

TEXAS COURT OF APPEALS, THIRD DISTRICT AT AUSTIN

Ex parte Gary Griffin

No. 03-21-00198-CR · No. No. 03-21-00198-CR · Decided November 26, 2025

SUMMARY

The Texas Court of Appeals for the Third District, on remand from the Texas Court of Criminal Appeals, considered whether Gary Griffin was entitled to an out-of-time appeal from the denial of his first application for habeas corpus. The court held that a 93-day delay in seeking the out-of-time appeal did not bar relief because there was no statutory deadline and a breakdown in the system had prevented a timely appeal. The court reversed the denial of Griffin’s second habeas application and remanded for further proceedings.

CASE DETAILS

COURT	Texas Court of Appeals, Third District at Austin
WRITING FOR THE COURT	Maggie Ellis, Justice; Chief Justice Byrne; Justice Triana; Justice Ellis
JURISDICTION	Texas Court of Appeals, Third District at Austin
DECIDED	November 26, 2025
DOCKET	No. 03-21-00198-CR
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	On remand from the Texas Court of Criminal Appeals after that court vacated the Court of Appeals' prior judgment and remanded for proceedings consistent with its opinion.
STANDARD OF REVIEW	The opinion does not expressly identify a standard of review. It reviews the habeas court's denial of the article 11.072 application and its ruling on the request for an out-of-time appeal for legal error.
PRECEDENTIAL VALUE	unpublished; do not publish
PARTIES	Gary Lee Griffin v. The State of Texas

TOPICS

- habeas corpus
- state post-conviction relief
- appellate procedure
- due process
- right to counsel

PRACTICE AREAS

- criminal procedure
- habeas corpus
- appellate procedure
- constitutional law

QUESTIONS PRESENTED

1. Whether the ninety-three-day delay in requesting an out-of-time appeal, absent a statutory deadline, disqualified Griffin from obtaining that relief.
2. Whether the breakdown caused by the clerk's failure to provide timely notice required protection of Griffin's right to appeal under due process and *Ex parte Riley*.
3. Whether the habeas court erred by denying Griffin's second article 11.072 application to the extent it relied on the delay in seeking an out-of-time appeal.

HOLDINGS

1. A ninety-three-day delay in requesting an out-of-time appeal does not disqualify a habeas applicant from relief when there is no statutory deadline for requesting the out-of-time appeal.
2. When a breakdown in the system prevents a habeas applicant from timely filing a proper notice of appeal, due process requires that the applicant be permitted to exercise the statutory right of appeal.
3. Griffin was entitled to an out-of-time appeal from the denial of his first application for writ of habeas corpus.

KEY QUOTATIONS

“Regardless of any delay by appellate counsel, a 93-day delay, given the absence of a statutory deadline, should not disqualify this case from being considered under Ex parte Riley.” (at 2)

“When such a breakdown occurs, due process requires that the right to appeal be protected.” (at 3)

FACTUAL BACKGROUND

Griffin was convicted of assault on a public servant and received a four-year term of community supervision after the trial court suspended a two-year sentence and fine. He filed an article 11.072 habeas application alleging ineffective assistance, but his counsel did not learn of the denial until December 14, 2020 because of a clerk's error. Griffin filed a second application on March 16, 2021, seeking an out-of-time appeal from the denial of the first application, approximately ninety-three days after counsel received actual notice.

PROCEDURAL HISTORY

A jury convicted Griffin of assault on a public servant, and the trial court placed him on community supervision. After the Court of Appeals affirmed his conviction, Griffin filed an article 11.072 habeas application alleging ineffective assistance of counsel; the habeas court denied it. Griffin later filed a second application seeking an out-of-time appeal from the denial of the first application. The Court of Appeals initially affirmed, but the Texas Court of Criminal Appeals vacated that judgment and remanded because the appellate court had improperly treated the delay in seeking an out-of-time appeal as disqualifying. On remand, the Court of Appeals reversed the denial of the second application and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The cause was remanded to the habeas court for proceedings consistent with the opinion, including proceedings recognizing Griffin's entitlement to an out-of-time appeal from the denial of his first habeas application.

CASES CITED

- Griffin v. State, No. 03-15-00398-CR, 2017 WL 2229869, at *9 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication)
- Ex parte Griffin, 703 S.W.3d 831 (Tex. App.—Austin 2024) (op. on reh'g), vacated and remanded, No. PD-0611-24, 2025 WL 2576270 (Tex. Crim. App. Sept. 3, 2025) (per curiam)
- Ex parte Riley, 193 S.W.3d 900, 901-02 (Tex. Crim. App. 2006)
- Rodriguez v. Court of Appeals, Eighth Supreme Jud. Dist., 769 S.W.2d 554, 558-59 (Tex. Crim. App. 1989)
- Ex parte Valdez, 489 S.W.3d 462, 465 (Tex. Crim. App. 2016)
- Ex parte McCarty, No. 03-14-00575-CR, 2015 WL 2089091, at *3-04 (Tex. App.—Austin Apr. 29, 2015, no pet.) (mem. op., not designated for publication)

