

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

State v. Palmer

Palmer · No. 02-14-00175-CR · Decided July 17, 2015

SUMMARY

This document is the State of Texas’s Petition for Discretionary Review in State v. Palmer, arising from the dismissal of the State’s appeal from an order granting a suppression motion. The State argues that a timely notice of appeal signed by an assistant district attorney was authorized by the elected district attorney and therefore invoked appellate jurisdiction, notwithstanding the later-filed affidavit memorializing that authorization. It asks the Texas Court of Criminal Appeals to grant review and reverse the court of appeals’ dismissal.

CASE DETAILS

COURT	Court of Appeals of Texas, Second District, Fort Worth
WRITING FOR THE COURT	Anne Gardner; Livingston, C.J.; Anne Gardner, J.; Walker, J.
JURISDICTION	Texas
DECIDED	July 17, 2015
DOCKET	02-14-00175-CR
DISPOSITION	dismissed
PROCEDURAL POSTURE	The State appealed the trial court's order granting Palmer's motion to suppress. Palmer challenged the court of appeals' jurisdiction, and the court dismissed the appeal for want of jurisdiction.
STANDARD OF REVIEW	The court reviewed the existence of appellate jurisdiction under the statutory requirements governing a State's appeal from an order granting a motion to suppress.
PRECEDENTIAL VALUE	published
PARTIES	The State of Texas v. Zachary Palmer

TOPICS

- appellate jurisdiction
- criminal procedure
- appellate procedure
- suppression of evidence
- statutory interpretation

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether a timely notice of appeal from an order granting a motion to suppress is effective when signed by an assistant district attorney without identifying the elected district attorney's personal authorization.
2. Whether an untimely amended notice of appeal or a post-deadline affidavit can cure a defective notice or establish jurisdiction retroactively under Texas Code of Criminal Procedure article 44.01.

HOLDINGS

1. A notice of appeal under Texas Code of Criminal Procedure article 44.01 is defective when it is signed by an assistant district attorney and the appellate record contains no contemporaneous signature or other written expression showing that the elected district attorney personally authorized the specific appeal.
2. An amended notice of appeal filed after the article 44.01(d) deadline cannot cure the defective original notice, and post-deadline ratification cannot retroactively confer appellate jurisdiction.
3. A post-deadline affidavit may, in some circumstances, prove that a prosecuting attorney timely made the appeal, but it did not do so here because the original notice was facially defective and contained no indication of personal authorization.

KEY QUOTATIONS

*“Because it would have been difficult for the Legislature to have more clearly excluded assistant prosecutors from its definition of ‘prosecuting attorney,’ we interpret section (i) to mean what it plainly states on its face: a ‘prosecuting attorney,’ as used in Article 44.01, does not include under any circumstance an assistant prosecutor or other subordinate.” (*4)*

*“The district attorney’s sworn statement that he authorized the assistant district attorney to perfect an appeal in this case proves compliance with Article 44.01 at the time the notice was filed.” (*10)*

*“If there is no compliance within the twenty-day window, the window is thereafter closed.” (*12)*

FACTUAL BACKGROUND

The trial court granted Zachary Palmer’s motion to suppress. The State filed its notice of appeal within the statutory twenty-day period, but the notice was signed only by an assistant district attorney and did not state that the elected district attorney had authorized the appeal. After the deadline, the State filed an amended notice signed by the district attorney and an affidavit asserting that authorization had existed when the original notice was filed.

PROCEDURAL HISTORY

The trial court signed the suppression order on April 1, 2014. The State timely filed a notice of appeal on April 7, 2014, but the notice was signed by an assistant district attorney and did not identify or reference authorization by the elected district attorney. After the twenty-day statutory deadline expired, the State filed an amended notice signed by the district attorney and an affidavit stating that the district attorney had authorized the original appeal.

The court of appeals held that the original notice was defective, that the amended notice was untimely and could not cure the defect, and that the post-deadline affidavit was ineffective.

