

Cite as 2017 Ark. App. 677
ARKANSAS COURT OF APPEALS
DIVISION IV
No. CR-17-389

DANNY LEE SCHEPP

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: December 13, 2017

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. 04CR-14-1464]

HONORABLE BRADLEY LEWIS
KARREN, JUDGE

APPEAL DISMISSED

RITA W. GRUBER, Chief Judge

The sole issue in this appeal is whether the Benton County Circuit Court had jurisdiction to reconsider its decision dismissing the charges against appellant Danny Schepp and then to set the case for a status hearing in December 2021. The court did not have jurisdiction to reconsider its decision; consequently, we do not have jurisdiction, and we dismiss the appeal.

The relevant facts are that on November 7, 2014, appellant was charged with 20 counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child in violation of Ark. Code Ann. § 5-27-602 (Repl. 2013). On January 20, 2015, appellant moved for a mental evaluation, averring that he suffered from Alzheimer's disease. The court granted the motion, ordered a mental evaluation, found appellant unfit

to proceed in an order entered on May 8, 2015, and committed him to the custody of the Arkansas State Hospital for restorative services. At a hearing conducted on July 15, 2016, the court found that appellant was not fit to proceed, that he was unlikely to be restored due to his neurocognitive disorder, and that there was no evidence that he was a danger to himself or others. The court then ordered that the case against appellant be dismissed and that he be released from custody. On July 18, 2016, the court entered an order consistent with this ruling, finding that appellant was not fit to proceed, dismissing the case, and releasing him from custody.

On August 15, 2016, the court entered an order setting a “Hearing on Motion” scheduled for September 29, 2016. It did not otherwise identify the motion, and no written pleading was filed in the case. At a hearing on September 29, 2016, the following colloquy occurred:

THE COURT: All right, on Mr. Schepp if I can recall what happened was . . . the Court had made a ruling on the record but has not filed a formal order on Mr. Schepp. I believe I had told the prosecutor's office that I would wait and file the formal order until the prosecutor had an opportunity to review it, the case law, to see what the case law said about whether the Court could legally dismiss the case after finding that Mr. Schepp was not a violent person to either threaten himself or others and that he could not be restored because the diagnosis is that Mr. Schepp has Alzheimer's. That's my recollection.

.....

THE COURT: Okay. All right, so with that being said, Mr. Hall, the State is basically asking the Court to reconsider its ruling that it has not formally filed. And does the State want to be heard?

PROSECUTOR: Your Honor, I think what you're stating is correct.

THE COURT: All right, Mr. Hall.

DEFENSE: Your Honor, if we want to have some sort of hearing on this, that's fine. Fine.

THE COURT: Well, it's not we, it's whether you want to have a hearing. I can make a decision. What do you want to do?

DEFENSE: I mean, we're not going to agree that the Court couldn't do what it already did.

THE COURT: Okay.

DEFENSE: So I think a hearing would be appropriate.

The court set a hearing for December 1, 2016.

At the hearing on December 1, 2016, the court stated that "the State has asked the Court to reconsider its motion to dismiss." Appellant objected, asserting that the State had not filed a motion and that more than 30 days had elapsed since the court had entered the dismissal order. The court then granted the State's motion to reconsider and set the case for a status hearing on December 13, 2021. The court entered an order memorializing its rulings on December 6, 2016. Appellant filed an appeal from the December 6, 2016, order.

The parties agree that the court's dismissal of the case was error. Arkansas Code Annotated section 5-2-310 provides that if a court determines that a defendant "lacks fitness to proceed, the proceeding against him or her shall be suspended" until restoration of fitness. Ark. Code Ann. § 5-2-310(a)(1)(A) (Repl. 2013). The statute authorizes a circuit court to dismiss criminal charges pending against a defendant who has previously been

found unfit to proceed “if the court determines that the defendant has regained fitness to proceed” and “the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding[.]” Ark. Code Ann. § 5-2-310(c) (Repl. 2013); *see also State v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690 (holding this statute does not give a circuit court authority to dismiss criminal charges against an unfit defendant).

Despite acknowledging that the order of dismissal was error, appellant argues that the circuit court had no jurisdiction to reconsider this order. He contends that the State did not file an appeal, a motion pursuant to Rule 33.3 of the Arkansas Rules of Criminal Procedure,¹ or any other written motion to reconsider within thirty days of entry of the order and that the circuit court lost jurisdiction to do anything on August 18, 2016, thirty-one days after its order had been entered. Accordingly, he argues, the circuit court had no jurisdiction to enter its order essentially reinstating the case on December 6, 2016.

We agree with appellant. The court entered its order dismissing the case on July 18, 2016. The State’s remedy was to appeal from the order. *State v. Thomas, supra* (holding State’s appeal of erroneous decision under Ark. Code Ann. § 5-2-310 was appealable pursuant to Ark. R. App. P.–Crim. 3). Once the State failed to pursue this remedy by filing

¹Rule 33.3 authorizes a person “convicted of either a felony or misdemeanor” to file a motion for new trial “or any other application for relief” within thirty days after the date of entry of judgment. Ark. R. Crim. P. 33.3(a), (b) (2017). *See Thomas v. State*, 345 Ark. 236, 45 S.W.3d 818 (2001) (holding that Rule 33.3 applies only when a person is “convicted of a felony or misdemeanor” and not to a circuit court’s order transferring a criminal matter to juvenile court).

an appeal within 30 days of the dismissal, the circuit court lost jurisdiction. Therefore, the court's order entered on December 6, 2016, reconsidering its dismissal, reinstating the case, and setting a status hearing is a nullity. And when a circuit court lacks jurisdiction, we do not acquire jurisdiction on appeal. *C.H. v. State*, 2010 Ark. 279, at 15, 365 S.W.3d 879, 886; *Jackson v. State*, 2010 Ark. 157, at 4; and *Thomas v. State*, 345 Ark. 236, 45 S.W.3d 818 (2001).

Appeal dismissed.

VIRDEN and HARRISON, JJ., agree.

Dusti Standridge, for appellant.

Leslie Rutledge, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.