

SUPREME COURT OF ARKANSAS

Childers v. Arkansas Department of Human Services, 361 Ark. 227

205 S.W.3d 795 (2005) · No. No. 05-30 · Decided March 24, 2005

SUMMARY

The Supreme Court of Arkansas addressed an untimely record in an indigent parent's appeal from an order terminating parental rights. The court directed the trial court to determine whether attorney error caused the delay, ordered the complete record filed, and directed that a briefing schedule be set.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Arkansas
DECIDED	March 24, 2005
DOCKET	No. 05-30
DISPOSITION	remanded
PROCEDURAL POSTURE	Appeal from an order of the Sebastian County Circuit Court terminating Sherry Childers's parental rights. The Arkansas Department of Human Services moved to dismiss because the record was not timely filed. The Arkansas Supreme Court accepted the complete record, directed that the appeal proceed, and remanded the issue of attorney error to the trial court.
STANDARD OF REVIEW	The Supreme Court determined whether the record was sufficient to decide attorney fault; because it was not, the issue was remanded to the trial court for factual findings.
PRECEDENTIAL VALUE	Published Arkansas Supreme Court opinion; precedential
PARTIES	Sherry Childers v. Arkansas Department of Human Services

TOPICS

- appellate procedure
- termination of parental rights
- parental rights
- writ of certiorari
- family law

PRACTICE AREAS

- appellate procedure
- family law
- termination of parental rights

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because the record was not timely filed.
2. Whether the issue of attorney error in failing to perfect the appeal could be resolved on the existing motion, affidavits, and record.
3. Whether an indigent parent appealing termination of parental rights is entitled to protections comparable to those afforded an indigent criminal defendant when the appeal is not timely perfected.

HOLDINGS

1. Because the motion, affidavits, and record were insufficient to determine whether attorney error caused the failure to timely perfect the appeal, the issue of attorney error had to be remanded to the trial court for findings of fact.
2. Indigent parents appealing termination-of-parental-rights orders receive protections similar to those afforded indigent criminal defendants when an appeal has not been timely perfected.

KEY QUOTATIONS

“Where a motion seeking relief from failure to perfect an appeal is filed, and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record and the appeal will proceed without delay. However, the matter of attorney error will be remanded to the trial court to make findings of fact.” (797)

FACTUAL BACKGROUND

The circuit court terminated Sherry Childers's parental rights. Although appointed counsel timely filed a notice of appeal and obtained an extension for filing the record, the record was not filed by the extended deadline. The fee bill indicated that the record had been completed months earlier, but the record was not secured from the circuit clerk and filed until after the Supreme Court intervened.

PROCEDURAL HISTORY

The circuit court entered an order terminating Childers's parental rights on December 18, 2003. Her appointed counsel filed a notice of appeal and obtained an extension to file the record through June 4, 2004, but the record was not timely filed. DHS later filed a partial record and moved to dismiss. After the Supreme Court directed counsel to pursue specified procedures, the complete record was tendered, and the Supreme Court remanded the issue of attorney error for factual findings while directing its clerk to file the record and set a briefing schedule.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The trial court must determine whether attorney error caused the failure to timely perfect the appeal, make findings of fact, and submit those findings to the Supreme Court within sixty days. The clerk of the Supreme

Court must file the complete record and set a briefing schedule.

CASES CITED

- Linker-Flores v. Arkansas Department of Human Services, 359 Ark. 131, 194 S.W.3d 739 (2004)
- Bogachoff v. Arkansas Department of Human Services, 360 Ark. 259, 200 S.W.3d 884 (2005)
- Moore v. State, 359 Ark. 370, 197 S.W.3d 447 (2004)
- McDonald v. State, 356 Ark. 106, 146 S.W.3d 883 (2004)

OPINION

PER CURIAM.

205 S.W.3d 795 (2005) Sherry CHILDERS, Appellant, v. ARKANSAS DEPARTMENT OF HUMAN SERVICES, Appellee. No. 05-30. Supreme Court of Arkansas. March 24, 2005. *796 Dale Arnold, for appellant. No response. PER CURIAM. This case is an appeal from an order entered by the Sebastian County Circuit Court, Fort Smith District, Juvenile Division, on December 18, 2003, terminating the parental rights of Appellant Sherry Childers.

Counsel appointed by the circuit court to represent Ms. Childers filed a timely notice of appeal on January 15, 2004, and an order extending the time to file the record until June 4, 2004, was entered by the circuit court. See Ark. R.App. P.-Civ. 5(b).

The time granted for the extension passed, and the record was not timely filed with our clerk. See Ark. R.App. P.-Civ. 5(a) (2004). Eventually, on January 7, 2005, the Department of Human Services (DHS) filed a partial record along with its motion to dismiss the appeal. Ark. R.App. P.-Civ. 5(c) (2004).

On February 3, 2005, we issued a per curiam, directing Ms. Childers's attorney to proceed with the appeal by (1) filing a no-merit brief, as established in Linker-Flores v. Ark. Dept. of Human Services, 359 Ark. 131, 194 S.W.3d 739 (2004); (2) filing an affidavit of waiver; or (3) filing an affidavit of indigency and a writ of certiorari to complete the record, pursuant to Bogachoff v. Arkansas Dept. of Human Services, 360 Ark.

259, 200 S.W.3d 884 (2005). The complete record was tendered to the clerk on February 14, 2005. The fee bill for the record (prepared by the circuit clerk) indicates that the record was completed on April 16, 2004. The fee bill further indicates that the transcript costs, totaling \$408.50, was to be paid by the State, and that the remaining \$100.50, which represents the circuit clerk's fee, was "uncollectable."

On February 22, 2005, Childers's attorney filed a motion to accept record and set briefing schedule. The motion does not indicate why the record was not secured from the circuit clerk and filed before the deadline, as extended, of June 4, 2004.

In the context of a belated appeal by an indigent-criminal defendant, we no longer require an affidavit of fault before we will decide motions for rule on the clerk and motions for belated appeals. *797 *Moore v. State*, 359 Ark. 370, 197 S.W.3d 447 (2004). This court will either decide the matter of fault where the record is sufficient to reach a conclusion, or: Where a motion seeking relief from failure to perfect an appeal is filed, and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record and the appeal will proceed without delay.

However, the matter of attorney error will be remanded to the trial court to make findings of fact. Upon receipt by this court of the findings, this court will render a decision on attorney error. *Moore v. State*, *supra* (quoting *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004)).

We have previously afforded indigent parents appealing from a termination of parental rights similar protections as those afforded indigent criminal defendants. *Bogachoff v. Arkansas Dept. of Human Services*, *supra*; *Linker-Flores v. Ark. Dept. of Human Services*, *supra*. Applying the *McDonald* principles to the present case, we conclude that the record is insufficient to decide the issue of fault, and we remand the question of attorney error to the trial court to make findings of fact and submit the findings to this court within the next sixty days.

We further direct the clerk of this court to file the complete record and set a briefing schedule. Motion granted; issue of attorney error remanded.