DISPOSITION

dismissed

CASES CITED

- State v. Muller, 829 S.W.2d 805 (Tex. Crim. App. 1992)
- State v. Boseman, 830 S.W.2d 588 (Tex. Crim. App. 1992)
- State v. Riewe, 13 S.W.3d 408 (Tex. Crim. App. 2000)
- State v. Blankenship, 146 S.W.3d 218 (Tex. Crim. App. 2004)
- State v. White, 261 S.W.3d 65 (Tex. App.—Austin 2007)
- State v. Shelton, 830 S.W.2d 605 (Tex. Crim. App. 1992)
- State v. Colyandro, 233 S.W.3d 870 (Tex. Crim. App. 2007)
- Coffey v. State, 979 S.W.2d 326 (Tex. Crim. App. 1998)
- State v. Bates, 889 S.W.2d 306 (Tex. Crim. App. 1994)
- State v. Redus, 445 S.W.3d 151 (Tex. Crim. App. 2014)
- State v. Palmer, 2015 Tex. App. LEXIS 6572 (Tex. App.—Fort Worth June 25, 2015)
- State v. Medrano, 67 S.W.3d 892 (Tex. Crim. App. 2002)
- State v. Roberts, 940 S.W.2d 655 (Tex. Crim. App. 1996)
- Bayless v. State, 91 S.W.3d 801 (Tex. Crim. App. 2002)

OPINION

Palmer, Zachary

PER CURIAM.

PD-0880-15

PD-0880-15 COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

Transmitted 7/15/2015 11:03:19 AM Accepted 7/17/2015 1:04:19 PM

ABEL ACOSTA

No. 02-14-00175-CR CLERK

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS, Appellant v. ZACHARY PALMER, Appellee Appeal from Wise County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF PARTIES, JUDGE, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellee, Zachary Palmer. * The trial Judge was Hon. John H. Fostel, 271st Judicial District Court. * Trial counsel for the State was Tim Cole, Assistant District Attorney, 101 North Trinity, Suite 200, Decatur, Texas 76234. * Counsel for the State before the Court of Appeals was Patrick D. Berry, Assistant District Attorney, 101 North Trinity, Suite 200, Decatur, Texas 76234. * Counsel for the State before the Court of Criminal Appeals is Stacey M. Goldstein, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711. * Counsel for Appellee at trial and before the Court of Appeals was Barry Green, 101 West Main, Decatur, Texas 76234. i

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Crim. App. 2014). 10 n.16 State v. Riewe, 13 S.W.3d 408 (Tex. Crim. App. 2000). 5, 9-10 State v. Shelton, 830 S.W.2d 605 (Tex. Crim. App. 1992). 7 n.10 State v. White, 261 S.W.3d 65 (Tex. App.—Austin 2007). 5, 5 n.8, 8 n.15 Statutes T EX. C ODE C RIM. P ROC. art. 44.01(a)(5). 2-3 T EX. C ODE C RIM. P ROC. art. 44.01(d). 3-4 T EX. C ODE C RIM. P ROC. art. 44.01(i).. 3 iii Secondary Sources B LACK’S L AW D ICTIONARY 74 (5th ed. 1979). 7 n.11 B LACK’S L AW D ICTIONARY 1135 (5th ed. 1979). 7 n.12 B LACK’S L AW D ICTIONARY 1184 (5th ed. 1979). 8 n.13 iv No. 02-14-00175-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

THE STATE OF TEXAS, Appellant v. ZACHARY PALMER, Appellee Appeal from Wise County
* * * * *

STATE’S PETITION FOR DISCRETIONARY REVIEW

* * * * * TO THE HONORABLE COURT OF CRIMINAL APPEALS: The State respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

The State filed a notice of appeal from the trial court’s order granting Appellee’s suppression motion. The notice was not signed by the elected district 1 attorney as required by Texas Code of Criminal Procedure Article 44.01(d), (i). In response to Appellee’s motion to dismiss for want of jurisdiction, filed after the appellate timetable expired, the State filed an affidavit from the district attorney, stating that he had authorized the assistant district attorney to pursue the appeal when it was filed. The court of appeals held that consideration of the untimely affidavit as proof of authorization was improper because it could not retroactively cure the notice by amendment or ratification. The court then dismissed the State’s appeal.

STATEMENT OF PROCEDURAL HISTORY

In a published decision, the court of appeals dismissed the State’s appeal for want of jurisdiction. State v. Palmer, __ S.W.3d __, No. 02-14-00175-CR, 2015 Tex. App. LEXIS 6572 (Tex. App.—Fort Worth 2015). The State did not file a motion for rehearing.

GROUND FOR REVIEW

Did the State’s timely filed notice of appeal signed only by an assistant district attorney invoke the court of appeals’ jurisdiction when the elected district attorney’s untimely filed affidavit stated that he authorized the appeal when it was filed?

