**SLIP OPINION**

Cite as 2009 Ark. 564

# SUPREME COURT OF ARKANSAS

**No.** 08-1492

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| STATE OF ARKANSAS,<br>APPELLANT;<br><br>VS.<br><br>R.H.,<br>APPELLEE; | **Opinion Delivered** November 12, 2009<br><br>APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TENTH DIVISION - JUVENILE; NO. JD2008-129, HON. JOYCE WILLIAMS WARREN, JUDGE;<br><br>APPEAL DISMISSED WITHOUT PREJUDICE. |

**DONALD L. CORBIN, Associate Justice**

This a State's appeal of a circuit court's ruling admitting into evidence the custodial statement of a third party over the State's hearsay objection. On appeal, the State asserts that the circuit court erred in determining that the statement was admissible under Ark. R. Evid. 803(6), as a business-records exception to the hearsay rule. Because the order appealed is not a final, appealable order, we dismiss the instant appeal.

On November 10, 2007, officers from the Pulaski County Sheriff's Office were dispatched to a Dollar General Store on Highway 107 in Gravel Ridge after receiving a report of suspicious activity. When officers arrived on the scene, they found three juveniles standing in the store's parking lot. After one of the juveniles fled on foot, the officers secured the other two juveniles, Appellee R.H. and M.W. A pat-down search of Appellee revealed that he was armed with a .38-caliber revolver.

Appellee was arrested and charged with one count of attempted aggravated robbery, after he admitted that the juveniles had gone to the store with the intent to rob it. He was also charged with one count of minor in possession of a firearm. Initially, Appellee was charged as an adult in the Pulaski County Circuit Court. The case was transferred, however, to the Juvenile Division of circuit court and designated as an Extended Juvenile Jurisdiction (EJJ) matter, with regard to the charge of attempted aggravated robbery.

An adjudication hearing was held on September 19, 2008, wherein Appellee pleaded guilty to the charge of minor in possession of a firearm. The hearing then proceeded on the charge of attempted aggravated robbery. Following the State's presentation of its case-in-chief, Appellee called Investigator Mark Swaggerty of the Pulaski County Sheriff's Office. Appellee sought to elicit testimony from Investigator Swaggerty in order to introduce the custodial statement of M.W. as evidence substantiating his claim that he renounced his plan to commit the aggravated robbery.[1] The State objected to the introduction of the statement, arguing that it was inadmissible hearsay.

Initially, the circuit court ruled that the statement was not admissible because it was not prior sworn testimony. Appellee then argued that the statement was taken during the course of a police investigation and was a business record-like instrument and, thus, admissible under Rule 803(6). Alternatively, Appellee argued that the statement was

[1] Appellee had subpoenaed M.W. to testify, but M.W. indicated that he would invoke his Fifth Amendment right not to testify if called as a witness at trial.

admissible under Ark. R. Evid. 804(b)(3), as a statement made against the declarant's interest. The State countered that a law-enforcement office is not a business, nor is a police investigation a regularly conducted business activity. As to Appellee's alternative argument, the State argued that because M.W. had admitted his renunciation of the robbery attempt, his statement was not a statement against interest. Moreover, the State countered that there was no corroborating circumstances indicating the trustworthiness of the statement. The circuit court took the evidentiary issue under advisement and ordered the parties to brief the issue.

Following the submission of briefs, the circuit court entered an order adjudicating Appellee delinquent on the charge of possession of a firearm by a minor but finding him not delinquent on the charge of attempted aggravated robbery. The court also found that M.W.'s statement was admissible as a business-records exception to the hearsay rule, pursuant to Rule 803(6). Finally, the order noted that a disposition hearing would be held on November 7, 2008. The State filed a notice of appeal from the adjudication order on October 30, 2008.

As a threshold issue, we must determine whether the order that is the subject of this appeal is a final, appealable order. Although not raised by either party, the question of whether an order is final and appealable is a jurisdictional question that we will raise on our own. *Duffield v. Benton County Stone Co., Inc.*, 369 Ark. 314, 254 S.W.3d 726 (2007).

The State's October 30th notice of appeal provided in relevant part:

> 1. That the State of Arkansas hereby gives its Notice, pursuant to Arkansas Code Annotated § 9-27-343, Arkansas Rules of Appellate Procedure

> - Civil Rule 3(c), and Arkansas Rules of Appellate Procedure - Criminal Rule 3, of Appeal from an Adjudication Order, file marked October 14, 2008, allowing the introduction of a statement by [M.W.] in the above case.

