COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE CITY OF BRADY and BRADY POLICE DEPARTMENT,	§	No. 08-20-00155-CV
Appellants,	§	Appeal from the
v.	§	County Court
WILLIAM DALE SCOTT,	§	of McCulloch County, Texas
Appellee.	§	(TC #4367)

O P I N I O N[1]

We withdraw our opinion and judgment of August 16, 2021 and substitute the following opinion. Appellant's Motion for Rehearing is denied.

This case began with the 2013 seizure of $11,452 in cash by the Brady Police Department from William Dale Scott's home. Many years later, Scott filed a petition in the McCulloch County Court pursuant to article 47.01a of the Texas Code of Criminal Procedure, to determine who owned the $11,452 in cash (hereinafter the "Chapter 47 petition"). Chapter 47 details a procedure for a county court judge to determine the right of possession to property that is alleged to have been stolen.[2]

[1] This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

[2] Article 47.01a provides that:

The City of Brady and the Brady Police Department (collectively referred to as "the City") filed a plea to the jurisdiction, which the trial court denied in the same order in which it entered a final judgment granting Scott's Chapter 47 petition, finding that he had a "superior right" to the money. The City thereafter filed an interlocutory appeal from the trial court's order denying its plea to the jurisdiction, but as we explain below, it failed to perfect an appeal from the final judgment. Because the trial court's interlocutory order denying the City's plea to the jurisdiction was merged into the final judgment, and because the City did not properly perfect an appeal from that final order, we conclude that we lack jurisdiction to hear this appeal.

I. BACKGROUND

A. The Chapter 47 Petition

In his Chapter 47 petition, Scott alleged that the Brady Police Department seized $11,452 in cash from his home while they were investigating a call that they had received from a Phoenix resident. According to the City's pleadings, the Phoenix caller had claimed that she mailed Scott's father, who had since passed away, over $7,000 in cash on the representation that she had won a million-dollar prize. She expressed the belief to the Brady police that she had been "scammed." A police report documents that Scott's father claimed that he had received over $11,000 in cash in the mail from unknown sources who asked him to put the funds onto a gift card, in anticipation of sending the father a much greater sum in the future. Instead of doing that, he gave the money to Scott for safekeeping, as he believed he may have been the victim of a fraudulent scheme.

> If a criminal action relating to allegedly stolen property is not pending, a . . . county court judge . . . having jurisdiction as a magistrate in the municipality in which the property is held or in which the property was alleged to have been stolen may hold a hearing to determine the right to possession of the property, upon the petition of an interested person, a county, a city, or the state. Jurisdiction under this article is based solely on jurisdiction as a criminal magistrate under this code and not jurisdiction as a civil court.

TEX.CODE CRIM.PROC.ANN. art. 47.01.

Scott's Chapter 47 petition complained that although the police opened a case file in the matter, and provided him with a receipt stating that it had taken $11,452 in cash from him, the police never returned the cash to him or his father. Criminal charges were never filed against either of them. Scott further alleged that he had contacted the police department over the years, but was told that the district attorney had to review the matter before the money could be released. And finally, Scott alleged that the Brady Police violated article 47.03 of the Code after it seized the cash, by failing to file a "schedule" with the court having jurisdiction over the matter, which would have included his contact information to assist the court in determining ownership of the property.[3]

B. The City's Plea to the Jurisdiction

In response, the City filed a plea to the jurisdiction, raising various challenges to the trial court's jurisdiction to hear the petition, claiming, among other things, that article 47 did not apply to Scott's case. The City contended that the money was not taken as part of a criminal investigation, and was instead taken solely to determine who owned the property.[4] The City also argued that the court could not order it to return the money to Scott, as it was no longer in its possession of the funds. It claimed that the funds were disposed of in 2017 under article 18.17 of the Code of Criminal Procedure, which outlines the procedures for "abandoned or unclaimed

[3] Article 47.03 provides that:

> When an officer seizes property alleged to have been stolen, he shall immediately file a schedule of the same, and its value, with the court having jurisdiction of the case, certifying that the property has been seized by him, and the reason therefor. The officer shall notify the court of the names and addresses of each party known to the officer who has a claim to possession of the seized property.