ARGUMENT

Texas Code of Criminal Procedure Article 44.01(a)(5) provides that the State is entitled to appeal

an order granting a motion to suppress if the “prosecuting attorney certifies . . . that the appeal is not taken for the purpose of delay and that the evidence 2 . . . is of substantial importance to the case” “Prosecuting Attorney” means the district attorney; it does not include an assistant district attorney. T EX. C ODE C RIM. P ROC. art. 44.01(i). This requirement was intended to prevent the State from filing frivolous appeals for purposes of harassment. *State v. Muller*, 829 S.W.2d 805, 811 n.7 (Tex. Crim. App. 1992). In this case, the State timely filed a notice of appeal from the trial court’s order granting Appellee’s motion to suppress.¹ However, it was signed by an assistant district attorney, not the Wise County District Attorney.² The State then filed an untimely amended notice of appeal, which was signed by the district attorney.³ Appellee moved to dismiss, arguing that the timely notice of appeal was defective because it was not signed and therefore not authorized by the district attorney.⁴ He also claimed that the amended notice was late, in violation of Texas Code of Criminal Procedure 44.01(d), which states that a prosecuting attorney may not make an appeal under subsection (a) later than 20 days after the order was 1 See 1 CR 70-71. 2 See 1 CR 70-71. 3 See 1 CR 75-76. 4 Appellee’s Motion to Dismiss State’s Appeal at 1-2. Because these documents were filed in the court of appeals, they are not included in the trial-court clerk’s record. 3 entered.⁵ The State filed a response, claiming that the assistant district attorney filed the timely notice of appeal with the full authorization of the district attorney.⁶ In support, the State attached an affidavit from the district attorney stating, in part: With my full knowledge, authorization and under my direct instruction, Patrick Berry filed a Notice of Appeal on April 7, 2014, within 20 days required by Texas Rule of Appellate Procedure, Rule 26.2(b). Mr. Berry signed said Notice of Appeal with my full consent and under my instruction to do so on my behalf. I personally authorized Mr. Berry to sign and file the Notice of Appeal at that time. Although I did not personally sign the original Notice of Appeal . . . I did personally authorize Patrick Berry . . . to sign said Notice on my behalf and said Notice should be taken as my personal act, authorization, and certification, of the appeal in the above-mentioned case.⁷ After twice denying Appellee’s motion to dismiss, *Palmer*, 2015 Tex. App. LEXIS 6572, at * 3, the Fort Worth Court of Appeals dismissed the State’s appeal for want of jurisdiction, relying primarily on this Court’s decision in *State v. Muller*. *Id.* at *4-12. Following *Muller*, the Forth Worth Court held that the State’s first notice was defective and that its untimely amended notice did not cure the defect. *Palmer*, 2015 Tex. App. LEXIS 6572, at *5. The district attorney’s affidavit, the court stated, 5 Appellee’s Motion to Dismiss State’s Appeal at 1-2. 6 See Appendix B, State’s Response to Appellee’s Motion to Dismiss State’s Appeal at 1-3. 7 See Appendix B, State’s Response to Appellee’s Motion to Dismiss State’s Appeal at Attachment A. 4 is no different than the amended notice. *Id.* Ratification after the filing deadline is ineffective under *State v. Boseman*, 830 S.W.2d 588 (Tex. Crim. App. 1992), and jurisdiction cannot be retroactively obtained under *State v. Riewe*, 13 S.W.3d 408 (Tex. Crim. App. 2000). *Palmer*, 2015 Tex. App. LEXIS 6572, at *6. The court also rejected the State’s reliance on *State v. Blankenship*, 146 S.W.3d 218 (Tex. Crim. App. 2004), and *State v. White*, 261 S.W.3d 65 (Tex. App.—Austin 2007), concluding that both were

