REL: July 15, 2022

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1210044

Frederick A. Burkes, Sr.

v.

James Franklin

Appeal from Jefferson Circuit Court
(CV-21-67)

BRYAN, Justice.

Frederick A. Burkes, Sr., appeals from a judgment entered by the Jefferson Circuit Court in favor of James Franklin in an action initiated by Burkes. For the reasons explained below, we conclude that the circuit

court lacked subject-matter jurisdiction over the action, and, consequently, we dismiss this appeal.

Background

In March 2020, Burkes defeated Franklin, the incumbent, in a primary election for the office of constable for District 59 in Jefferson County. Burkes was unopposed in the general election and was declared and certified as the winner of the election on Friday, November 13, 2020.

Thereafter, Franklin sent a letter to the Jefferson Probate Court informing the probate court that Burkes had not filed an official bond within 40 days of the declaration of Burkes's election to the office of constable. On January 8, 2021, the probate court sent a letter to Governor Kay Ivey stating, in relevant part:

> "Under Ala[.] Code [(1975),] § 11-2-3, the official bonds of all county officials (except for the bond of the judge of probate) are to be recorded in the office of judge of probate. This includes the official bonds of duly elected county Constables.
>
> "Alabama Code [(1975),] § 36-5-2 provides that '[i]n all cases, official bonds must be filed in the proper office within 40 days after the declaration of election ….' Alabama Code [(1975),] § 36-5-15 provides in turn that '[i]f any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office. In such case, it is the duty of the officer in whose office such bond is required to be filed at once to certify such failure to the appointing power,

> and the vacancy be filled as in other cases.' Finally, Ala[.] Code [(1975),] § 36-23-2 provides that '[v]acancies in the office of constable shall be filled by appointment of the Governor, and the person appointed shall hold office for the unexpired term until his successor is elected and qualified.'
>
> "....
>
> "It is this office's understanding that by statute it is required to notify the Governor (as the 'appointing power') of any duly elected Constable failing to file his or her bond within 40 days after election results are declared, as the office is then, by statute, vacated. Please consider this letter to be such declaration and certification with respect to Constable for District 59, Jefferson County, Alabama. This office takes no position with respect to any appointment to fill any vacancy; I would note, however, that Mr. Burkes, the duly elected Constable for District 59, ran unopposed in the November 2020 General Election."

The governor thereafter appointed Franklin to the office of constable for District 59.

On April 22, 2021, Burkes, acting pro se, initiated this action, which he identified as a quo warranto action, in the circuit court. Burkes alleged in his complaint that he had been sworn into the office of constable on January 4, 2021, and that he had filed an official bond on December 31, 2020, which he contended was timely pursuant to § 36-23-4, Ala. Code 1975 ("Before entering upon the duties of his office, the constable must give bond as prescribed by law."). Burkes requested that

Franklin be ordered to return "all Constable paperwork back to the clerk's office and to cease and desist all actions concerning this office."

Also acting pro se, Franklin filed an "answer" in which he also moved for a "summary judgment." In summary, Franklin asserted that Burkes had vacated the office of constable by failing to comply with the pertinent statutory procedure concerning the payment of official bonds. Franklin requested, among other things, that Burkes be ordered to cease and desist all activities concerning the office of constable and that Burkes's quo warranto action be "dismissed with prejudice." Franklin attached to his filing a copy of the probate court's letter to the governor and a copy of a February 26, 2021, letter from the governor to Franklin appointing Franklin to the office of constable.

On August 19, 2021, the circuit court entered a judgment that provided, in relevant part:

> "This matter came on before the Court for hearing on [Franklin]'s motion for summary judgment. [Burkes] neither filed a response nor appeared for oral argument. Accordingly, and after due consideration of the pleading and exhibits attached, the Court finds [that Franklin]'s motion is due to be granted.
>
> "Therefore, [Franklin]'s motion for summary judgment is hereby granted. Judgment is entered in favor of [Franklin]

> and against [Burkes]. [Burkes]'s complaint is dismissed with prejudice. Costs taxed as paid.
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> "This constitutes a final order in this case. The Jefferson County Circuit Clerk is directed to remove this matter from the Court's active docket."

Still acting pro se, Burkes sent a letter to the circuit court on August 24, 2021, asserting that he had "never received notices for court" and asking the circuit court to set a new court date. The circuit court appears to have construed Burkes's letter as a postjudgment motion to alter, amend, or vacate the circuit court's judgment. See Rule 59(e), Ala. R. Civ. P. On September 15, 2021, after conducting a hearing on Burkes's postjudgment motion, the circuit court entered an order that provided, in pertinent part:

> "This matter came on before the Court for hearing on [Burkes]'s motion to vacate or modify this Court's order dated August 19, 2021, granting [Franklin]'s motion for summary judgment. All parties were present and presented pro se argument during the hearing. After due consideration of the pleadings and argument from the parties, the Court finds as follows:
>
> "1. [Burkes], who was elected to the position of Constable, District 59[,] at the time of the November 2020 general election[,] failed to timely file his bond with the probate court and thereby vacated his office pursuant to [§] 36-5-2[, Ala. Code 1975].