The adjudication order that is the subject of the State's appeal provides in part:

> 5. Disposition is scheduled for November 7, 2008 at 1:00 p.m. All parties have been previously notified of this date, and no further notice is required.

On the same day that the adjudication order was entered, an order to appear, directed to Appellee and his mother, was also filed. In the record before us, however, there is neither a transcript of a disposition hearing, nor any disposition order.

Pursuant to Ark. Code Ann. § 9-27-343 (Repl. 2008), all appeals from juvenile court shall be made in the same time and manner provided for appeals in the Arkansas Rules of Appellate Procedure. More specifically, section 9-27-343(b) states that in delinquency cases, the petitioner may appeal only under those circumstances that would permit the State to appeal in criminal proceedings.

As juvenile matters are considered civil in nature, we must turn first to Ark. R. App. P.–Civ. 2(c)(1), which tracks the statutory language and provides that in delinquency cases, the State may only appeal under those circumstances that would permit the State to appeal in criminal proceedings. Thus, Rule 2 directs us to Ark. R. App. P.–Crim. 3, governing appeals by the State. Under that rule, the State may appeal only from a final order following a misdemeanor or felony prosecution, with the exception of three limited types of

interlocutory appeals, none of which are at issue here. Thus, in the present delinquency case, the State may only appeal from a final order, and we must determine whether the October 14, 2008 adjudication order is a final order.

While there is no specific provision in our rules or the Juvenile Code speaking to the finality of an adjudication order in a delinquency case, Rule 2 provides that in juvenile cases, where an out-of-home placement has been ordered, an order resulting from an adjudication hearing is a final, appealable order. Similarly, Ark. Sup. Ct. R. 6-9(a)(1)(A) allows appeals of adjudication orders, but only in dependency-neglect cases. At the time the adjudication order was entered in this case, Appellee was in the custody of his mother, having been released to her by a previous court order. As there was no out-of-home placement, the provision of Rule 2 is inapplicable. Likewise, this adjudication order is not appealable pursuant to Rule 6-9(a)(1), as this was a delinquency proceeding.

Pursuant to provisions of the Juvenile Code, a circuit court must hold a disposition hearing following a finding of delinquency. Arkansas Code Annotated section 9-27-329(a) (Repl. 2008) governs disposition in this case and provides as follows:

> If the circuit court finds that the petition has been substantiated by the proof at the adjudication hearing, a disposition hearing shall be held for the court to enter orders consistent with the disposition alternatives.

The disposition alternatives available to the circuit court are set forth in Ark. Code Ann. § 9-27-330 (Repl. 2008), and include, among other things, commitment of the youth

to an appropriate facility, imposition of a fine, assessment of court costs, or ordering restitution. The circuit court was clearly required to hold a disposition hearing so as to render a disposition order in this matter and based on the adjudication order, such a hearing was scheduled.

While this court has heretofore not addressed this precise issue, the court of appeals discussed the appealability of an adjudication order in a delinquency case in *Daniel v. State*, 64 Ark. App. 98, 983 S.W.2d 146 (1998). There, the appellant filed a notice of appeal from an adjudication order finding him delinquent on two charges. That adjudication order specifically stated that the appellant was to return to court for a scheduled disposition hearing. The State filed a motion to dismiss, arguing that the order appealed was not a final, appealable order. The court of appeals granted the motion to dismiss and, in so doing, rejected the appellant's argument that the adjudication order was a final, appealable order because the disposition hearing and order were collateral matters.[2] Citing to *Kelly*, 310 Ark. 244, 835 S.W.2d 869, the court stated that when an order provides for a subsequent hearing, such a provision prevents that order from being a final order. Finally, the court noted that while the appellant had supplemented the record with the disposition order, that inclusion did

[2] *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992), was overruled to the extent that it invalidated notices of appeal filed on the same day but before the judgment, decree, or order appealed from. *See In re Adoption of Revised Rules of Appellate Procedure*, 321 Ark. App'x 663, 900 S.W.2d 560 (1995) (per curiam).

not cure the jurisdictional defect where the notice of appeal did not designate the disposition order as the appealable order.

We believe the decision in *Daniel* to be instructive in the instant case. This situation is akin to the State bringing an appeal following a finding of guilt in a criminal proceeding but prior to entry of a judgment and commitment order. Moreover, as there is no provision in either our court rules or the Juvenile Code allowing an appeal from an adjudication order in a delinquency case where there is no out-of-home placement, we cannot say that the instant adjudication order constitutes a final, appealable order. Accordingly, we are without jurisdiction to consider this appeal.

Appeal dismissed without prejudice.