**Dismissed and Opinion filed April 26, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01247-CR**

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**TOMMIE JUNIOUS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 240th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 29,317-A**

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## O P I N I O N

On October 19, 2000, we withdrew our opinion of October 12, 2000 dismissing the appeal for want of jurisdiction. We issue the following opinion in its place.

Appellant appeals from a judgment adjudicating guilt. In two points of error, appellant contends the trial court erred in granting a new trial as to punishment and in entering judgment. We dismiss for lack of jurisdiction.

On July 14, 1997, the State charged appellant by indictment with aggravated assault with a deadly weapon. The indictment also included two enhancement paragraphs alleging prior convictions of felony delivery of marijuana and felony forgery. On August 6, 1998, appellant

entered a plea of nolo contendere to the offense of aggravated assault with a deadly weapon pursuant to a plea agreement. Appellant initialed and signed the trial court's written admonishments, one of which indicated the range of punishment for the offense of aggravated assault to be imprisonment for any term of not more than twenty years or less than two years. Appellant also initialed and signed a written stipulation and judicial confession in which he acknowledged that he committed the acts alleged in the indictment and recognized the State's recommended punishment to be two years of deferred adjudication and 240 hours of community service. The trial court accepted appellant's plea, found the evidence sufficient to substantiate guilt, deferred the adjudication of guilt, and placed appellant on community supervision for two years.

On the same day, appellant signed a waiver of his right to file a motion for new trial, motion for arrest of judgment or notice of appeal. By his signature, appellant acknowledged that he had been previously admonished about the right to appeal, specifically, "that if the punishment assessed by the State and agreed to by myself and my attorney, I [appellant] must have the permission of this [trial] Court before I may prosecute an appeal on any matter in this case, except for those matters raised by written motions prior to trial." He also acknowledged his right to an appointed attorney if found indigent and the time frame in which he must file a motion for new trial, motion in arrest of judgment, or a notice of appeal. "With the knowledge and understanding of above," appellant voluntarily waived his right to file a motion for new trial, motion in arrest of judgment, notice of appeal, or any right to appeal in this cause of action.

On July 9, 1999, the State moved to adjudicate appellant's guilt. On October 7, 1999, after a hearing on the State's motion, the trial court revoked appellant's community supervision and adjudicated appellant's guilt on the offense of aggravated assault. The trial court found the enhancement paragraphs true and assessed punishment at twenty-five years confinement in the Institutional Division of the Texas Department of Criminal Justice. Seven days after the judgment was entered, appellant filed a motion for new trial complaining that his plea was involuntary because he had not been informed prior to entering his plea to the original offense

that he could be sentenced to twenty-five years-to-life if the enhancement paragraphs in the indictment were proven true. On October 22, 1999, the trial court granted the motion for new trial as to punishment only. On the same day, appellant signed a plea of true to the State's motion to adjudicate guilt, initialed the court's written admonishments and a recommendation that the trial court assess punishment at ten years confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant also signed a document entitled, Defendant's Notice to the Court of Waiver of Right to Appeal, in which he waived his right to appeal. On the same day, the trial court entered a new judgment adjudicating appellant's guilt and assessing punishment in accordance with the new agreement at ten years confinement. Appellant filed a general notice of appeal, asserting the trial court granted him permission to appeal due to other errors that might accrue. Four months later, appellant filed an amended notice of appeal alleging an unspecified jurisdictional defect.

On appeal, appellant contends the trial court lacked jurisdiction to grant a new trial on punishment; thus, the trial court's judgment adjudicating his guilt and assessing punishment at ten years confinement is void. Appellant further argues by granting the motion for new trial, regardless of language limiting the new trial to punishment, the trial court restored the case to its original position before the entry of his plea. Appellant urges this court to remand the cause to the trial court for the entry of a new plea and a new trial. In the alternative, appellant prays this court remand the cause to the trial court for a ruling on the motion for new trial.

We do not reach the merits of appellant's points of error because we lack jurisdiction over the appeal. To invoke the appellate jurisdiction of this court over an appeal from a judgment entered on a negotiated plea of nolo contendere where the punishment does not exceed that agreed upon, appellant must file a specific notice of appeal complying with the extra notice requirements of rule 25.2(b)(3) of the Texas Rules of Appellate Procedure. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). Rule 25.2(b)(3) requires the notice of appeal to state the following: (1) the appeal is for a jurisdictional defect; (2) the substance of the appeal was raised by written motion and ruled on before trial; or (3) the trial court granted appellant permission to appeal. TEX. R. APP. P. 25.2(b)(3).