TEX.CODE CRIM.PROC.ANN. art. 47.03. The police are thereafter required to hold the property "subject to the order of the proper court only if the ownership of the property is contested or disputed. *Id*. art. 47.01(a).

[4] The police department's incident report categorized the matter as a "non-criminal" investigation. However, the record reflects that the police "seized" or "confiscated" the money from Scott's home and placed it into evidence after receiving the call alerting them to possible criminal activity involving Scott's father.

property" whose owner or address was "unknown."[5] Under that article, the police placed an advertisement in the local Brady newspaper stating that it had cash in excess of $500 in its possession, and that anyone claiming the money had 90 days to contact them.[6] After no one responded to the advertisement, the department, on motion from its evidence custodian, obtained an order awarding the funds to the City of Brady from a Brady Municipal Court judge. The City alleged that Scott only had 30 days to appeal or otherwise contest the municipal court's disposition order, and that doing so was a "statutory prerequisite" to filing a Chapter 47 petition. And because Scott had failed to do so, the City argued that the trial court had no jurisdiction to hear his petition, and requested that it be dismissed.

C. The Trial Court's Order and Judgment

McCullough County Judge, Bill Spears, set the City's plea to the jurisdiction for hearing, but in its notice of hearing, Judge Spears stated that he was voluntarily recusing himself from the hearing, stating that he knew Scott. Consequently, the notice provided that the hearing would be held before "Visiting Judge Jerry Bearden of Mason County, Texas." Neither party objected to Judge Bearden's authority or qualifications to hear the case.

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[5] The record reflects that the police department had the contact information for both Scott and the Phoenix resident, who had apparently ceased communicating with them, but nevertheless made the decision that neither of them had any "means of proving ownership of the cash."

[6] Article 18.17(c) provides that if unclaimed or abandoned property:

> has a fair market value of $500 or more and the owner or the address of the owner is unknown, the person designated by the municipality . . . shall cause to be published once in a paper of general circulation in the municipality . . . a notice containing a general description of the property held, the name of the owner if known, the name and address of the officer holding such property, and a statement that if the owner does not claim such property within 90 days from the date of the publication such property will be disposed of and the proceeds, after deducting the reasonable expense of keeping such property and the costs of the disposition, placed in the treasury of the municipality or county disposing of the property.

TEX.CODE CRIM.PROC.ANN. art. 18.17.

The City, however, did object when the trial court announced its intention to rule on both the City's plea and Scott's petition. The City complained that the notice of hearing only extended to its plea to the jurisdiction. The trial court nevertheless orally ruled that it was denying the City's plea and that it was granting Scott's petition. Because of the City's objection, Scott's counsel then offered to reset the matter to allow the trial court to conduct a separate hearing on the merits of Scott's petition, but the City's attorney stated that he did not believe a second hearing was necessary as the trial court had already ruled on the merits. The City's attorney thereafter agreed to allow Scott's attorney to draft a proposed order in accordance with the trial court's oral rulings, with the proviso that the order would be reviewed by counsel before it was submitted to the trial court for signature. The City did not indicate at the hearing that it intended to appeal from either of the trial court's rulings.

Thereafter, the trial court signed its "Order on the City of Brady's Plea to the Jurisdiction and Final Judgment" that both denied the City's plea to the jurisdiction and granted Scott's Chapter 47 petition (finding that Scott had a superior right to the $11,452). The City then filed a "Notice of Interlocutory Appeal," stating that it was appealing from the trial court's order denying its plea to the jurisdiction pursuant to section 51.014(a)(8) of the Texas Civil Practices & Remedies Code.

