive timely notice of the revocation order appealed from.

01-4-49. In the Matter of M.M., UNPUBLISHED, No. 04-00-00649-CV, 2001 WL 1335414, 2001 Tex.App.Lexis ___ (Tex.App.-San Antonio 10/31/01) [Texas Juvenile Law (5th Edition 2000)].

Facts: Appellant M.M. appeals from the trial court's revocation of his probation and confinement to the Texas Youth Commission until his twenty-first birthday. The State has moved to dismiss the appeal, arguing that M.M.'s notice of appeal was untimely and that this court has no jurisdiction to hear the case. After reviewing the record, we agree that the notice of appeal was untimely filed and that the case should be dismissed for want of jurisdiction.

On March 3, 1999, M.M. was arrested for possession of marijuana and evading arrest. On April 22, 1999, the trial court conducted a disposition hearing at which time M.M. pled true to the charges of possession and evasion. The court then issued an order that placed M.M. on probation for fifteen months and detailed a number of conditions with which he had to comply to remain on probation. The order specifically provided that M.M. was not to "commit any offense against the laws of the State of Texas, the United States, any municipality or any other place where you may be," and was to "avoid any and all use of alcoholic beverages, drugs and/or controlled substances."

M.M., however, did not abide by the probation conditions, and so on June 26, 2000, the State filed a motion to modify the trial court's earlier disposition of his case. In that motion, the State argued that M.M.'s probation must be revoked because he committed the offense of burglary and because he was found in possession of a controlled substance, both of which were direct violations of the court's order. Accordingly, on July 5, 2000, the trial court held a second hearing after which it granted the State's motion. In particular, the trial court concluded that M.M.'s probation should be revoked and that he should be confined to the Texas Youth Commission until his twenty-first birthday. A day after the modification hearing the trial court issued its order.

On September 21, 2000, M.M filed, with the trial court, a notice of appeal along with a "Motion for Nunc Pro Tunc Correction of Order of Disposition" and a "Motion to Determine the Date of Notice and Leave to Late File Appeal." On September 27, 2000, the trial court issued a nunc pro tunc order. However, to date it has not ruled on M.M.'s "Motion to Determine the Date of Notice and Leave to Late File Appeal." The State now moves to dismiss this appeal arguing that M.M.'s notice of appeal was not timely filed. It contends further that neither M.M.'s motion for nunc pro tunc order nor his motion to determine the date of his appeal can serve to extend the appellate deadline. The State insists, therefore, that this court has no jurisdiction.

Held: Appeal dismissed

Opinion Text: JURISDICTION

All appeals from juvenile orders are governed by the Texas Rules of Civil and Appellate Procedure, except when in conflict with the specific provisions of the Family Code. See Tex. Fam.Code Ann . § 56.01 (Vernon Supp.2001); In the Matter of J.C.H., 12 S.W.3d 561, 562 (Tex.App.–San Antonio 1999, no pet.). Therefore, to determine whether

M.M. timely perfected his appeal, this court must look to the rules governing civil appeals. See Tex. Fam.Code Ann. § 56.01; In the Matter of J.C.H., 12 S.W.3d at 562. The State asserts that under those rules, M.M.'s appeal was not filed within the time limitations articulated in Rule 26.1 of the Texas Rules of Appellate Procedure.

Under Rule 26.1, a notice of appeal generally must be filed within thirty days after the judgment is signed. Tex.R.App. P. 26.1. However, there are a few exceptions to this general rule. If an appellant files a motion for new trial, a motion to modify the judgment, a motion to reinstate under Texas Rule of Civil Procedure 165a, or a request for findings of fact and conclusions of law, then that party has ninety days, from the date the original judgment was signed, to file a notice of appeal. Id.

Here, it is undisputed that the order revoking M.M.'s probation was signed on July 6, 2000, and the deadline to file his notice of appeal was August 7, 2000. M.M., however, did not file his notice of appeal until September 21, 2000, which was seventy-seven days after the signing of the final judgment and clearly outside the thirty day window to file the appeal. M.M.'s notice of appeal could have been considered timely if a motion for new trial, a motion to modify the judgment, a motion to reinstate, or a request for findings of fact and conclusions of law had been filed. The record, however, reflects that no such motions or requests were submitted before M.M. filed his notice of appeal on September 21, 2000. Tex.R.App. P. 26.1.

FAILURE TO NOTIFY APPELLANT OF THE JULY 6, 2000 ORDER

In M.M.'s "Motion to Determine Date of Notice and Leave to File Late Appeal," he asks the trial court to issue a nunc pro tunc judgment correcting the date of entry of the judgment from July 6, 2000 to August 22, 2000. On appeal, M.M. argues that because August 22, 2000 is the day that his attorney learned of the July 6th order, it is clearly the appropriate date from which the appeals deadlines should run. The State contends, however, that because M.M.'s motion does not meet the requirements set out in Rule 306a of the Texas Rules of Civil Procedure, he cannot rely on it to toll the initial thirty day limitations period.

To support its argument, the State relies on Rule 306a(4) of the Texas Rules of Civil Procedure, which provides as follows:

[i]f within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

Tex.R. Civ. P. 306a(4). In essence, Rule 306a permits a party to effectively obtain an extension of time within which to file certain post trial motions. However Rule 306a(4) is not self-executing, and to invoke the benefits of this rule,

[t]he party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

Tex.R. Civ. P. 306a(5). Further, to establish this date, the moving party must submit competent proof to the court establishing the date of notice, and he must ensure that the proof is included in a written order signed by the trial judge. In re R.W. Jones, 974 S.W.2d 766, 768 (Tex.App.--San Antonio 1998, no pet.). In fact, it is well-settled that " [c]ompliance with the provisions of Rule 306(5) is a jurisdictional prerequisite." Gonzalez v. Sanchez, 927 S.W.2d 218, 220 (Tex.App.--El Paso 1996, no writ); Womack- Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 813 (Tex.App.--Dallas 1994, writ denied). Thus, unless a party establishes that he had no notice or knowledge of the judgment, in the manner required by the rule, neither the trial court's plenary power nor the appellate timetable is restarted. In re R.W. Jones, 974 S.W.2d at 768 (citing Memorial Hosp. v. Gillis, 741 S.W.2d 364, 365-366 (Tex.1987)); Barrasso, 886 S.W .2d at 813.

In this case, M.M. filed a motion requesting the trial court to administratively enter August 22, 2000 as the date of the judgment. In the motion, M.M. alleges that shortly after the July 6th order, he requested a copy of it, but was told that it was unavailable. He contends that the order was eventually sent to him, sometime in August, but it was never delivered to his attorney of record. M.M. maintains that his attorney did not learn of the order until August 22, 2000, and that actual notice of the order did not occur until that day.

While this motion details how M.M. received notice of the order, it was not sworn to by M.M.'s counsel, as required by Rule 306a. In fact, there is nothing in the record that reveals that M.M. submitted to the trial court any type of sworn document regarding the date or the circumstances in which he gained knowledge or received notice of the order. Further, the record does not contain an order from the trial court establishing August 22, 2000 as the date M.M. first received notice of the July 6th order. See Tex.R.App. P. 4.2(c).

M.M. does not dispute that the trial court has not ruled on his motion. Instead, to remedy this deficiency he asks this court to abate his appeal and remand to the trial court with instructions to rule on the "Motion to Determine Date of Notice and Leave to Late File Appeal." A remand, however, is not appropriate at this time. Although the trial court failed to rule on this motion, more than seventy-five days have elapsed since it was submitted. The motion, therefore, has been overruled by operation of law in accordance with Rule 329(b) of the Texas Rules of Civil Procedure. Tex.R. Civ. P . 329(b); see Barrasso, 886 S.W.2d at 815-16; see Montalvo v. Rio Nat. Bank, 885 S.W.2d 235, 237 (Tex.App.--Corpus Christi 1994, no writ).

