

SIXTH COURT OF APPEALS

06-17-00107-CR

State of Texas, Appellant

Andrew Robert Vannoord, Appellee,

v.

**On Appeal from the County Court at Law, Fannin County
49012**

Appellee's Motion to Dismiss the State's Appeal for Want of Jurisdiction

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Appellee files this motion to dismiss the State’s appeal for want of jurisdiction
[See Tex. Rule App. Proc. 10.5(a)]:

II. Motion

1. Background

1. This case is a State’s appeal from the County Court at Law, Fannin County. The cause number below is 49012.

2. On June 8, 2017, the reporter’s record was filed. On July 12, 2017, the clerk’s record was filed.

2. This appeal falls under [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#), which contains a strict 20-day deadline from the date on which the order, ruling, or sentence to be appealed is entered by the trial court for the State to file a notice of appeal

3. This State’s appeal falls under [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#) because the State seeks to appeal the trial court’s granting of motion to suppress evidence. The order in which the trial court granted the motion to suppress was signed and entered by the trial court on **May 23, 2017**. See CR.39.¹

4. Under [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#), the State “[m]ay **not** make an appeal under [Tex. Code Crim. Proc. Art. 44.01(a) or (b)] later than the **20th day after the date on which the order, ruling, or sentence to be appealed is entered by the court.**” (emphasis supplied). See also [Tex. Rule App. Proc. 26.2\(b\)](#)

¹ The record is cited as “CR” followed by the page number for the clerk’s record and “CR-Supp.” Followed by the page number for the supplemental clerk’s record.

[\(2017\)](#) (State must file notice of appeal within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.).

5. If the State seeks to appeal a trial court's granting of motion to suppress evidence as the State does here, under [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#), the State must certify in its notice of appeal that "[t]hat the appeal is **not** taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case." (emphasis supplied).

3. The State's notice of appeal filed on May 22, 2017 is fatally defective

6. On May 22, 2017, the State filed this notice of appeal:

THE STATE OF TEXAS
VS.
ANDREW ROBERT VANNOORD

NO. 49012
§
§
§
§

IN THE COUNTY COURT
AT LAW OF
FANNIN COUNTY, TEXAS

STATE'S NOTICE OF APPEAL

COMES NOW the State of Texas, by and through her Criminal District Attorney of Fannin County, Richard E. Glaser, and files this *State's Notice of Appeal*.

I.

The trial court signed an order granting the motion to suppress on and thereby dismissing the complaint and information in this case on May 19, 2017. As required by Code of Criminal Procedure Article 44.01(d), this notice is filed within 20 days of the Court entering its written order.

II.

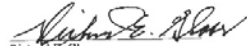
Under Code of Criminal Procedure Article 44.01(a)(5), the State is entitled to appeal the trial court's decision to grant a motion to suppress evidence. See TEX. CODE CRIM. PROC. art. 44.04(a)(5). The undersigned prosecuting attorney certifies that:

1. Jeopardy has not attached in the case; and
2. The appeal is not taken for the purposes of delay.

III.

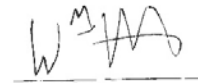
Pursuant to Code of Criminal Procedure Article 44.01(e), the State is entitled to stay in the proceedings pending the disposition of the appeal. The State hereby requests that this Court stay further proceedings in this case until the appeal has been disposed.

Respectfully submitted,


Richard E. Glaser
State Bar No. 08000000
Criminal District Attorney
Fannin County, Texas
101 East Sam Rayburn Drive, Suite 301
Bonham, Texas 75418
903-583-1448
903-583-7682 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *Notice of Appeal* has been served on counsel for the defendant by facsimile on this 22nd day of May, 2017.


William S. Porter
Assistant Criminal District Attorney
Fannin County, Texas

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7. As depicted in the notice of appeal filed on **May 22, 2017** (CR.37-38), the State **failed to comply with** [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#). The State certified that “1. Jeopardy has not attached in the case; and 2. The appeal is not taken for the purposes of delay,” but the State **failed to assert** that “[t]he evidence, confession, or admission is of substantial importance in the case.” See CR.37.

