

IN THE UTAH COURT OF APPEALS

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Brendt Thomas Bennett,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20100524-CA
v.)	
)	F I L E D
Alfred Bigelow,)	(September 10, 2010)
)	
Respondent and Appellee.)	2010 UT App 252

Sixth District, Manti Department, 090600317
The Honorable Marvin D. Bagley

Attorneys: Brendt T. Bennett, Gunnison, Appellant Pro Se
Mark L. Shurtleff and Annina M. Mitchell, Salt Lake
City, for Appellee

Before Judges Davis, Orme, and Christiansen.

PER CURIAM:

Petitioner Brendt Thomas Bennett appeals the denial of his motion to declare Utah Code section 77-27-5(3) unconstitutional. The motion, which was filed during proceedings on his petition for extraordinary relief, claimed that the statute prohibiting judicial review of the decisions of the Utah State Board of Pardons and Parole constitutes an unconstitutional suspension of the writ of habeas corpus. This case is before the court on a sua sponte motion for summary dismissal for lack of jurisdiction because it is taken from an order that is not final and appealable.

Rule 3(a) of the Utah Rules of Appellate Procedure states that "[a]n appeal may be taken from a district . . . court to the appellate court with jurisdiction over the appeal from all final orders and judgments." Utah R. App. P. 3(a). An appeal taken from an order that is not final must be dismissed for lack of appellate jurisdiction. See Bradbury v. Valencia, 2000 UT 50, ¶ 8, 5 P.3d 649. An order is final and appealable when it disposes of all of the claims against all parties on the merits. See id. ¶ 9; see also Loffredo v. Holt, 2001 UT 97, ¶ 12, 37 P.3d 1070.

Bennett concedes that the ruling he seeks to appeal does not resolve his pending petition for extraordinary relief filed pursuant to rule 65B of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 65B. The ruling on Bennett's motion to declare section 77-27-5(3) unconstitutional is interlocutory. However, he did not seek or obtain permission to appeal the interlocutory ruling under rule 5 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 5. While Bennett is correct that a nonfinal order may be certified as final for purposes of appeal under rule 54(b) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 54(b), the order he seeks to appeal was not certified as final by the district court.

Bennett claims that the ruling on his motion to declare Utah Code section 77-27-5(3) unconstitutional is final and appealable based upon the statutory provisions pertaining to declaratory judgments. See Utah Code Ann. § 78B-6-401(2) (2008) (providing that a declaratory judgment "shall have the force and effect of a final judgment"). The underlying action is a petition for extraordinary relief and is not a declaratory judgment action. Nevertheless, the statute cited by Bennett does not alter the final judgment rule and instead stands for the proposition that the final judgment in an action seeking a declaratory judgment would be appealable in the same manner as any other final judgment. Because the ruling on Bennett's motion in this case is not a final judgment fully resolving the merits of the petition for extraordinary relief, it is not final and appealable, and we lack jurisdiction to consider this appeal.

Once a court has determined that it lacks jurisdiction, it "retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). Accordingly, we dismiss the appeal for lack of jurisdiction, without prejudice to an appeal filed after the entry of a final judgment resolving the remaining claims.

James Z. Davis,
Presiding Judge

Gregory K. Orme, Judge

Michele M. Christiansen, Judge