OPINION

Ex Parte Gary Griffin v. the State of Texas

PER CURIAM.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

ON REMAND

NO. 03-21-00198-CR

Ex parte Gary Griffin

FROM THE 22ND DISTRICT COURT OF HAYS COUNTY

NO. CR-14-0432-A-WHC2, THE HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Gary Lee Griffin of assault on a public servant. See Tex. Penal Code § 22.01(b)(1). The trial court sentenced him to two years' confinement and a \$2,500 fine, suspended imposition of the sentence, and placed him on community supervision for a period of four years. This Court affirmed his conviction. See Griffin v. State, No. 03-15-00398-CR, 2017 WL 2229869, at *9 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication). On August 31, 2020, Griffin filed an article 11.072 application for writ of habeas corpus, alleging that his trial counsel was ineffective. See Tex. Code Crim. Proc. art. 11.072 (establishing procedure for habeas application in felony case in which applicant seeks relief from community-supervision order). The habeas court denied the application on October 20, 2020. However, due to a clerk's error, habeas counsel did not learn of the denial until December 14, 2020. On March 16, 2021, Griffin filed a second article 11.072 application, once more raising the ineffective-assistance claim

and requesting an out-of-time appeal from the denial of the first application. The habeas court denied the second application after finding that there were no controverted, previously unresolved facts material to the legality of [Griffin]’s confinement, or that due process was violated by not receiving a certified copy or encrypted email of the order [denying the first application] since [Griffin] had notice of the decision on December 14, 2020 and failed to file a motion for an out-of-time appeal within thirty days of having notice. We abated the appeal of that denial for the habeas court to clarify the nature of its order; the court issued a revised order in which it dismissed the second application as frivolous and determined that Griffin was not entitled to relief based on the application’s contents. See *Ex parte Griffin*, No. 03-21-00198-CR, 2023 WL 2837487, at *3 (Tex. App.—Austin Apr. 7, 2023, no pet.) (mem. op., not designated for publication); see also Tex. Code Crim. Proc. art. 11.072, § 7(a) (requiring that when habeas court determines “that the applicant is manifestly entitled to no relief,” court either “enter a written order denying the application as frivolous” or “enter a written order including findings of fact and conclusions of law”). On appeal in this Court, Griffin contended, *inter alia*, that the habeas court erred by denying his request for an out-of-time appeal based on the mistaken belief that the second application was subject to a thirty-day deadline. We affirmed the habeas court’s order and, citing the Court of Criminal Appeals’ decision in *Ex parte Riley*, 193 S.W.3d 900, 901 (Tex. Crim. App. 2006), concluded that Griffin had “failed to show that he was entitled to an out-of-time appeal as a matter of due process in light of his attorney’s 93-day delay in requesting the out-of-time appeal without the barest reason given for the delay.” *Ex parte Griffin*, 703 S.W.3d 831, 837 (Tex. App.—Austin 2024) (op. on reh’g), vacated and remanded, No. PD-0611-24, 2025 WL 2576270 (Tex. Crim. App. Sept. 3, 2025) (per curiam) (not designated for publication). 2 The Court of Criminal Appeals vacated our judgment, agreed with Griffin that our conclusion was not supported by its case law, and stated, “Regardless of any delay by appellate counsel, a 93-day delay, given the absence of a statutory deadline, should not disqualify this case from being considered under *Ex parte Riley*.” *Griffin*, 2025 WL 2576270, at *1. The court remanded the case to this Court for proceedings consistent with its opinion. *Id.* In Texas, the writ of habeas corpus protects, among other rights, the right to obtain an out-of-time appeal when there is a “breakdown in the system” that prevents the filing of a proper notice of appeal. See *Riley*, 193 S.W.3d at 902; see also *Griffin*, 703 S.W.3d at 839 (Triana, J., dissenting). When such a breakdown occurs, due process requires that a habeas applicant be permitted to exercise a statutory right of appeal. See *Riley*, 193 S.W.3d at 902. The Court of Criminal Appeals has held that a trial court that otherwise has habeas authority may grant an out-of-time appeal from a judgment of conviction, *Rodriguez v. Court of Appeals, Eighth Supreme Jud. Dist.*, 769 S.W.2d 554, 558–59 (Tex. Crim. App. 1989); see also *Ex parte Valdez*, 489 S.W.3d 462, 465 (Tex. Crim. App. 2016) (observing that there is “no relevant distinction between a request for an out-of-time appeal and a request for an out-of-time PDR”), and we have concluded that an article 11.072 habeas application is an appropriate vehicle through which to seek such a remedy, *Ex parte McCarty*, No. 03-14-00575-CR, 2015 WL 2089091, at *3-4 (Tex. App.—

Austin Apr. 29, 2015, no pet.) (mem. op., not designated for publication) (listing supporting cases). There is no deadline for requesting an out-of-time appeal. Griffin, 703 S.W.3d at 839 (Triana, J., dissenting). In light of the breakdown that occurred in this case, which prevented habeas counsel from filing a timely notice of appeal from the denial of Griffin's first application, the ninety-three-day delay between counsel's receiving actual notice of the denial and the filing of the 3 second application did not disqualify Griffin from entitlement to an out-of-time appeal under Riley. When such a breakdown occurs, due process requires that the right to appeal be protected. See Riley, 193 S.W.3d at 902. Accordingly, we conclude that Griffin is entitled to an out-of-time from the denial of his first application for writ of habeas corpus. To the extent that the habeas court relied on the delay to deny Griffin's request for an out-of-time appeal from the denial of his first application, its ruling was in error. We therefore reverse the habeas court's order denying Griffin's second application for writ of habeas corpus and remand the cause to the habeas court for proceedings consistent with this opinion.¹ _____ Maggie Ellis, Justice Before Chief Justice Byrne, Justices Triana and Ellis Reversed and Remanded on Remand Filed: November 26, 2025 Do Not Publish 1 All pending motions are dismissed as moot. 4