8. Thus, the State’s notice of appeal filed on **May 22, 2017** (CR.37-38) is **fatally defective**. See [State v. Redus, 06-13-00136-CR, 2013 Tex. App. LEXIS 14459 \(Tex. App. Texarkana Nov. 27, 2013\)](#), *pet. granted*, [PD-0067-14, 2014 Tex. Crim. App. LEXIS 584 \(Tex. Crim. App. Apr. 9, 2014\)](#), *affirmed*, [445 S.W.3d 151](#)

[\(Tex. Crim. App. 2014\)](#).

9. As the Texas Court of Criminal Appeals (“TCCA”) held in *Redus*, affirming this Court’s ruling, the State is **not** permitted to appeal a trial court’s order granting a defendant’s motion to suppress evidence if the State’s notice of appeal fails to include the certification required by [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#). *Id.* at 155-156.

10. Further, the State is **not** permitted to confer jurisdiction on the appellate court **retroactively** by filing an amended notice of appeal after the 20-day period imposed by [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#) containing the certification. *Id.* at 152 and 152 n.3, citing [State v. Riewe, 13 S.W.3d 408, 409 \(Tex. Crim. App. 2000\)](#) [(1) The lack of a timely certification in a State’s notice of appeal **deprived** the court of appeals of jurisdiction, and (2) an amended, **but untimely**, certification **did not retroactively confer jurisdiction**] (emphasis supplied).

11. In addition, the TCCA rejected arguments that the requirements set forth by [Tex. Code Crim. Proc. Art. 44.01\(a\)\(5\) \(2017\)](#) and [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#) are “hypertechnical” requirements that may be ignored, *see* 445 S.W.3d at 158 (emphasis added):

Courts are **not** “hypertechnical” in requiring the elected prosecutor to actually vouch for the facts that his interlocutory appeal is not being taken for purposes of delay and that the evidence suppressed is of “substantial importance” to the case. Courts do **not** go behind the certification to examine the importance of the suppressed evidence precisely because they rely upon the elected prosecutor’s certification

that he has reviewed the legal merits of his appeal.

12. These requirements go to the basic evenhanded fairness of the jurisdictional process in appeals. If a criminal defendant who wishes to appeal does **not** abide by [Tex. Rule App. Proc. 26.2\(a\) \(2017\)](#) and fails to file his notice of appeal: (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or (2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely files a motion for new trial, then this Court would **not** have jurisdiction to entertain the criminal defendant's appeal. See [Satterwhite v. State, 36 S.W.3d 145 \(Tex. App. Houston 1st Dist. 2000\)](#) (Jurisdictional issues may **not** be waived, and criminal defendant must file the notice of appeal within 30 days); [State ex rel Holmes v. Denson, 671 S.W.2d 896, 898-899 \(Tex. Crim. App. 1984, orig. proceeding\)](#) (Jurisdictional matters may **not** be waived); see, e.g., [Foreman v. State, 05-03-00567-CR, 2004 Tex. App. LEXIS 5117, *2 \(Tex. App. Dallas June 10, 2004\)](#) (Where the criminal defendant fails to file a timely notice of appeal, the court of appeals lacks jurisdiction to consider the appeal).

4. On July 12, 2017, this Court issued a letter, directing the State to respond by July 27, 2017, explaining why this Court should not dismiss this appeal for want of jurisdiction

13. On **July 12, 2017**, the same day that the clerk's record was filed, the fact that the State's notice appeal filed on **May 22, 2017** (CR.37-38) is defective of

came to this Court's attention.

14. On **July 12, 2017**, this Court issued a letter informing the State regarding this fatal defect, and correctly pointed out that this Court is “[w]ithout jurisdiction over the State’s appeal.” In the **July 12, 2017 letter**, this Court wrote (emphasis supplied):

“[T]his constitutes notice of the Court’s intent to dismiss this appeal for want of jurisdiction unless the State demonstrates how the Court has jurisdiction over the appeal notwithstanding the facts and circumstances discussed above. The State’s response to this letter is due to be filed within fifteen days of the date of this letter, or on or before July 27, 2017.”

5. In response to the July 12, 2017 letter issued by this Court, on July 17, 2017, the State files an amended notice of appeal, which is a nullity

15. In apparent response to this Court’s July 12, 2017 letter, on **July 17, 2017** the State filed a “*State’s Amended Notice of Appeal.*” See CR-Supp.7-8.

16. In the *State’s Amended Notice of Appeal*, the State asserts that the notice “[i]s filed in accordance with TEX. R. APP. P. 25.2(f) and 37.1 and hereby incorporates by reference the State’s Notice of Appeal filed on May 22, 2017.” (CR-Supp.7-8).

17. The **July 17, 2017** *State’s Amended Notice of Appeal* was filed **55 days after** the order in which the trial court granted the motion to suppress was signed and entered by the trial court on **May 23, 2017**. See CR.39. Thus, the State missed the filing deadline by **35 days**.

18. As discussed above, the State is **not** permitted to confer jurisdiction on the appellate court **retroactively** by filing an amended notice of appeal after the 20-day period imposed by [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#) containing the certification. See [Riewe, 13 S.W.3d 408 at 409](#) [(1) The lack of a timely certification in a State’s notice of appeal **deprived** the court of appeals of jurisdiction, and (2) an amended, **but untimely**, certification **did not retroactively confer jurisdiction**] (emphasis supplied).

19. And, the rules cited by the State in the *State’s Amended Notice of Appeal* do **not** help the State.

20. First, [Tex. Rule App. Proc. 25.2\(f\) \(2017\)](#) (cited by the State) does **not** help the State because on its face, it applies **only** to the defendant filing an amended notice of appeal (emphasis supplied):

(f) Amending the Notice or Certification. An amended notice of appeal or trial court’s certification **of the defendant’s right of appeal** correcting a defect or omission in an earlier filed notice or certification, including a defect in the notification of the defendant’s appellate rights, may be filed in the appellate court in accordance with Rule 37.1, or at any time before the appealing party’s brief is filed if the court of appeals has not used Rule 37.1. The amended notice or certification is subject to being struck for cause on the motion of any party affected by the amended notice or certification. After the appealing party’s brief is filed, the notice or certification may be amended only on leave of the appellate court and on such terms as the court may prescribe.

21. Thus, [Tex. Rule App. Proc. 25.2\(f\) \(2017\)](#) has **no** applicability to the State’s right to amend a notice of appeal. This is clear because Rule 25.2(f) also

references [Tex. Rule App. Proc. 37.1 \(2017\)](#), which is also cited by the State in the *State's Amended Notice of Appeal*. [Tex. Rule App. Proc. 37.1 \(2017\)](#) **clearly applies only** to the criminal defendant's rights of amending a notice of appeal (emphasis added):

37.1 - On Receiving the Notice of Appeal. If the appellate clerk determines that the notice of appeal or certification of **defendant's right of appeal in a criminal case is defective**, the clerk must notify the parties of the defect so that it can be remedied, if possible. If a proper notice of appeal or certification of **a criminal defendant's right of appeal** is not filed in the trial court within 30 days of the date of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order under this rule or Rule 34.5(c)(2).

22. This renders the *State's Amended Notice of Appeal* filed on **July 17, 2017** a nullity.

6. The State has not yet responded to this Court's July 12, 2017 letter

23. As of the filing of this motion to dismiss, undersigned counsel has **not** received notice of service of the State's response to this Court's July 12, 2017 letter.

24. There is **no** indication on the Court's online docket that the State responded on July 27, 2017 to this Court's July 12, 2017 letter. See Court's docket as of the filing of this motion on the Texas Judicial Branch Website in Appendix; see <http://www.search.txcourts.gov/Case.aspx?cn=06-17-00107-CR&coa=coa06>.

25. Thus, it appears the State may **not** respond to this Court's July 12, 2017 letter.

7. The issue before this Court is foreclosed by years of precedent and Tex. Code Crim. Proc. Art. 44.01

26. Even if the State files a late response to this Court's July 12, 2017 letter, the issue is foreclosed by years of precedent and [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#).