distinguishable.⁸ Palmer, 2015 Tex. App. LEXIS 6572, at *6-9. The court of appeals' decision merits review. The particular facts of this case parallel the second ground for review granted but left unaddressed by this Court in Blankenship in 2004.⁹ In Blankenship, like this case, when the appellee urged the court of appeals to dismiss for lack of jurisdiction, the State filed a response with an accompanying affidavit from the elected county attorney, which stated that he had consented to and authorized the appeal within the time for filing the appeal. 146 S.W.3d at 219. Arguing in the alternative to its reliance on a timely and properly ⁸ In White, the Austin Court of Appeals relied, in part, on the district attorney's affidavit, filed after the appellate deadline, that provided the date he had filed the notice of appeal. 261 S.W.3d at 67. ⁹ Instead, this Court relied on the State's timely signed amended notice when holding that the court of appeals' jurisdiction had been properly invoked. Blankenship, 146 S.W.3d at 220. Even though the notice was signed by an assistant county attorney, it included a "written express personal authorization by the County Attorney of this specific notice of appeal in this particular case." Id. 5 signed amended notice, the State submitted the following ground for review: "The Court of Appeals erred in holding, in effect, that the State's notice of appeal requires the personal signature of the 'prosecuting attorney.'" Id. at 219 n.3. This Court should decide whether a State's notice of appeal that is signed by an assistant district attorney deprives an appellate court of jurisdiction when the district attorney later explains in an affidavit, filed after the appellate timetable expired, that he had authorized the "making of the appeal" when it was filed. There is no precedent from this Court addressing this situation, and the Fort Worth Court's application of related precedent is incorrect. In Muller, the first assistant district attorney signed the notice of appeal. 829 S.W.2d at 806. Over eight months later, the court of appeals granted the State leave to file an amended notice of appeal signed by the district attorney. Id. at 806-07. The court of appeals held that the amended notice cured any defect in the original notice. Id. at 807. This Court reversed, holding that Article 44.01(d) plainly states that only the "prosecuting attorney" may "make an appeal" under subsection (a). Id. at 810. "Make an appeal" requires the prosecuting attorney "to personally supervise and authorize the appeals to be undertaken by his office on behalf of the State." Id. Thus, "to comply with the statute, he must either physically sign the notice of appeal or ⁶ personally instruct and authorize a subordinate to sign the specific notice of appeal in question." Id. A statement that the appeal is taken "'by and through the prosecuting attorney'" is insufficient to prove that the prosecuting attorney has "performed the safeguard function."¹⁰ Id. at 811. And the authorization must occur before the time for filing the notice expires. Id. at 810. This Court then held that the State's first notice of appeal was defective because the elected district attorney did not authorize it within the time required. Id. at 811. Considering the late amended notice, this Court determined that, because Article 44.01(d) limits the State's substantive right to appeal, it could not be cured by correction or amendment. Id. at 812-13. Therefore, the court of appeals had no jurisdiction to consider the State's appeal. Id. at 813. Contrary to the Fort Worth Court of Appeals, correction or cure via amendment,¹¹ ratification,¹² and retroactivity¹³ are inapplicable principles. All pertain ¹⁰ Nor is

a district attorney's signature stamp, coupled with the "live" signature of an assistant district attorney, adequate. *State v. Shelton*, 830 S.W.2d 605, 606 (Tex. Crim. App. 1992). 11 "Amendment" means "[t]o change or modify for the better. To alter by modification, deletion, or addition." *B LACK'S L A W D ICTIONARY* 74 (5th ed. 1979). One appellate court justice has observed that an amended document replaces the original. *Leal v. State*, ___ S.W.3d ___, No. 14-13-00208-CR, 2015 Tex. App. LEXIS 6460 (Tex. App.—Houston [14th] 2015) (op. on remand) (Frost, J., concurring). 12 "Ratify" means "[t]o approve and sanction; to make valid; to confirm; to give sanction to." *B LACK'S L A W D ICTIONARY* 1135 (5th ed. 1979). This Court has recognized that ratification involves reaffirming an interpretation at a point later in 7 to subsequent, post-notice effective action. But such action is not at issue here. The notice of appeal was proper at the time it was filed because the district attorney's authorization for filing was operative at that time. Therefore, no subsequent action was needed. The affidavit merely memorialized the prior, timely authorization.¹⁴ The circumstances here are in accord with the dictates of *Muller*. *Muller* indicated that there is no requirement that the authorization appear on the face of the notice, just that the appellate record clearly reflect its existence.¹⁵ Whenever a question is legitimately raised concerning the prosecuting attorneys personal authorization of a State's appeal, the State bears the burden of proving that the appeal in question was personally, expressly and specifically authorized by the prosecuting attorney. Thus, the appellate record must clearly reflect the prosecuting attorney's personal authorization of the specific notice of appeal filed in a given case. Without a signature or other written expressed authorization, as reflected in the appellate record, there would be no guarantee that the only person permitted by statute to make an appeal on behalf of the State actually time. See *State v. Colyandro*, 233 S.W.3d 870, 878-85 (Tex. Crim. App. 2007). 13 "Retroactive" means "[r]etropective," which means "[l]ooking backwards; contemplating what is past; having reference to a state of things existing before the act in question." *B LACK'S L A W D ICTIONARY* 1184 (5th ed. 1979). 14 See, e.g., *Coffey v. State*, 979 S.W.2d 326, 328-29 (Tex. Crim. App. 1998) (written judgment is intended to be a memorialization of oral pronouncement of sentence); *State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) ("A judgment nunc pro tunc . . . literally means 'now for then' . . ."). 15 See also *White*, 261 S.W.3d at 68 ("neither the statute nor any opinion of which we are aware establishes a time limit for the State to prove that the prosecuting attorney did in fact properly authorize the appeal."). 8 participated in the process. Evidence of a general delegation of authority to an assistant does not qualify under the statute. *Muller*, 829 S.W.2d at 810 n.6. The existence of the Wise County District Attorney's authorization was established by affidavit. And because the notice of appeal was authorized, it was made by the district attorney and thus invoked the court of appeals' jurisdiction at that time. *Boseman* is inapposite because the county attorney had not authorized the assistant country attorney to act on his behalf or appeal when the notice was filed. There, the county attorney filed an untimely affidavit in response to *Boseman's* motion to dismiss, purporting to deputize the assistant county attorney to prosecute the appeal and stating that he