II. DISCUSSION

On appeal, the City contends, among other things, that the proceedings below were a "nullity," and that the trial court's order was "void" because: (1) Judge Bearden was not qualified to sit as a visiting judge in place of Judge Spillar; (2) Judge Bearden had no authority to hear Scott's Chapter 47 petition, as the hearing notice only extended to the City's plea to the jurisdiction; and (3) the court erred in overruling the plea to the jurisdiction. Scott replies to these issues, but adds that the City has failed to perfect its appeal, because unique to Chapter 47, an interested party to the disputed funds must orally announce their intention to appeal at the hearing,

and thereafter within one business day post a bond. TEX.CODE CRIM.PROC.ANN. art. 47.12 (c). Because the City did neither, Scott contends the entire appeal must be dismissed for want of jurisdiction. Although the argument is not quite as simple as Scott presents it, we ultimately agree.[7]

A. Mootness and Merger

Subject to a few exceptions, parties may only appeal a final judgment. *Bonsmara Nat. Beef Co., LLC v. Hart of Texas Cattle Feeders, LLC*, 603 S.W.3d 385, 387 (Tex. 2020). One of those exceptions is found in section 51.014(a)(8) of the Texas Civil Practices & Remedies Code that permits a governmental body to file an appeal from an interlocutory order of . . . a county court that . . . "grants or denies a plea to the jurisdiction . . ." *See* TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(a)(8). However, when a trial court subsequently renders a final judgment in favor of a plaintiff on the merits of his case, the trial court's interlocutory order denying a governmental body's plea to the jurisdiction is merged into the final judgment. In turn, this renders a governmental body's interlocutory appeal from the denial of its plea moot, as an appellate court's decision on the interlocutory appeal could have no "practical effect" on the final judgment. *See Elec. Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 636 (Tex. 2021), *citing Texas Dep't of Transp. v. Flores*, 513 S.W.3d 826, 827 (Tex.App.--El Paso 2017, no pet.); *see also Lincoln Property Company v. Kondos*, 110 S.W.3d 712, 715-16 (Tex.App.--Dallas 2003, no pet.) (finding that an appeal of an interlocutory order granting class certification became moot following entry of a final summary judgment because the

[7] Even had Scott not generally raised this issue, we would be obligated to do so sua sponte, as jurisdiction is fundamental to our ability to hear an appeal, and we are therefore required to address any issues affecting our jurisdiction whether raised by the parties or not. *See Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012) (per curiam) (appellate courts are required to consider their jurisdiction sua sponte); *Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007) (appellate courts always have jurisdiction to determine their own jurisdiction); *Ins. Co. of State of Pennsylvania v. Martinez*, 18 S.W.3d 844, 846-47 (Tex.App.--El Paso 2000, no pet.) ("Because jurisdiction is fundamental, an appellate court must determine, even *sua sponte*, whether it has jurisdiction to consider an appeal.").

order was merged into the final judgment and any decision made in the interlocutory appeal could not have a practical effect on the rights of the parties). Accordingly, when a trial court has already entered a final judgment, an appellate court has no jurisdiction to hear a governmental body's interlocutory appeal from an order denying its plea to the jurisdiction, and the governmental body must instead pursue an appeal from the final judgment if it wishes to challenge the order. *Panda Power*, 619 S.W.3d at 635-637 (recognizing that when an interlocutory appeal has been rendered moot by the entry of a final judgment, the defendant may still address the trial court's interlocutory order in its appeal from the final judgment); *see also Bonsmara*, 603 S.W.3d at 390 ("When a trial court renders a final judgment, the court's interlocutory orders merge into the judgment and may be challenged by appealing that judgment.").