> "2. Subsequent thereto, the probate court wrote Governor Ivey certificating a vacancy in office of Constable, District 59[,] pursuant to [§] 36-5-15[, Ala. Code 1975].
>
> "3. While regrettable in cases of mistake, the law regarding failure of an officer to timely file a bond is clear; by statute, if any duly elected Constable fails to file his/her bond within fort[y] (40) days after election results are declared, he/she vacates his/her office.
>
> "4. On or about February 26, 2021 (Revised: March 4, 2021), Governor Ivey reappointed … Franklin as Jefferson County Constable, as representative of District 59.
>
> "5. Accordingly, judgment remains entered in favor of … Franklin against … Burkes ….
>
> "6. Per his reappointment, … Franklin is hereby the Jefferson County Constable representing District 59.
>
> "7. However, all papers served by [Burkes] during the period after January 20, 2021, shall remain declared as 'good service[,]' as this Court finds he was acting as a 'de facto officer' while exercising the duties of a de jure officer under color of election. Gwin v. State, 808 So. 2d 65 [(Ala. 2001)].
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> "[Burkes]'s motion to modify/vacate is hereby denied. As there is no just reason delay, the Court hereby directs the entry of a final judgment as to claims plead[ed]."

Burkes appealed.

Analysis

On appeal, Burkes argues that the circuit court applied the wrong statute in concluding that Burkes had not timely filed an official bond

and that he was deprived of due process by the probate court as a result of that court's sending its January 8, 2021, letter to the governor declaring that Burkes had vacated the office of constable. We express no opinion regarding those arguments and reach no holdings on those points, however, because we conclude that Burkes's action failed to meet certain basic requirements of a quo warranto action.

As noted above, Burkes contends that his action is a quo warranto action to assert the unlawful usurpation of a public office by Franklin. Section 6-6-591, Ala. Code 1975, provides, in relevant part:

> "(a) An action may be commenced in the name of the state against the party offending in the following cases:
>
> > "(1) When any person usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, any franchise, any profession requiring a license, certificate, or other legal authorization within this state or any office in a corporation created by the authority of this state;
> >
> > "….
>
> "(b) The judge of the circuit court may direct the action to be commenced when he believes that any of the acts specified in subsection (a) of this section can be proved and it is necessary for the public good, or it may be commenced without the direction of such judge on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is brought."

In Riley v. Hughes, 17 So. 3d 643, 646-47 (Ala. 2009), this Court explained the following regarding quo warranto actions:

> "'This remedy [quo warranto] "looks to the sovereign power of the state with respect to the use or abuse of franchises -- which are special privileges -- created by its authority, and which must, as a principle of fundamental public policy, remain subject to its sovereign action in so far as the interests of the public, or any part of the public, are affected by their usurpation or abuse."
>
> "'Our statute has extended the right to institute such proceeding to a person giving security for costs of the action. But, in such case, the action is still prerogative in character, brought in the name of the State, on the relation of such person, who becomes a joint party with the State. The giving of security for the costs of the action is the condition upon which the relator is permitted to sue in the name of the State. Without such security, he usurps the authority of the State.
>
> "'But this is not the only method of invoking the authority of the State in the protection of franchises it has granted in the interest of the public.
>
> > "'"The judge of the circuit court may direct such action to be brought when he believes that any of the acts specified in the preceding section can be proved, and it is necessary for the public good." Code, § 9933 [now § 6-6-591(b)].

> "'Thus is committed to the judicial department the institution of such proceedings, the same authority said to have the inherent power and duty to suppress the unlawful practice of law for the public good. ...
>
> "'....
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> "'As indicated, it is the policy of the law of Alabama that [quo warranto] proceedings should be had in the name of the State, and instituted in the manner designated by statute.
>
> "'To sanction a private action inter partes with the same objective would operate a virtual repeal of the quo warranto statute.
>
> "'....'
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> "Birmingham Bar Ass'n v. Phillips & Marsh, 239 Ala. 650, 657-58, 196 So. 725, 732 (1940)(citations omitted)."

Burkes's quo warranto action was not initiated by direction of a judge of the circuit court pursuant to § 6-5-591(b). Cf. Reed v. State ex rel. Davis, 961 So. 2d 89, 92 (Ala. 2006)("On December 13, 2005, Judge Johnson issued an order, in accord with Code of Alabama 1975, § 6-6-591 et seq., directing the district attorney for Russell County, Kenneth E. Davis, to file a quo warranto action against Reed ...."). Thus, the question is whether Burkes is permitted to maintain this quo warranto action

against Franklin under § 6-5-591(b) in the absence of direction by a judge of the circuit court.