ratified and approved of the notice of appeal. 830 S.W.3d at 589. This Court held that the State lost its right to appeal when the “window of opportunity closed without the county attorney’s personal and express authorization of this specific notice of appeal.” Id. at 591. Riewe is also not on point. In that case, the State failed to certify in its notice that the appeal was not for delay and that the evidence was of substantial importance to the case. 13 S.W.3d at 409. After filing its brief, the State amended its notice with the certifications. Id. This Court held that amended notice could not retroactively invoke the court of appeals’ jurisdiction. Id. at 412. In this case, unlike the absent certifications, the authorization here did in fact exist at the time the notice was filed. Nothing in this Court’s precedent requires that the existence of the district attorney’s authorization to appeal appear on the notice itself. The district attorney’s sworn statement that he authorized the assistant district attorney to perfect an appeal in this case proves compliance with Article 44.01 at the time the notice was filed. The court of appeals erred to dismiss for want of jurisdiction. 16 Last year in State v. Redus, the Court unanimously reaffirmed its decision in Riewe that the State’s notice must contain the certification statements to invoke the appellate court’s jurisdiction. 445 S.W.3d 151, 156 (Tex. Crim. App. 2014). The Court went on to hold that the district attorney’s citation to the statute requiring the certification does not satisfy the substantive voucher requirements for the certification statements. Id. at 157. 10

PRAYER

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and reverse the decision of the court of appeals dismissing the State’s appeal. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,112 words, exclusive of the items excepted by TEX. R. A PP. P. 9.4(i)(1).

/s/ STACEY M. GOLDSTEIN

Assistant State Prosecuting Attorney 12

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State’s Petition for Discretionary Review has been served on July 15, 2015, via certified electronic service provider to: Hon. Patrick D. Berry 101 North Trinity Suite 200 Decatur, Texas 76234 patrick.berry@co.wise.tx.us Hon. Barry Green 101 West Main Decatur, Texas 76234 barry@barrysgreen.com

