Cite as 2013 Ark. App. 68

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-1229

RODNEY D. KANKEY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 6, 2013 APPEAL FROM THE FULTON COUNTY CIRCUIT COURT, [NO. CV 2011-23-4] HONORABLE TIM WEAVER, JUDGE DISMISSED

RITA W. GRUBER, Judge

Rodney D. Kankey initiated this case in the civil division of district court pursuant to Arkansas Code Annotated section 5-62-106, which governs the disposition of animals seized by law enforcement in response to an allegation of animal cruelty. He appealed the district court's order divesting him of ownership to the circuit court. The circuit court dismissed the appeal as untimely and not properly perfected.[1] The circuit court found that the untimely filing of the appeal from district court to circuit court deprived it of subject-matter jurisdiction. Although we hold that the circuit court properly dismissed the appeal for lack of subject-matter jurisdiction, we dismiss this appeal because appellant failed to

[1]The circuit court cited Rule 9 of the Arkansas District Court Rules, which requires an appellant to file a certified copy of the district court's docket sheet within thirty days from the date of a docket entry awarding judgment, and Rule 36 of the Arkansas Rules of Criminal Procedure, which requires an appellant to file a certified record of the proceedings within thirty days from the date of the entry of the judgment.

timely file a notice of appeal from the circuit court's order.

On January 6, 2011, appellant filed a petition against the Fulton County Sheriff's Department (the Department) to determine custody and for return of unlawfully seized animals, alleging that the Department had seized 116 horses and two puppies from his property in violation of the law, and asked the court to determine custody of the animals and return them to him. The Department admitted that it had seized the animals, but it alleged that they were being subjected to cruel mistreatment and that there was significant evidence that he had knowingly neglected the animals. The Department filed a cross petition to divest appellant of ownership of the horses and asked the court to order that the horses be transferred to an appropriate place of custody, euthanized, or disposed of as the court deemed appropriate pursuant to Ark. Code Ann. § 5-62-106(a)(4)(B) (Supp. 2011). The Department also asked the court to require any person claiming an interest in the animals to post a bond with the district court in an amount sufficient to care for them for at least thirty days. Neither party designated a dollar amount for the value of the horses.

After conducting a hearing on January 28, 2011, the district court entered an order on February 2, 2011, finding that the animals had been lawfully seized, divesting appellant of ownership, and vesting custody of the animals in the American Society for Prevention of Cruelty to Animals (ASPCA) as agent for the Fulton County Sheriff's Department. The court found that ASPCA had incurred $95,960.66 in expenses caring for the animals through January 27, 2011, and gave authority to ASPCA to transfer ownership of the animals to a third party, stating that any proceeds realized from the transfer were to be used to defer their

expenses. Finally, the court stated that the order would take effect on February 10, 2011, unless a bond in the amount of $50,000 was posted in the circuit court or the circuit judge entered a stay pending a hearing in circuit court.

Appellant filed an appeal in the civil division of the circuit court by filing a notice of appeal and a copy of the district-court file. He did not file a certified copy of the docket sheet nor was the district-court file certified by the district court clerk. The State filed a motion to dismiss the appeal for failure to comply with District Court Rule 9(b), which requires an appellant to file a certified copy of the district court docket sheet within thirty days from the date of a docket entry awarding judgment. After a hearing on the motion, the circuit court entered an order on June 28, 2011, dismissing the appeal as untimely and not properly perfected.

On July 28, 2011, appellant filed a motion to reconsider or in the alternative for a new trial. On September 6, 2011, the circuit court entered an order denying the motion. Appellant filed a notice of appeal on September 12, 2011.[2]

Before addressing the merits of appellant's arguments, we turn to the question of our own jurisdiction. A timely notice of appeal is a jurisdictional requirement. *Stacks v. Marks*, 354 Ark. 594, 599, 127 S.W.3d 483, 485 (2003). Without one, we have no jurisdiction to consider other issues raised on appeal. *Arkco Corp. v. Askew*, 360 Ark. 222, 227, 200 S.W.3d 444, 449 (2004). Moreover, we are required to raise the issue of subject-matter jurisdiction

[2]We ordered rebriefing in this case on October 10, 2012, and it is here now for the second time. *See Kankey v. State*, 2012 Ark. App. 569.

on our own motion. *Stacks*, 354 Ark. at 599, 127 S.W.3d at 485. Arkansas Rule of Appellate Procedure–Civil 4 states that a notice of appeal "shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from." Ark. R. App. P.–Civ. 4(a) (2012). Rule 4(b) provides an exception to the thirty-day requirement if a party files a timely motion for judgment notwithstanding the verdict under Ark. R. Civ. P. 50; to amend findings or make additional findings under Ark. R. Civ. P. 52(b); for a new trial under Ark. R. Civ. P. 59(a); or to vacate, alter, or amend the judgment. All of these motions must be made no later than ten days after entry of the court's judgment in order to extend the time for filing a notice of appeal. If the motion is timely filed, then the notice of appeal must be filed within thirty days from entry of the order disposing of the last motion outstanding. Ark. R. App. P.–Civ. 4(b). But if the circuit court neither grants nor denies the motion within thirty days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date. *Id*.

In this case, the circuit court's order dismissing the case was entered on June 28, 2011. Appellant did file a motion to reconsider or in the alternative for a new trial, but it was not filed until July 28, 2011, more than ten days after entry of the court's order dismissing the case. Because appellant's motion was untimely, it did not extend the time for filing a notice of appeal, which should have been filed within thirty days from entry of the court's order on June 28, 2011. Appellant filed a notice of appeal on September 12, 2011. Because appellant's notice of appeal was untimely, we have no jurisdiction and must dismiss the

appeal.

The State filed a motion to dismiss this appeal, arguing that we lack jurisdiction to entertain the appeal because the circuit court lacked jurisdiction. We agree that, even if appellant's notice of appeal to this court had been timely filed, we would still dismiss for lack of subject-matter jurisdiction. Arkansas District Court Rule 9, which governs appeals from district courts to circuit court, states in pertinent part as follows:

> (a) *Time for Taking Appeal From District Court*. All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of a docket entry awarding judgment regardless of whether a formal judgment is entered. The 30-day period is not extended by a motion for new trial, a motion to amend the court's findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.
>
> (b) *How Taken From District Court*. A party may take an appeal from a district court by filing a certified copy of the district court's docket sheet, which shows the awarding of judgment and all prior entries, with the clerk of the circuit court having jurisdiction over the matter. Neither a notice of appeal nor an order granting leave to appeal shall be required.

Ark. Dist. Ct. R. 9 (2011). Compliance with Rule 9 is mandatory and jurisdictional. *Duffy v. Little*, 2011 Ark. 160, at 3. Failure to comply with Rule 9 mandates the circuit court's dismissal of the appeal. *Id*.

Here, appellant filed an appeal to the circuit court by filing a copy of the district-court file within thirty days. He did not file a certified copy of the docket sheet, nor was the district-court file certified by the district court clerk when it was filed. He admitted at the circuit court hearing that he did not file a certified copy of the docket sheet or the record with the circuit clerk within thirty days from the date of the docket entry awarding

judgment. Therefore, the appeal from district court to circuit court was not properly perfected, and the circuit court correctly ruled that it was without jurisdiction to accept the appeal. If the circuit court had no jurisdiction, we also have no subject-matter jurisdiction to hear this appeal. *Ark. State Univ. v. Prof'l. Credit Mgmt., Inc.*, 2009 Ark. 153, at 3, 299 S.W.3d 535, 536.

Appeal dismissed.

WYNNE, J., agrees.

HARRISON, J., concurs.

BRANDON J. HARRISON, Judge, concurring. I respectfully disagree with my colleagues' decision to decide this appeal under the civil, not criminal, rules of procedure. I write separately to explain why I believe the original district-court case, the subsequent appeal to circuit court, and the question of whether this court has jurisdiction over Kankey's appeal should be determined by applying the rules of criminal procedure.

In my view, a case filed under Ark. Code Ann. § 5-62-106 (Supp. 2011), like the one Kankey filed in the district court, began a criminal, not civil, proceeding. Whether the Section 106 case is more criminal than civil in nature matters because different sets of rules apply depending on the characterization. This case presents an example where the decision on which rules apply has a material consequence. If we apply the criminal rules of procedure, as I have done, then Kankey timely filed a notice of appeal from the circuit court's order. Given this point, I believe we have jurisdiction to further review the case. And upon that further review, I believe that Kankey did not timely perfect his appeal from the district court

to circuit court because he did not file a certified record with the circuit clerk as the applicable rule of criminal procedure required. So I agree with my colleagues that we must dismiss this appeal. But I have reached the same end for different reasons.

I.A. *Why the District Court Case was More Criminal Than Civil in Nature*

Before explaining why I disagree with the decision to characterize Kankey's Section 106 case as a civil one that required the application of our civil rules, I stress that no statutory provision or other consideration, standing alone, has persuaded me to decide the criminal-versus-civil question one way or the other.

1. *Placement in the criminal code.* The first hint that the Section 106 case is criminal in nature relates to where the statute may be found. The Arkansas General Assembly enacted Section 106 under our State's criminal code. Specifically, the statute appears in the "Cruelty to Animals" subchapter of Title 5. And Title 5, Chapter 62's main thrust is to criminalize certain conduct directed towards animals.

2. *The Seizure.* Another point that cuts in favor of finding that a Section 106 case is more criminal than civil is that law-enforcement personnel must give an animal's owner written notice of seizure. Ark. Code Ann. §§ 5-62-106(a)(2)–(3). The State issued notice in this case. In the process of doing so, it attempted to follow the usual criminal-procedural steps—like making a reasonable-cause case to a judicial officer. And Kankey challenged the seizure of his horses and puppies under the Fourth, Fifth, and Fifteenth Amendments to the United States Constitution and under Article 2 Section 15 of the Arkansas Constitution. He

also invoked Rule 15.2 of the rules of criminal procedure in his attack on the search-and-seizure issues. The State defended its seizure-related process.

3. *Who files a Section 106 Case*? This important question has two answers. After a seizure has occurred, animal owners may ask the district court to hold a hearing, during which the owner may argue to regain custody. Ark. Code Ann. § 5-62-106(a)(4)(A). But if the owner, or any other person claiming an interest in the animal, does not petition the district court for custody within fifteen days after the seizure has occurred, then the prosecuting attorney must file a petition in the district court to determine custody. Ark. Code Ann. § 5-62-106(a)(4)(B). There is no discretion: if a citizen does not file a petition then the prosecuting attorney must do so. Here, Kankey filed the Section 106 petition, and it was assigned a civil case number. But these two facts do not resolve the civil-versus-criminal question given that a prosecutor would have had to file the petition had Kankey not done so.

4. *The Bond Requirement*. Once the petition has been filed, an owner or interested person must post a bond with the district court—for an amount sufficient to care for the animal (or animals) for at least thirty days—and that course must be renewed every thirty days. Ark. Code Ann. §§ 5-62-106(b)(1)(A), (b)(2)(A), (b)(1)(B), and (b)(2)(B). Except for two exceptions, the bond's essential purpose is to keep the custodian from disposing of the seized animal. Ark. Code Ann. §§ 5-62-106(b)(1)(A), 106(b)(2)(A), and 106(c)(1)–(2). The bond is not necessarily meant to guarantee a party's appearance in court.

5. *Internal Misdemeanor Offense*. Section 106 contains a provision that makes the custodian's act of altering or modifying an animal a misdemeanor offense, if the alteration is

done without the court's permission or the owner's written consent. Ark. Code Ann. § 5-62-106(c)(2)(A)–(B). That Section 106 has an embedded criminal offense is some evidence that a case initiated under it is, on balance, more criminal than civil in nature.

6. *Kankey's Burden of Proof to Prevail on His Petition is Arguably a Criminal One*. Animals seized under Section 106 must be returned to Kankey if three things happen

- He files a petition with the district court;
- He pays all reasonable expense incurred in caring for the animals; and
- He is found not guilty of the offense of cruelty to animals, the offense of aggravated cruelty to a dog, cat or horse, or the proceedings against him are otherwise terminated.

Ark. Code Ann. § 5-62-106(e); *see also* Ark. Code Ann. § 5-62-106(d)(1). The third point is the most important one to weigh, and it helps tip the scales toward finding that a Section 106 case is criminal in nature.

7. *Civil or Criminal Forfeiture Proceeding? A Compare-and-Contrast Approach*. When deciding the characterization question, it helps to look at another statute that addresses the taking of property—and a case where our supreme court had to decide whether the statute at issue concerned a criminal penalty or civil sanction. In *Sims v. State*, 326 Ark. 296, 298–300, 930 S.W.2d 381, 382–83 (1996), our supreme court addressed Section 505 of Arkansas's Controlled Substances Act, which empowers the State to take all money and property that a person used, or intended to be used, to violate the Controlled Substances Act. Ark. Code Ann. § 5-64-505 (Supp. 2011). The court determined, for purposes of deciding whether double jeopardy attaches, that Section 505 created a civil sanction. While analyzing

the statute, the court addressed two main points: (a) whether the General Assembly intended the statute at issue to be a remedial civil sanction or criminal penalty, and (b) whether forfeiture proceedings are so punitive that they may not legitimately be viewed as being civil in nature. *Id.*

The court drilled down to the particulars as it analyzed the broad points. The supreme court did not believe that Section 505's location in the code book fully answered the question of whether the statute was criminal or civil. *Sims*, 326 Ark. at 298–300, 930 S.W.2d at 382–83. More was required, so the court examined, among other things, the burden of proof, which rules of procedure Section 505 referenced, and whether scienter was required to trigger the statute. The court said that the Arkansas Rules of Civil Procedure applied because the statute plainly said that they did. The court also noted that Section 505 placed upon the claimant the familiar civil burden of a preponderance of the evidence. And it asked how the State had applied Section 505 in the lower-court proceedings. The supreme court ultimately concluded that the statute was applied as a civil sanction because the State had filed a forfeiture action to retain money found on Sims during a drug bust. *Id.* at 298, 930 S.W.2d at 382.

Turning back to this case and following our supreme court's lead, I have compared and contrasted Section 106 with the civil-forfeiture provisions in Section 505 to help me determine if the General Assembly intended to enact Section 106 as a civil or criminal forfeiture statute. Section 106 has some civil-law aspects: there is no express scienter requirement in the statute, individual notice of the proceeding is not always required, a third

party may petition the court for custody, and bonds are posted to the court to ensure that animals may be cared for and not necessarily to ensure that a violator will appear in court. Ark. Code Ann. §§ 5-62-106(a)(1)–(3) and 106(b)(2)(B). On the other hand, Section 106 begins with how to seize an animal, and further within Subchapter 1, another statute plainly contemplates that law enforcement will execute search warrants to carry out Section 106's aims. Ark. Code Ann. § 5-62-112 (Supp. 2011). Search warrants involve criminal, not civil, procedure. The record also reveals, for what it's worth, that no party sought an injunction under the civil rules of procedure or conducted any discovery under our civil rules. Though the supreme court did not mention it in *Sims*, Section 505's opening provision lists a number of items that may be forfeited "upon the initiation of a *civil proceeding* filed by the prosecuting attorney[.]" Ark. Code Ann. § 5-64-505(a)(emphasis added). Section 106 does not expressly characterize a case under it as being a "civil proceeding."

As I have mentioned, if Kankey had not petitioned the district court then a prosecuting attorney was required to do so. Ark. Code Ann. § 5-62-106(a)(4)(B). And unlike Section 505, which expressly references the Arkansas Rules of Civil Procedure by name six times—as it mentions complaints, answers, default judgments, and temporary restraining orders under Rule 65—Section 106 does not mention these things once. Ark. Code Ann. § 5-64-505. Moreover, two other statutes within Chapter 62, Subchapter 1, provide immunity from "either criminal or civil liability" under certain conditions. Ark. Code Ann. § 5-62-107 (Supp. 2011); Ark. Code Ann. § 5-62-109(a)(1) (Supp. 2011).

8. *What Did the Courts and Parties Do in This Case?* I again take my lead from our supreme court by asking what the parties and courts actually did in this case. When Kankey filed a petition in district court under Section 106(a)(4)(A), his case was, as I have mentioned, styled as a civil suit and given a civil case number in the district court and circuit court. More important than captions and case numbers is the substance of the petition that started this case and what the parties did afterwards. As I have also mentioned, the bulk of the substance of Kankey's district-court petition was about alleged Fourth Amendment and related violations. Kankey even filed in the circuit court a motion to quash a search warrant and to suppress evidence. And he contended, on the one hand, that the case is civil in nature because it deprives him of his property. On the other hand, he invoked both the criminal rules and civil rules of procedure at various times. The State's response to Kankey's petition, and its cross petition filed in the district court, alleged criminal behavior. The State used words that often appear in a criminal-law context like "probable cause," "willfully failed," and "knowingly neglected." Finally, once before the circuit court, the State argued that "even though [the case] [was] filed as a civil case in district court . . . it's misfiled. It's a criminal case." The circuit court said, "this [case] seems to be punitive in nature to me. . . I think this [case] is much more criminal than it is civil."

On the whole, I have concluded that Section 106's core is more criminal than civil in nature. Consequently, any jurisdictional issues this appeal presents should be analyzed under the rules of criminal procedure.

I.B. *Kankey Filed a Timely Notice of Appeal From the Circuit Court's Order*

Contrary to my colleagues' opinion, I believe Kankey timely filed his notice of appeal. Kankey filed a timely post-judgment motion under Rule 33.3(b) after the circuit court entered the order that dismissed the case before it. Ark. R. Crim. P. 33.3(b) (2012). After his post-judgment motion was deemed denied thirty days later, Kankey timely filed a notice of appeal within thirty days of the deemed-denied date. Ark. R. Crim. P. 33.3(c); Ark. R. App. P—Crim. 2(a)(3) and (b)(1) (2012). Because Kankey filed a timely notice of appeal under the rules of criminal procedure, I now turn to the next issue of jurisdictional significance—whether he timely perfected his district-court appeal to the circuit court.

I.C. *Kankey Did Not File a Certified Record as Arkansas Rule of Criminal Procedure 36 Requires*

I now apply the rules of criminal procedure to decide whether Kankey timely perfected an appeal from the district court's adverse judgment to the circuit court. If he did not do so, then we have no jurisdiction. *Arkansas State Univ. v. Prof'l Credit Mgmt., Inc.*, 2009 Ark. 153, at 2, 299 S.W.3d 535, 536. Arkansas Rule of Criminal Procedure Rule 36 governs whether Kankey properly appealed the district-court judgment to circuit court. *See Risner v. State*, 2011 Ark. App. 549 (explaining that district-court appeals in criminal cases used to be governed by Rule 9 but are now governed under Rule 36). Under Rule 36, a party like Kankey must file a certified record of the district-court proceedings in the circuit court within thirty days from the date the district court entered judgment. If he does so, then we (all other things being equal) acquire jurisdiction. If he does not do so, then we have none. For this case's purposes, the two important subsections in Rule 36 read:

> (b) *Time for Taking Appeal.* An appeal from a district court to the circuit court shall be filed in the office of the clerk of the circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment in the district court. The 30-day period is not extended by the filing of a post-trial motion under Rule 33.3.
>
> (c) *How Taken.* An appeal from a district court to circuit court shall be taken by filing with the clerk of the circuit court a certified record of the proceedings in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. The record of proceedings in the district court shall include, at a minimum, a copy of the district court docket sheet and any bond or other security filed by the defendant to guarantee the defendant's appearance before the circuit court. It shall be the duty of the clerk of the district court to prepare and certify such record when the defendant files a written request to that effect with the clerk of the district court and pays any fees of the district court authorized by law therefor. The defendant shall serve a copy of the written request on the prosecuting attorney for the judicial district and shall file a certificate of such service with the district court. The defendant shall have the responsibility of filing the certified record in the office of the circuit clerk. Except as otherwise provided in subsection (d) of this rule, the circuit court shall acquire jurisdiction of the appeal upon the filing of the certified record in the office of the circuit clerk.

Ark. R. Crim. P. 36(b)–(c) (2012).

Kankey had the burden to timely and properly file an appeal in the circuit court. *Risner*, 2011 Ark. App. 549, at 5-6. The district court's order was entered on 2 February 2011, and Kankey filed the district-court record with the circuit clerk on February 25. The problem is that the record was not a certified one. True, Kankey lodged what purports to be the complete, original district-court record with the circuit court within the thirty-day deadline Rule 36(b) imposes. The rub of jurisdictional significance, however, is that the district-court clerk had not certified the record before it was picked up and filed as an appeal in the circuit court. Under Rule 36(b), that omission ended Kankey's appeal to circuit court.

Our supreme court has strictly enforced jurisdictional requirements that touch appeals from district court to circuit court. *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 129, 60 S.W.3d 481,483 (2001); *Frolos v. State*, 2010 Ark. App. 498, at 2. There is no wiggle room here; if an appeal from district court is untimely then the circuit court must dismiss the appeal. *Hampton*, 347 Ark. at 129, 60 S.W.3d at 483 (holding that a district-court record was not certified when it was filed with the circuit court although the district clerk belatedly certified the record). And if the circuit court had no jurisdiction, we don't have it either. *Prof'l Credit Mgmt., Inc.*, 2009 Ark. at 2, 299 S.W.3d at 536.

May an appealing party belatedly certify and "cure" an otherwise defective record? This important question arises because the deputy district clerk filed a certificate with the circuit court not long after Kankey had filed the uncertified record in circuit court. The district clerk's certificate was file-marked 7 March 2011, and it states, "I hereby certify that the original file in the above referenced case which was filed on February 25, 2011 is a true and correct copy." I do not read Rule 36's plain terms as permitting a belated certification. *See Velek v. State*, 364 Ark. 531, 533, 222 S.W.3d 182, 184 (2006) (stating that rules are construed like statutes). This court cannot create an exception to Rule 36's requirements that a party must file a certified record with the circuit court within thirty days of the entry of the adverse district-court judgment being appealed. Whether our rules of criminal (or civil) procedure should expressly recognize a belated-certification exception, and in what circumstances, is for our supreme court to decide should it choose to do so.

II. *Conclusion*

I agree with my colleagues' conclusion that we have no jurisdiction over this appeal. I therefore concur with their decision to dismiss the appeal.

Bailey & Russo, PLC, by: *John O. Russo*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Jake H. Jones*, Ass't Att'y Gen., for appellee.