As noted in Riley, 17 So. 3d at 646-47, a quo warranto action must be brought in the name of the State of Alabama. The pro se complaint that Burkes filed in the circuit court in this case was not brought upon his relation in the name of the State. This Court has explained how such an omission renders a quo warranto action deficient:

> "Although the State of Alabama is a nominal party in quo warranto proceedings, Baxter v. State ex rel. Metcalf, 243 Ala. 120, 9 So. 2d 119 (1942), the petition must be brought in the name of the State. This is so, not only because of the history and purpose of the quo warranto proceeding, but because, among other things, Ala. Code 1975, § 6-6-595, expressly provides: 'Whenever an action is commenced under the provisions of this article on the information of any person, his name must be joined as plaintiff with the state.' (Emphasis added.)
>
> "These requirements follow logically from the fact that, historically, 'it was required that the proceeding should be instituted in the King's own right, in his name, and at the instance of his legal representative, the Attorney General.' State ex rel. Paugh v. Bradley, 231 Mont. 46, 49, 753 P.2d 857, 859 (1988). However, because 'private individuals frequently had a stronger interest in initiating quo warranto proceedings than did the government, especially in connection with offices in corporate bodies, there grew up a class of informations in the nature of quo warranto which were in fact initiated by private relators.' Id. In Alabama, '[t]he right of the citizen to use the name of the state in prosecuting an information in the nature of quo warranto ... is purely statutory.' Ex parte

> Talley, 238 Ala. 527, 529, 192 So. 271, 271 (1939). The writ retains its public flavor in that the issuance thereof 'must serve the public good, although it may also incidentally benefit the person or persons that institute the action.' Ex parte Sierra Club, 674 So. 2d 54, 57 (Ala. 1995)(emphasis added)."

Brannan v. Smith, 784 So. 2d 293, 296 (Ala. 2000).

However, a more fundamental defect also exists in this case. As Franklin notes on appeal, "there is no indication or documentation in the record that Burkes filed a 'security for costs' [that] had been approved by the Clerk of the Court, as required by [§] 6-6-591(b)." Franklin's brief at 5-6. Our review of the record confirms Franklin's assertion; there is no indication that Burkes gave the circuit court security for the costs of this quo warranto action. "'The giving of security for the costs of the action is the condition upon which the relator is permitted to sue in the name of the State. Without such security, he usurps the authority of the State.'" Riley, 17 So. 3d at 646 (quoting Birmingham Bar Ass'n v. Phillips & Marsh, 239 Ala. 650, 657, 196 So. 725, 732 (1940)).

> "[Section] 6-6-591(b) provides that the action 'may be commenced ... on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is brought.'
>
> "The giving of security for the costs of the litigation 'is a condition on which the right to proceed in the name of the

> State is given to individuals.' State ex rel. Radcliff v. Lauten, 256 Ala. 559, 561, 56 So. 2d 106, 107 (1952). Otherwise stated, it 'is a condition precedent to the jurisdiction of the court.' Id., 56 So. 2d at 106-07. See Wenzel v. State ex rel. Powell, 241 Ala. 406, 407, 3 So. 2d 26, 26 (1941)('failure to give security for costs in such proceedings ... is jurisdictional and fatal to the proceedings'). 'Without [the giving of] such security, [the relator] usurps the authority of the State.' Birmingham Bar Ass'n v. Phillips & Marsh, 239 Ala. 650, 657-58, 196 So. 725, 732 (1940); see also Evans v. State ex rel. Sanford, 215 Ala. 61, 109 So. 357 (1926)."

Brannan, 784 So. 2d at 296-97. The absence of such security deprives the circuit court of subject-matter jurisdiction over a quo warranto action. See Riley, 17 So. 3d at 648-49 ("Because of the unavailability of a remedy by declaratory judgment and the absence of security for costs if the action is treated as one for quo warranto, the trial court did not have subject-matter jurisdiction." (emphasis added)).

Although neither party has acknowledged that Burkes's failure to give security for costs deprived the circuit court of subject-matter jurisdiction over this quo warranto action, "[t]his Court is duty bound to notice ex mero motu the absence of subject-matter jurisdiction." Stamps v. Jefferson Cnty. Bd. of Educ., 642 So. 2d 941, 945 n.2 (Ala. 1994)(citing Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983); City of Gadsden v. Head,

429 So. 2d 1005, 1008 (Ala. 1983); and City of Huntsville v. Miller, 271 Ala. 687, 689, 127 So. 2d 606, 608 (1958)). Moreover,

> "[a]ny action taken by a trial court without subject-matter jurisdiction is void. Property at 2018 Rainbow Drive, 740 So. 2d [1025,] 1029 [(Ala. 1999)]. Furthermore, 'a void order or judgment will not support an appeal.' Gallagher Bassett Servs., Inc. v. Phillips, 991 So. 2d 697, 701 (Ala. 2008)."

Riley, 17 So. 3d at 649. Consequently, this Court must dismiss this appeal.

Conclusion

Burkes's failure to give the circuit court security for the costs of this action deprived the circuit court of subject-matter jurisdiction over the action. Because the circuit court lacked subject-matter jurisdiction over this action, its judgment is void. Because a void judgment will not support an appeal, this appeal must be dismissed. See Riley, 17 So. 3d at 649.

APPEAL DISMISSED.

Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur.