

Cite as 2018 Ark. 78  
**SUPREME COURT OF ARKANSAS**  
No. CV-18-9

WALTER A. MCCULLOUGH  
PETITIONER

V.

WENDY KELLEY, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION, TERRI BANISTER,  
KEITH L. WADDLE, T. ALLISON, AND  
L. BELL

RESPONDENTS

Opinion Delivered March 8, 2018

PRO SE MOTION FOR BELATED  
APPEAL

[JEFFERSON COUNTY CIRCUIT  
COURT, NO. 35CV-17-119]

HONORABLE JODI RAINES DENNIS,  
JUDGE

MOTION DENIED.

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**JOSEPHINE LINKER HART, Associate Justice**

Petitioner Walter A. McCullough asks this court to allow him to proceed with the appeal of an order that dismissed his pro se petition for declaratory judgment and mandamus relief. Because the order that McCullough would appeal is not a final, appealable order, we deny the motion.

McCullough is an inmate incarcerated in the Arkansas Department of Correction (ADC). He filed his petition in circuit court alleging due-process violations in the respondents' conduct and the implementation of disciplinary procedures against him for violation of ADC policy. On July 13, 2017, the circuit court dismissed the petition without prejudice under Arkansas Rule of Civil Procedure 4(i) (2017), finding that McCullough had failed to serve the defendants as required. McCullough filed his notice of appeal of that order on October 19, 2017.

When the record was submitted, our clerk declined to lodge the record on appeal because the notice of appeal was not timely filed. Under Arkansas Rule of Appellate Procedure–Civil 4(a) (2017), McCullough was required to file his notice of appeal within thirty days of the date of the entry of the order to be appealed unless an extension of time was granted in accord with the rule. The record does not contain an order granting an extension of time, and McCullough filed his pro se notice of appeal ninety-eight days after the entry of the order dismissing the petition.

Under Arkansas Rule of Appellate Procedure–Criminal 2(e) (2017), this court may act upon and decide a case in which the notice of appeal was not filed in the time prescribed when a good reason for the omission is shown. Although there is no comparable provision in our procedural rules for civil cases, this court treats declaratory-judgment proceedings as applications for postconviction relief in those instances in which a prisoner seeks relief from the conditions of his incarceration. *Brown v. State*, 2017 Ark. 232, 522 S.W.3d 791. Even if McCullough has a right to appeal a final decision on his petition, however, this court does not have jurisdiction over the appeal of the order at issue. We therefore need not consider whether the circumstances here excuse the delay in filing the notice of appeal.

With some exceptions, none of which is applicable in the instant case, our rules of appellate procedure allow for an appeal to be taken from a circuit court to this court only when the order is a final judgment on the merits. Ark. R. App. P.–Civ. 2(a)(1). For an order to be final and appealable, it must terminate the action, end the litigation, and

conclude the parties' rights to the matter in controversy. *Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000). The order must be of such a nature as to not only decide the rights of the parties, but also put the court's directive into execution, ending the litigation or a separable part of it. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688. Whether an order is final and subject to appeal is a jurisdictional question that the court will raise on its own. *Henson v. Craddock*, 2017 Ark. 317, 530 S.W.3d 847.

Rule 4(i) is mandatory; where service is not made on a defendant within 120 days of the filing of the complaint, a circuit court must dismiss the action without prejudice to refiling those claims. See *Jordan v. Circuit Court of Lee Cty.*, 366 Ark. 326, 235 S.W.3d 487 (2006). Because a plaintiff who has his case dismissed without prejudice under Rule 4(i) may refile those claims, his position after the dismissal is no different than that of a plaintiff who voluntarily nonsuits his claims. A party may refile his nonsuited claims, and, consequently, the order granting a motion to nonsuit is not a final, appealable order. See, e.g., *Beverly Enters.-Ark., Inc.*, 341 Ark. 1, 14 S.W.3d 487. When the plaintiff may refile his or her claims, the order appealed from is not a final, appealable order. *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

Because McCullough was allowed under the procedural rules to refile his claim after his petition had been dismissed, the order he would appeal is not a final, appealable order. This court therefore does not have appellate jurisdiction, and we accordingly deny McCullough's motion for belated appeal of the order.

Motion denied.