/s/ STACEY M. GOLDSTEIN

Assistant State Prosecuting Attorney 13

APPENDIX A

THE STATE OF TEXAS, STATE v. ZACHARY PALMER,
APPELLEE

NO. 02-14-00175-CR

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT
WORTH

June 25, 2015, Delivered June 25, 2015, Opinion Filed

NOTICE: PUBLISH

The Jurisdictional Statute PRIOR HISTORY: [*1] FROM THE Article 44.01(a)(5) of the Texas Code of 271ST DISTRICT COURT OF WISE Criminal Procedure authorizes the State to COUNTY. TRIAL COURT NO. CR17314. appeal the granting of a motion to suppress TRIAL COURT JUDGE: HON. JOHN H. evidence. Tex. Code Crim. Proc. Ann. art. FOSTEL. 44.01(a)(5) (West Supp. 2014). "The prosecuting attorney may not make an appeal under . . . this article later than the 20th day COUNSEL: FOR STATE: GREG PRESTON after the date on which the order, ruling, or LOWERY, DISTRICT ATTORNEY FOR sentence to be appealed is entered by the WISE COUNTY, DECATUR, TEXAS. court." Id. art. 44.01(d). "In this article, 'prosecuting attorney' means the county FOR APPELLEE: BARRY GREEN, SMITH attorney, district attorney, or criminal district & GREEN, P.C., DECATUR, TEXAS. attorney who has the primary responsibility of prosecuting cases in the court hearing the case JUDGES: PANEL: LIVINGSTON, C.J.; and does not include an assistant prosecuting GARDNER and WALKER, JJ. attorney." Id. art. 44.01(i). OPINION BY: ANNE GARDNER Background [*2] OPINION The trial court signed the order granting Palmer's motion to suppress on April 1, 2014. The State is attempting to appeal the trial The State, therefore, had until April 21, 2014, court's order granting Zachary Palmer's motion to perfect its appeal. Id. art. 44.01(d). to suppress. In one cross-point, Palmer asserts this court lacks jurisdiction over the State's The State filed a notice of appeal on April appeal. We agree, sustain Palmer's cross-point, 7, 2014. This document stated that it was and dismiss the State's appeal for want of brought "by and through the Assistant District jurisdiction. District [sic] Attorney," and the "undersigned prosecuting attorney" is identified as the deadline were ineffective under article assistant district attorney. The assistant district 44.01(d). attorney signed the notice of appeal. The The State did not file a brief responding to district attorney's name does not appear Palmer's cross-point. However, we have the anywhere on the document. The April 21, 2014 benefit of the [*4] State's responses to Palmer's deadline to perfect the appeal thereafter expired motion to dismiss and to Palmer's motion for without the State filing any additional rehearing. In both of the State's responses, it documents. stated correctly that the prosecuting attorney, as Two weeks after the expiration of the defined in article 44.01(i) of the Texas Code of deadline, on May 5, 2014, the State filed an Criminal Procedure, had to physically sign the amended notice of appeal. This document was notice of appeal or personally instruct and brought "by and through the District Attorney," authorize a subordinate to sign the specific and the

"undersigned prosecuting attorney" is notice of appeal in question. See *State v. [redacted]*, 829 S.W.2d 805, 810 (Tex. Crim. App. 1992). The district attorney signed the amended notice of appeal. The State then asserted, "While the instruction and authorization must occur prior Thereafter, in our court, Palmer filed a motion to dismiss on May 13, 2014. Palmer demonstrates that proof of the authorization, argued that the April 7, 2014 notice of appeal [sic] may come in the form of a subsequently was defective because it was signed and filed affidavit to prove the appellate court was authorized not by the district attorney but only empowered with jurisdiction by the original [*3] by an assistant district attorney in Notice of Appeal." The State then cited two violation of article 44.01(i) and that the May 5, cases: *State v. White*, 261 S.W.3d 65, 67-68 2014 amended notice of appeal was late and in (Tex. App.--Austin 2007, no pet.), and *State v. [redacted]*, violation of article 44.01(d). The State filed a Blankenship, 146 S.W.3d 218, 219 (Tex. Crim. response on May 13, 2014, as well, and, along App. 2004). with it, an affidavit by the district attorney in which he stated he authorized the assistant Upon further review, we hold that the April district attorney to file the original notice of 7, 2014 notice of appeal signed by the assistant appeal on April 7, 2014. In a per curiam order, district attorney is defective. In *Muller*, the we denied the motion to dismiss on May 14, Texas Court of Criminal Appeals wrote: 2014. Because it would have been Undaunted, Palmer filed a motion for difficult for the Legislature to have rehearing on May 16, 2014. He argued the May more clearly excluded assistant 13, 2014 affidavit did not cure the prosecutors from its definition of jurisdictional defect. The State filed a response 'prosecuting attorney,' we interpret on May 20, 2014, and on May 28, 2014, in section (i) to mean what it plainly another per curiam order, we granted the states on its face: a 'prosecuting motion for rehearing but again denied Palmer's attorney,' as used in Article 44.01, motion to dismiss. does not include under any circumstance an assistant [*5] Discussion prosecutor or other subordinate. In Palmer's brief, he raises one cross-point in which he again assails this court's jurisdiction. He contends that the assistant *Muller*, 829 S.W.2d at 809. The April 7, 2014 district attorney's April 7, 2014 notice of appeal notice of appeal was defective and, therefore, was ineffective under article 44.01(i) and that ineffective to perfect the appeal because there the district attorney's attempts to perfect the is nothing showing the district attorney appeal after the expiration of the twenty-day authorized making the appeal. *Id.* at 812. stated that the portion of *Riewe* that We further hold that the May 5, 2014 asserted a defendant could not use rule amended notice of appeal was similarly 25.2(d) of the Texas Rules of Appellate ineffective for two reasons. First, the State filed Procedure to cure a jurisdictional defect it after the expiration of the twenty-day in a notice of appeal was dicta and deadline. See Tex. Code Crim. Proc. Ann. art. declined to rely on it. See *Bayless v. [redacted]*, 44.01(d). Second, noncompliance is not State, 91 S.W.3d 801, 805 n.8 (Tex. Crim. susceptible to correction through application of App. 2002). the amendment-and-cure provisions of the Texas Rules of Appellate Procedure. *Muller*, Regarding the two cases the State relied on 829 S.W.2d at 812. in its responses, *White* and *Blankenship*, we hold that they are distinguishable. We address This leaves the State with the

