IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0945-09

ERIC LEE DIAZ, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SEVENTH COURT OF APPEALS
RANDALL COUNTY

***Per Curiam*.**

O P I N I O N

Appellant was convicted of aggravated assault and the court assessed punishment at confinement for fourteen years. The Court of Appeals dismissed the appeal for want of jurisdiction after deciding that Appellant's notice of appeal was untimely. *Diaz v. State*, No. 07-09-00147-CR (Tex.App-Amarillo, delivered June 2, 2009). On August 3, 2009, Appellant timely filed his petition for discretionary review in the Court of Appeals. See Tex.R.App.P. 68.2. On September 18, 2009, the Court of Appeals withdrew its opinion, but failed to issue

another opinion in its place. On August 17, 2010, the Court of Appeals issued another opinion and affirmed the conviction. *Diaz v. State*, No. 07-09-00147-CR (Amarillo, delivered August 17, 2010).

The Court of Appeals's opinion issued on August 17, 2010, was untimely under rule 50 of the Texas Rules of Appellate Procedure because it was issued more than 60 days after Appellant's petition for discretionary review had been filed. Accordingly, the court had no jurisdiction to issue that opinion. See *Miller v. State*, 267 S.W.3d 32 (Tex.Cr.App. 2008); *Jones v. State*, 280 S.W.3d 847 (Tex.Cr.App. 2006); *Beller v. State*, 191 S.W.3d 718 (Tex.Cr.App. 2005); *Parsons v. State*, 187 S.W.3d 385 (Tex.Cr.App. 2005); Ex *parte Brashear*, 985 S.W.2d 460 (Tex.Cr.App. 1998); *Garza v. State*, 896 S.W.2d 192 (Tex.Cr.App. 1995). Therefore, the Court of Appeals's opinion issued on August 17, 2010, is ordered withdrawn, and the original judgment and opinion of the Court of Appeals that issued on June 2, 2009, are reinstated.

In his initial petition for discretionary review Appellant contended, among other things, that the Court of Appeals erred to dismiss his appeal because it did not consider or apply the mailbox rule contained in the Texas Rules of Appellate Procedure, rule 9.2. We agree. Accordingly, we grant ground one of Appellant's petition for discretionary review, vacate the judgment of the Court of Appeals dated June 2, 2009, and remand the case to the Court of Appeals to properly consider application of rule 9.2.

Delivered November 10, 2010
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