Here, the City expressly stated in its written notice of appeal that it was appealing solely from the trial court's interlocutory order denying its plea to the jurisdiction, and we are therefore unable to construe it as an appeal from the final judgment. *See Flores*, 513 S.W.3d at 827 (a court of appeal's review in an interlocutory appeal is necessarily restricted to the order denying the governmental body's plea to the jurisdiction, and it "does not encompass or extend to the final judgment."). Moreover, as Scott points out, if the City wished to appeal the trial court's decision granting his Chapter 47 petition, it was required to follow the steps set forth in article 47.12 of the Code of Criminal Procedure, which provides that an "interested person" who wishes to appeal from a trial court's decision in a Chapter 47 proceeding must "give an oral notice of appeal at the conclusion of the hearing and must post an appeal bond by the end of the next business day . . ." TEX.CODE CRIM.PROC.ANN. art. 47.12 (c). The City, however, failed to provide any such oral notification of appeal at the conclusion of the hearing and did not file an appeal bond in the trial court. And in light of the legislature's clear, albeit severe, mandate imposing these requirements, when, as here, the requirements are not met, an appellate court lacks jurisdiction to hear the appeal.

See, e.g., *One (1) 2007 GMC Yukon VIN 1GKFC13047R304753 v. State*, 405 S.W.3d 305, 308-09 (Tex.App.--Corpus Christi 2013, no pet.) (finding that the legislature intended to "severely" limit the time frame in which an appeal from an order under article 47.01a could be perfected, as reflected by the plain language of article 47.12(c), requiring a person wishing to appeal from the ruling of a trial court under article 47.01a to give oral notice of appeal at the conclusion of the hearing); *State v. Blue 1966 Ford Mustang*, No. 11-10-00173-CV, 2010 WL 4879228, at *1 (Tex.App.--Eastland Nov. 30, 2010, no pet.) (per curiam) (mem. op.) (finding that State's appeal from trial court's order granting plaintiff's Chapter 47 petition was not perfected, where the State provided no oral notice of appeal at the hearing on the plaintiff's motion for summary judgment seeking a ruling on his petition); *see generally York v. State*, 373 S.W.3d 32, 35 (Tex. 2012) (recognizing that an interested party must give notice or appeal orally at the conclusion of a Chapter 47 hearing).

The City contends that any "failure to orally announce an appeal at the hearing is a nullity in light of the trial court's improper conduct in holding a hearing on the merits without notice to the parties." City Reply Brief at 14. This argument, however, puts the cart before the horse. We have no jurisdiction to review the merits of any alleged errors the trial court may have made if an appeal is not perfected. *See generally Matter of J.J.R.*, 599 S.W.3d 605, 610 (Tex.App.--El Paso 2020, no pet.) ("A court of appeals lacks jurisdiction over a case in which an appellant fails to timely perfect the appeal."), *citing Naaman v. Grider*, 126 S.W.3d 73, 74 (Tex. 2003).

B. No Stay of the Final Judgment

And finally, we note that although section 51.014 of the Texas Civil Practices and Remedies Code provides for a stay of the trial court proceedings during the pendency of a defendant's interlocutory appeal, the defendant waives its right to the stay if it does not object

when the trial court goes forward with proceedings that culminate in a final judgment.[8] *See Panda Power*, 619 S.W.3d at 639 n.18 (recognizing that "[a]lthough the statutory stay is mandatory, parties must seek the stay and object to court actions in violation of the stay"); *see also Roach v. Ingram*, 557 S.W.3d 203, 214 (Tex.App.--Houston [14th Dist.] 2018, pet. denied) ("a party must lodge a timely objection in the trial court to preserve a complaint about a trial court's actions in violation of a stay."). Accordingly, when a governmental body allows a matter to go forward to final judgment during the pendency of its interlocutory appeal, without objection, its only recourse is to file an appeal from the final judgment. *See Panda Power*, 619 S.W.3d at 639 n.18 (where neither party ever complained that the trial court failed to stay the proceedings during the pendency of the defendant's interlocutory appeal, the defendant could only appeal from the trial court's final judgment); *Flores*, 513 S.W.3d at 827 (where matter proceeded to final judgment during pendency of governmental body's interlocutory appeal from the trial court's order denying its plea to the jurisdiction, court dismissed the interlocutory appeal, but allowed the appeal from the final judgment to go forward); *see also Texas Department of Public Safety v. Alexander*, No. 03-04-00439-CV, 2005 WL 8147253, at *1 (Tex.App.--Austin April 14, 2005, no pet.) (mem. op.) (dismissing interlocutory appeal from plea to the jurisdiction after final judgment entered); *City of Lancaster v. White Rock Commercial, LLC*, No. 05-16-00842-CV, 2017 WL 2875520, at *1 (Tex.App.--Dallas July 6, 2017, no pet.) (mem. op.) (same).