The record reflects that appellant entered a negotiated plea for two years deferred adjudication, no fine, 240 hours of community service and no restitution, and the trial court assessed punishment in accordance with the plea agreement.[1] Because appellant appeals from a judgment where he entered a nolo contendere plea and the trial court assessed punishment according to the terms of the plea recommendation, he must file a notice of appeal that meets the requirements of section 25.2(b)(3) to invoke this court's jurisdiction.

Appellant's notice of appeal did not state that the appeal was for a jurisdictional defect or that the substance of the appeal was raised by written motion and ruled on before trial. Instead, appellant stated the following in his notice of appeal:

> Defendant above named files the Notice For Appeal From Adjudicating his Guilt in the Cause pursuant to 21.1, 21.2; 21.3(b) of the Texas Rules [sic] Appellate Procedure. For reasons stated herein defendant's sentence of 25 years on October 7, 1999. [sic] After this material erra [sic] and misrepresentation, by the State. [sic] Concerning the range of punishment. [sic] On October, [sic] 15, 1999 Attorney for Defendant filed a motion for New Trial, October, [sic] 22, 1999. A hearing was conducted, Attorney for state asked for plea bargin [sic], in his best interest of 10 years. The said judge granted defendant a right appeal, due to other erra's [sic] that may accure. [sic]

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[1] Deferred adjudication community supervision is viewed as punishment for purposes of plea negotiations. *Ditto v. State*, 988 S.W.2d 236, 238 (Tex. Crim. App. 1999).

> [W]hen a prosecutor recommends deferred adjudication in exchange for a defendant's plea of guilty or nolo contendere, the trial judge does not exceed that recommendation if, upon proceeding to an adjudication of guilt, he later assesses any punishment within the range allowed by law. That is because a defendant who trades a plea of guilty or nolo contendere for a recommendation by the prosecutor that a judgment of guilt be delayed while he serves a period of community supervision necessarily accepts, at least in the absence of some express agreement to the contrary, that the prosecutor is making no recommendation at all concerning the term of years he may be required to serve if his probation is later revoked and the trial court proceeds to adjudicate him guilty of the charged offense.

*Watson v. State*, 924 S.W.2d 711, 714 (Tex. Crim. App. 1996); *Tackett v. State*, 989 S.W.2d 855, 858 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (holding legislature treats "deferred adjudication as punishment for purposes of plea negotiations in order to make appellate rules with respect to such pleas equal to those in other cases").

Although the notice states the trial court granted appellant a right to appeal other errors, the record does not indicate that the trial court granted appellant permission to appeal any issue. After assessing punishment at twenty-five years, the trial court explained to appellant that if appellant thought an error had been committed, appellant had a right to appeal and the trial court would appoint an attorney to represent him on appeal if appellant was found to be indigent. Later, at the hearing ordered by this court to determine if appellant wanted to prosecute the appeal and to appoint appellate counsel if indigent, the trial court took judicial notice of the court's records, including appellant's waiver of an appeal, and specifically declined to find that appellant was entitled to an appeal.

The amended notice of appeal, filed four months later pursuant to rule 25.2(d) of the rules of appellate procedure, attempted to cure the defects in the general notice "by excepting to the October 22, 1999, judgment . . . by virtue of a jurisdictional defect." Amendments to a notice of appeal made pursuant to rule 25.2(d) cannot suffice to confer jurisdiction over an appeal. *State v. Riewe*, 13 S.W.3d 408, 413-14 (Tex. Crim. App. 2000). "[O]nce jurisdiction is lost, the court of appeals lacks the power to invoke any rule to thereafter obtain jurisdiction." *Id*. at 413. Because neither appellant's general notice of appeal nor his amended notice invoked this court's jurisdiction, we must dismiss the appeal. *Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998).

Accordingly, we dismiss this appeal for want of jurisdiction.

PER CURIAM

Judgment rendered and Opinion filed April 26, 2001.
Panel consists of Justices Anderson, Fowler, and Edelman.
Do Not Publish — TEX. R. APP. P. 47.3(b).