district Blankenship first. attorney's affidavit, filed in this court on May 13, 2014, in which he states he authorized the In Blankenship, the State timely filed the assistant district attorney to file the original original notice of appeal and its amended notice of appeal on April 7, 2014. For the notice of appeal on the same date. State v. reasons given below, we hold it is ineffective to Blankenship, 123 S.W.3d 99, 104 n.5 (Tex. perfect the appeal. App.--Austin 2003), rev'd, 146 S.W.3d 218 (Tex. Crim. App. 2004). The court of appeals Substantively, we see no difference did not question the timeliness of the original between the district attorney's affidavit and the [*7] and amended notices of appeal. Id. at 105. amended notice of appeal filed in Muller after The original notice of appeal was signed by an the expiration of the deadline. See Muller, 829 assistant city attorney and made no mention of S.W.2d at 812-13. As noted earlier, the county attorney. Id. at 104 n.5. The noncompliance is not susceptible to correction amended notice of appeal, although still signed through application of the amendment-and-cure by the assistant city attorney, added one provisions of the Texas Rules of Appellate paragraph stating that the notice of appeal was Procedure. Id. at 812. Ratification [*6] by the with the consent of the county attorney. Id. at prosecuting attorney after the expiration of the 105. After the expiration of the deadline, the deadline is ineffective. State v. Boseman, 830 State filed affidavits in which it asserted both S.W.2d 588, 589-90 (Tex. Crim. App. 1992). the city and the county attorneys had "[T]he State lost the opportunity to appeal authorized the appeal within the deadline. Id. at when the fifteen[-]day window of opportunity 106. The Austin Court of Appeals held that closed without the county attorney's personal both the recitation in the timely-filed amended and express authorization of this specific notice notice of appeal (that the appeal was with the of appeal." Id. at 590. Jurisdiction cannot be 1 consent of the county attorney) and the retroactively obtained. State v. Riewe, 13 untimely-filed affidavits were ineffective and S.W.3d 408, 412 (Tex. Crim. App. 2000). Once2 dismissed the appeal. Id. at 105-06. jurisdiction is lost, the courts of appeals lack the power to invoke any rule to thereafter In contrast, the Texas Court of Criminal obtain jurisdiction. Id. at 413. Appeals, relying strictly on the recitation of the county attorney's consent in the timely-filed 1 The statute was amended in 2007 to amended notice of appeal, held the amended extend the deadline from fifteen days to notice of appeal complied with article 44.01(d) twenty days. Act of May 28, 2007, 80th and reversed the court of appeals. Blankenship, Leg., R.S., ch. 1038, § 2, 2007 Tex. Gen. 146 S.W.3d at 220. The Texas Court of Laws 3592 (amended 2007) (current Criminal Appeals did not rely on the untimely- version at Tex. Code Crim. Proc. Ann. filed affidavits. Id. The State's reliance on art. 44.01(d)). Blankenship for that proposition is, therefore, 2 The Texas Court of Appeals later misplaced. Moving on to [*8] White, in that case, App.--Austin Dec. 18, 2008), rev'd, 306 S.W.3d when determining the timeliness of the filing, 753 (Tex. Crim. App. 2010). the court of appeals relied on an affidavit by a clerk to show the district clerk's office was When the case went up to the Texas Court closed for two days due to inclement weather. of Criminal Appeals, that court never State v. White, 248 S.W.3d 310, 312 (Tex. App.- questioned jurisdiction. State v. White, 306 -Austin 2007, no pet.). The court noted rule S.W.3d 753, 754-60