SEPTEMBER 27, 2000 NUNC PRO TUNC JUDGMENT

Finally, M.M. argues that the September 27, 2000 nunc pro tunc order, is the order from which the appellate timetable runs. In turn, the State insists that because the nunc pro tunc order was issued after the expiration of the trial court's plenary power, MM's appeal is limited to the clerical corrections of the September 27th order. It is true that Rule 329b provides that a trial court has the plenary power to correct judicial errors if a motion requesting a correction is filed within thirty days after the judgment is signed. See Tex.R. Civ. P. 329(b); Lane Bank Equip. Co. v. Smith Southern Equip., Inc., 10 S.W.3d 308, 310 (Tex.2000); Check v. Mitchell, 758 S.W.2d 755, 756 (Tex.1988); Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex.1986). A "judicial error" is commonly defined as an error in the rendition of a judgment. America's Favorite Chicken Co. v. Galvan, 897 S.W.2d 874, 876 (Tex.App.--San Antonio 1995, writ denied) (citing Escobar, 711 S.W.2d at 231). Judicial errors, however, may not be corrected after the trial court's plenary jurisdiction expires. America's Favorite Chicken Co., 897 S.W.2d at 876 (citing Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex.1970)).

Nevertheless, through the use of a judgment nunc pro tunc, a trial court may correct some errors in its judgment after its plenary power has expired. Tex.R.App. P. 36. Post-plenary power corrections are limited to the modification or the correction of a written judgment, if it does not reflect the substance of the judgment as it was rendered. Tex.R. Civ. P. 329(b); Escobar, 711 S.W.2d at 231. Such errors in the entered judgment are usually termed "clerical" rather than "judicial" errors and may be corrected under the court's nunc pro tunc power at any time. Tex.R. Civ. P. 316; America's Favorite Chicken Co., 897 S.W.2d at 876. Further, if a trial court makes such a clerical correction, after the expiration of its plenary power, "all periods provided in these rules that run from the date the judgment is signed run from the date the corrected judgment is signed for complaints that would not apply to the original judgment." Tex.R.App. P. 4.3(b).

In this instance, the trial court issued a judgment nunc pro tunc, on September 27, 2000, after its plenary power expired. However, as clearly stated in the Texas Rules of Appellate Procedure, any appeal of this order must necessarily relate to the clerical corrections addressed in the nunc pro tunc order and cannot attack the merits of the judicial disposition articulated in the original judgment. Tex.R.App. P. 4.3(b). M.M. complains to this court that the order issued on July 6, 2000, "offered no basis for appeal" because the dates, the burden of proof, and the charges were erroneously entered. These clerical errors, nonetheless, were corrected in the court's order issued on September 27, 2000. We find, therefore, that any remaining grievance that M.M. has before this court concerns not the clerical errors because these were subsequently rectified in the judgment nunc pro tunc but the merits of the trial court's decision to revoke M.M.'s probation on July 6, 2000. Rule 329(b) of the Texas Rules of Civil Procedure explicitly prohibits such a review of the original judgment, as the opportunity to challenge the merits of the original order which expired on August 7, 2000. M.M. cannot now use the September 27, 2000 order to circumvent the rules requiring him to appeal on the merits of the original judgment within thirty days of its issuance.

Accordingly, we find that M.M.'s appeal is untimely and should be dismissed for lack of jurisdiction. Olivo v. State, 918 S.W.2d 519, 522 (Tex.Crim.App.1996); Shute v. State, 744 S.W.2d 96, 97 (Tex.Crim.App.1988); see also Ater v. Eighth Court of Appeals, 802 S.W.2d 241, 243 (Tex.Crim.App.1991)(out-of-time appeal).