27. In addition to [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#), *Redus*, the other cases discussed above, and numerous other cases, the conclusion that the State is **not** permitted to confer jurisdiction on the appellate court **retroactively** by filing an amended notice of appeal after the 20-day period imposed by [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#) containing the required certification is also **foreclosed** by [State v. Boseman, 830 S.W.2d 588, 589-90 \(Tex. Crim. App. 1992\)](#) and [State v. Palmer, 469 S.W.3d 264 \(Tex. App. Fort Worth 2015\)](#), pet. ref., [PD-0880-15, 2015 Tex. Crim. App. LEXIS 1299 \(Tex. Crim. App. Nov. 4, 2015\)](#).

28. As held in *Palmer*, (1) noncompliance with [Tex. Code Crim. Proc. Art. 44.01\(d\) \(2017\)](#) is **not** "susceptible to correction through application of the amendment-and-cure provisions of the Texas Rules of Appellate Procedure"; (2) ratification by the prosecuting attorney after the expiration of the deadline is ineffective; (3) the State lost the opportunity to appeal when the (then-15-day) window of opportunity closed without the county attorney's personal and express authorization of this specific notice of appeal; (4) jurisdiction **cannot** be retroactively obtained, citing *Riewe*, 13 S.W.3d at 412; and (5) once jurisdiction

is lost, the courts of appeals lack the power to invoke any rule to thereafter obtain jurisdiction. [Palmer, 469 S.W.3d at 266-267](#). See also [State v. Boseman, 830 S.W.2d 588, 589-90 \(Tex. Crim. App. 1992\)](#) (Once the filing deadline of the State's notice of appeal passes, the State may **not** cure defects in the notice of appeal by filing an amended notice).

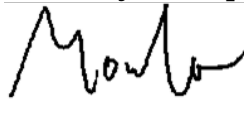
29. Appellee argues that this Court's **only** option is to dismiss the State's appeal for want of jurisdiction.

III. Prayer

Appellee prays that this Court grant this motion to dismiss the State's appeal for want of jurisdiction.

Respectfully submitted,

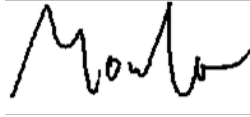
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Attorney for Appellee



/s/ **Michael Mowla**
Michael Mowla

IV. Certificate of Service

I certify that on July 28, 2017 a copy of this document was served on Richard Glaser via efile to reglaser@fanninco.net; William Porter via efile to wporter@fanninco.net; and John Setterberg via efile to jbsetterberg@fanninco.net.

A handwritten signature in black ink, appearing to read "Mowla", enclosed within a rectangular box.

/s/ Michael Mowla

Michael Mowla

Appendix

Case: 06-17-00107-CR

Date Filed: 05/23/2017

Case Type: Driving While Intoxicated

Style: The State of Texas

v.: Andrew Robert Vannoord

Orig Proc: No

Transfer From:

Transfer In:

Transfer Case:

Transfer To:

Transfer Out:

Pub Service:

APPELLATE BRIEFS

Date	Event Type	Description	Document
No briefs.			

CASE EVENTS

Date	Event Type	Disposition	Document
07/20/2017	Electronic Supplemental Clerks Record Filed		
07/12/2017	Electronic Clerks Record Filed		[PDF/136 KB] Notice
07/10/2017	Clerks record received		
06/23/2017	Appearance of counsel		[PDF/103 KB] Designati
06/08/2017	Electronic Reporter/Recorders Record Filed		[PDF/110 KB] Notice

Date	Event Type	Disposition	Document
06/02/2017	Docketing statement filed		[PDF/3.45 MB] Docketing [PDF/112 KB] Notice
05/23/2017	Notice of appeal filed in court of appeals		[PDF/71 KB] State's Notice [PDF/121 KB] Notice

CALENDARS

Set Date	Calendar Type	Reason Set
07/27/2017	Status	Supplemental clerks record due

PARTIES

Party	PartyType	Representative
State of Texas	Appellant	Richard Glaser William S. Porter
Vannoord, Andrew Robert	Appellee	William David Burrows Michael Mowla

TRIAL COURT INFORMATION

Court: County Court at Law

County: Fannin

Court Judge: Honorable Charles W. Butler

Court Case: 49012

Court Reporter: Gale H. Fiasco

Punishment:

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