We recognize that in the present case, the trial court entered its final judgment *before* the City filed its notice of interlocutory appeal, which puts this case in a somewhat different procedural posture than the cases discussed above. However, as set forth above, the trial court orally notified the City during the hearing that it intended to enter a final judgment granting Scott's Chapter 47 petition, and the City did not request that the trial court stay the entry of the final judgment so that

[8] Section 51.014 provides that the filing of an interlocutory appeal under subsection (a)(8) "stays all other proceedings in the trial court pending resolution of that appeal[.]" TEX.CIV.PRAC. & REM.CODE ANN. § 51.014.

it could pursue an interlocutory appeal from the court's denial of its plea to the jurisdiction. Instead, as set forth above, the City expressly agreed to allow Scott's attorney to submit a proposed final judgment to the trial court for its signature, and the City never complained in the trial court--nor has it done so on appeal--that the trial court entered the final judgment in violation of the Code's stay provisions.[9] Therefore, given the trial court's unobjected entry of the final judgment, the City was required to file an appeal from that judgment if it wished to challenge the trial court's denial of its plea to the jurisdiction, which it failed to do.

C. Opportunity to Amend Notice of Appeal

In its motion for rehearing, the City directs us to the long-standing rule that "a court of appeals may not dismiss an appeal when the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity to correct the error." *Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991); *see also Kinder Morgan SACROC, LP v. Scurry County*, 622 S.W.3d 835, 846 (Tex. 2021) (restating same rule). In conjunction with its motion for rehearing, the City has also filed a motion to amend its notice of appeal. Additionally, the City directs us to authority where the notice of appeal from an interlocutory appeal preserved the right to appeal from the merged final judgment. *See Roccaforte v. Jefferson County*, 341 S.W.3d 919, 924-25 (Tex. 2011). Underpinning all these arguments is the policy that "procedural rules should be construed and applied so that the right of appeal is not unnecessarily lost to technicalities." *Guest v. Dixon*, 195 S.W.3d 687, 688 (Tex. 2006).

[9] In its notice of interlocutory appeal, the City stated that its interlocutory appeal "stay[ed] commencement of a trial and all other proceedings in the trial court pending resolution of the interlocutory appeal." However, this statement came after the City agreed to the entry of the final judgment, and the City never sought to vacate the final judgment after it filed its interlocutory appeal. We therefore cannot conclude that the statement did in fact stay the entry of the final judgment.

While we respect all this cited authority, it cannot overcome the jurisdictional problem in this appeal. The City acknowledges in its motion for rehearing that the denial of the plea to jurisdiction merged into the final judgment. And as we pointed out in our original opinion, the final judgment disposed of a claim filed under Chapter 47. That statutory claim has the rather unique requirement that the notice of appeal must be given orally at the time of the hearing, with a bond posted the next day. TEX.CODE CRIM.PRO.ANN. art. 47.12 (c). We acknowledged the severe nature of this provision, but we are constrained to follow the requirements imposed by the legislature. And the City does not propose any way to amend its *written* notice of appeal to satisfy the requirement of an *oral* announcement of the intent to appeal from a hearing held years ago. Nor does it suggest how it could meet the time deadline for the bond requirement. Because there is no amendment to its notice of appeal that could meet these requirements, permitting an amended notice of appeal would be futile. We overrule the motion for rehearing and deny the motion to amend the notice of appeal.

Accordingly, for the reasons set forth above, we conclude that we lack jurisdiction to hear the City's interlocutory appeal from the trial court' order denying its plea to the jurisdiction, and that we must therefore dismiss the appeal.

The City's appeal is hereby dismissed.

JEFF ALLEY, Justice

September 17, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.