(Tex. Crim. App. 2010). 4.1(b) of the Texas Rules of Appellate Courts may sua sponte address jurisdictional Procedure expressly authorized the use of issues because subject matter jurisdiction affidavits when determining the timeliness of cannot be conferred by agreement of the filings. Id. (citing Tex. R. App. P. 4.1(b)). As parties. State v. Roberts, 940 S.W.2d 655, 657 shown in a subsequent opinion by the court in (Tex. Crim. App. 1996), overruled on other the same case, the court drew a distinction grounds by State v. Medrano, 67 S.W.3d 892, between the making of an appeal under article 894 (Tex. Crim. App. 2002) (overruling 44.01(d) and the filing of the notice of appeal. requirement that defendant must allege evidence was illegally obtained before the State The deadline for filing the notice of appeal could take an appeal under article 44.01(a)(5) in White was January 15, 2007, but due to a contesting the granting of a motion to holiday and two days of inclement weather, the suppress). Consequently, if the Austin Court of deadline for filing was extended until January Appeals had incorrectly asserted jurisdiction, 18, 2007, by virtue of rule 4.1 of the Texas we would expect the Texas Court of Criminal Rules of Appellate Procedure, and the State [*10] Appeals to have addressed that issue. thus successfully filed its notice of appeal We conclude, therefore, that, at least under timely on January 18, 2007. White, 261 S.W.3d some circumstances, the State may use an at 66. The problem, however, was not the affidavit filed after the deadline to prove its timeliness of the filing of the notice of appeal assertion that it properly made the appeal in but the timeliness of the making of the appeal compliance with article 44.01(d). under article 44.01(d). We nevert hel es s hold White is The district attorney signed the notice of distinguishable. First, the court in White appeal but did not date his signature. Id. at 67. expressly stated that the State's notice of appeal Although rule 4.1 extended the time to file the was not defective on its face because neither notice of appeal, the court held that rule 4.1 did article 44.01 nor earlier case law required the not extend the time during which the prosecuting attorney to indicate the date on prosecuting attorney had to make the appeal which he signed the notice of appeal. White, under article 44.01(d); consequently, [*9] the 261 S.W.3d at 67. In contrast, the notice of court of appeals abated the appeal and appeal in the present case is defective on its remanded the matter to the trial court to face because it is signed by an assistant district determine whether the district attorney had attorney and makes no reference to the signed the notice of appeal, that is, made the prosecuting attorney having authorized the appeal as contemplated under article 44.01(d), appeal. See Muller, 829 S.W.2d at 812. A by January 15, 2007. Id. "The district attorney defective notice of appeal is "not susceptible to filed an affidavit in the district court stating correction through application of the that he signed the State's notice of appeal on 'amendment and cure' provisions of the Texas January 10, 2007, and after a brief hearing, the Rules of Appellate Procedure." See id. Article district court so found." Id. The Austin Court of 44.01 itself provides no "amendment and cure" Appeals asserted jurisdiction and went on to provision. Tex. Code Crim. Proc. art. 44.01. affirm the trial court's order on the merits dismissing the State's indictment. State v. Second, in Muller, the Texas Court of White, No. 03-07-00041-CR, 2008 Tex. App. Criminal Appeals wrote: could be clarified with an affidavit after the Whenever a

question is expiration of the article 44.01(d) deadline. In legitimately raised concerning the the present case, there is no "legitimately prosecuting attorney's personal raised" concern in the April 7, 2014 notice of authorization of a State's appeal, appeal. It is defective on its face. See Muller, the State bears the burden of 829 S.W.2d at 812. Nothing in that document proving that [*11] the appeal in hints in the least [*12] that the district attorney question was personally, expressly authorized this specific appeal. If there is no and specifically authorized by the compliance within the twenty-day window, the prosecuting attorney. Thus, the window is thereafter closed. See Boseman, 830 appellate record must clearly S.W.2d at 590-91; Muller, 829 S.W.2d at 813. reflect the prosecuting attorney's At the expiration of the twenty-day deadline, personal authorization of the the State had only a defective notice of appeal specific notice of appeal filed in a on file, which perfected nothing. See State v. given case. Without a signature or Shelton, 830 S.W.2d 605, 606 (Tex. Crim. App. other written expressed 1992) (holding signature stamp of county authorization, as reflected in the attorney authorizing the appeal was ineffective appellate record, there would be no to vest court of appeals with jurisdiction). guarantee that the only person permitted by statute to make an Conclusion appeal on behalf of the State We sustain Palmer's cross-point and actually participated in the process. dismiss the State's appeal for want of Evidence of a general delegation jurisdiction. of authority to an assistant does not qualify under the statute. /s/ Anne Gardner

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Muller, 829 S.W.2d at 810 n.6. In White the JUSTICE district attorney signed the notice of appeal, PANEL: LIVINGSTON, C.J.; GARDNER and the State filed the notice of appeal timely. and WALKER, JJ. White, 261 S.W.3d at 66-67. The ambiguity-- the "legitimately raised" concern-- was whether PUBLISH the district attorney made the appeal within the DELIVERED: June 25, 2015 article 44.01(d) deadline, which, unlike the filing requirements, could not be extended. White had a "legitimately raised" concern that

APPENDIX B