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STATE OF NEBRASKA, APPELLANT, V. CESAR PENADO, APPELLEE.

804 N.W.2d 160

Filed October 7, 2011. No. S-10-1049.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
4. **Criminal Law: Judgments: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review.
5. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.
6. **Judgments: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Appeal dismissed.

Joe Kelly, Lancaster County Attorney, and Lory A. Pasold for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Cesar Penado was charged with murder in the first degree, use of a weapon to commit a felony, and burglary. Following Penado's request for a hearing to determine competency, the Lancaster County District Court found that Penado was not competent to stand trial and determined that there was not a substantial likelihood that Penado may become competent in the foreseeable future. The State of Nebraska appeals.

BACKGROUND

The State charged Penado with murder in the first degree, use of a weapon to commit a felony, and burglary. Penado was arraigned and entered pleas of not guilty on all three counts. Prior to trial, Penado filed a motion for a competency evaluation pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2008). The district court granted Penado's motion and ordered him to be evaluated at the Lincoln Regional Center.

On July 9, 2008, a hearing to determine Penado's competency to stand trial was held. Following the hearing, on July 22, the district court entered an order finding that Penado was not competent to stand trial, but that there was a substantial probability that Penado will become competent to stand trial within the foreseeable future. The court ordered Penado to be committed to the regional center for appropriate treatment "until such time as the disability may be removed." The court further ordered that a hearing to review competency would be held in January 2009.

On January 15, 2009, a hearing to review competency was held. Penado's admission to the regional center had been delayed due to a lack of beds available. Penado was admitted in September 2008. Because Penado's treatment had been delayed, the court concluded that additional time should be given to the treating physicians at the regional center to determine whether their efforts were likely to restore Penado's competency. The court again ordered Penado to remain in the custody of the regional center "until such time as the disability may be removed."

On September 14 and 24, 2009, a hearing to review competency was held. In a September 29 order, the court again determined that additional time should be given, and ordered Penado to remain in the custody of the regional center. Penado perfected an appeal from the September 29 order. In case No. A-09-1081, the Nebraska Court of Appeals issued a mandate to the district court on May 5, 2010. Citing Neb. Ct. R. App. P. § 2-107(B)(3) (rev. 2008) and *State v. Jones*,[1] the Court of Appeals vacated the September 29, 2009, order, and

[1] *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

remanded the cause with directions for the district court to enter an order in compliance with § 29-1823. Upon remand, the district court entered an amended order on competency on May 13, 2010. The amended order found that Penado remained not competent to stand trial, but that there was a substantial likelihood that Penado will become competent within the foreseeable future.

On August 3 and 24, 2010, the final hearing to review Penado's competency was held. The court heard testimony and received evidence regarding Penado's competency. On September 16, the district court entered an order on competency, finding that Penado was not competent to stand trial and that there was not a substantial probability that Penado will become competent in the foreseeable future. The court noted a number of complications impeding competency and restorability, including Penado's psychosis, his anxiety toward the court process, and his degree of mental retardation.

The September 16, 2010, order did not dismiss the charges against Penado. The court gave the State 10 days to commence civil commitment proceedings pursuant to § 29-1823(3). The order directed Penado to be released from custody if a temporary or final civil commitment order was not entered within 10 days. The State thereafter sought and obtained civil commitment of Penado.[2]

On October 5, 2010, the State presented an application for leave to docket an appeal in the district court, which was reviewed by the district court. Also on October 5, the State filed its notice of intention to prosecute an appeal. On October 15, the State filed its application for leave to docket an appeal in the Court of Appeals. The State filed its appeal pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). We moved the case to our docket on our own motion.

Penado sought summary dismissal of the State's appeal for lack of jurisdiction. In his motion for summary dismissal, Penado contended that the State failed to comply with the requirements of Neb. Rev. Stat. §§ 25-1912 (Reissue 2008)

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[2] See memorandum brief for appellee in support of motion for summary dismissal at 14.

and 29-2315.01 to perfect a timely appeal. We denied Penado's motion for summary dismissal.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in finding (1) Penado was not competent to stand trial and (2) there was not a substantial likelihood that Penado will become competent in the foreseeable future.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

[2] In his motion for summary dismissal, Penado raises the issue of whether this court has jurisdiction over the State's appeal. Penado argues, among other things, that the order from which the State appealed does not constitute a final, appealable order as required by § 29-2315.01. In light of Penado's assertions and in light of the timing of the State's application for leave to docket an appeal, we must first determine whether we have jurisdiction to decide the issues presented in the present appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4]

[3,4] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.[5] Section 29-2315.01 grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review.[6] This court has consistently maintained that strict compliance with § 29-2315.01 is required to confer jurisdiction.[7] Section 29-2315.01 provides in relevant part:

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[3] *In re Interest of D.H.*, 281 Neb. 554, 797 N.W.2d 263 (2011).

[4] *Id.*

[5] *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[6] See, *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

[7] See *State v. Johnson, supra* note 5.

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court. Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall *then* present such application to the appellate court within thirty days from the date of the final order.

(Emphasis supplied.)

Section 29-2315.01 does not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. This is consistent with the longstanding principle of avoiding piecemeal appeals arising out of one set of operative facts.[8] And it is well established that a party may appeal from a court's order if the decision is a final, appealable order.[9]

In this case, the State filed its application for leave to docket an appeal and notice of appeal on October 5, 2010. The court's September 16 competency order, from which the State appealed, did not dismiss the charges against Penado. The record does not contain an order dismissing the charges against Penado. And at oral argument, the State conceded and Penado stipulated that the charges against Penado have yet to be dismissed.

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[8] See *State v. Wieczorek, supra* note 6.

[9] *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

[5,6] A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.[10] The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.[11]

The September 16, 2010, order did not terminate the proceedings below, and further action is required to completely dispose of the cause in the district court. The competency order entered by the district court was therefore not a final order as required by § 29-2315.01, and the State's application was premature. The State failed to comply with the jurisdictional requirements of § 29-2315.01. Therefore, we lack jurisdiction over the present appeal.

CONCLUSION

Because the State did not appeal from a final order as required by § 29-2315.01, we lack jurisdiction over this appeal. When an appellate court is without jurisdiction to act, the appeal must be dismissed.[12] Accordingly, the State's appeal is dismissed.

APPEAL DISMISSED.

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[10] *State v. Dunlap, supra* note 6.

[11] *Id.*

[12] *Id.*