

SUPREME COURT OF NEBRASKA

State v. McColery

297 Neb. 53 (2017) · No. No. S-16-1017 · Decided June 23, 2017

SUMMARY

The Nebraska Supreme Court dismissed Scott McColery’s appeal as premature. The court held that an order denying release of appearance-bond funds to McColery’s attorney was not a final, appealable order because it did not determine the parties’ rights to the funds or affect a substantial right. The court noted that the attorney could assert ownership in later garnishment proceedings.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Kelch, J.; Heavican, C.J.; Wright, J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	June 23, 2017
DOCKET	No. S-16-1017
DISPOSITION	dismissed
PROCEDURAL POSTURE	McColery appealed the Lancaster County District Court's order overruling his motion to release appearance-bond funds to his attorney. The Nebraska Supreme Court dismissed the appeal for lack of a final, appealable order.
STANDARD OF REVIEW	A jurisdictional issue not involving a factual dispute is a question of law reviewed independently.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion
PARTIES	Scott McColery v. State of Nebraska

TOPICS

- appellate jurisdiction
- final judgment rule
- appellate procedure
- child support
- third party practice

PRACTICE AREAS

- Appellate procedure
- Civil procedure
- Child support
- Criminal procedure

QUESTIONS PRESENTED

1. Whether the district court's order overruling McColery's motion to release appearance-bond funds was a final, appealable order.
2. Whether the order affected a substantial right so as to confer appellate jurisdiction under Nebraska's final-order statute.

HOLDINGS

1. The order overruling the motion to release the bond funds was not a final, appealable order because it did not affect a substantial right or determine the parties' rights to the funds.
2. The appeal was premature and had to be dismissed because the State had not yet initiated garnishment proceedings and the challenged order did not resolve the parties' rights to the bond funds.
3. An appellate court must independently determine whether it has jurisdiction before reaching the legal issues presented, regardless of whether the parties raise the jurisdictional issue.

KEY QUOTATIONS

“Because the order merely holds the funds in the court, it does not diminish McColery’s or his attorney’s claim to the funds or eliminate any objection he or his attorney might have to the State’s garnishment of the funds for child support.” (56)

“Because we find that the order does not affect a substantial right, it is not a final, appealable order. We therefore dismiss.” (56)

FACTUAL BACKGROUND

McColery was charged with strangulation and posted a \$5,000 appearance bond. He later assigned the bond funds to his private attorney. The State filed an affidavit of lien asserting that the funds were subject to garnishment for more than \$18,000 in overdue child support. After McColery was convicted, the district court denied his motion to release the funds to his attorney, but the order did not determine ownership of the funds or authorize the State to obtain them.

PROCEDURAL HISTORY

McColery posted a \$5,000 appearance bond and later assigned the bond funds to his attorney. The State filed an affidavit of lien concerning overdue child support. After McColery was convicted, he moved to release the funds to his attorney; the district court overruled the motion on October 20, 2016. The Nebraska Supreme Court dismissed the appeal as premature because the order did not affect a substantial right and was not final.

DISPOSITION

dismissed

CASES CITED

- Big John's Billiards v. State, 283 Neb. 496, 811 N.W.2d 205 (2012)

- Sutton v. Killham, 285 Neb. 1, 825 N.W.2d 188 (2013)
- Carlos H. v. Lindsay M., 283 Neb. 1004, 815 N.W.2d 168 (2012)
- Pearce v. Mutual of Omaha Ins. Co., 293 Neb. 277, 876 N.W.2d 899 (2016)
- Cattle Nat. Bank & Trust Co. v. Watson, 293 Neb. 943, 880 N.W.2d 906 (2016)

OPINION

PER CURIAM.

Nebraska Supreme Court Online Library www.nebraska.gov/apps-courts-epub/ 06/23/2017 09:13 AM CDT - 53 - Nebraska Supreme Court Advance Sheets 297 Nebraska Reports STATE v. McCOLERY Cite as 297 Neb. 53 State of Nebraska, appellee, v. Scott McColery, appellant. ____ N.W.2d ____ Filed June 23, 2017. No. S-16-1017. 1. Judgments: Jurisdiction. A jurisdictional issue that does not involve a factual dispute presents a question of law.

2. Judgments: Appeal and Error. An appellate court independently reviews questions of law decided by a lower court. 3. Jurisdiction: Appeal and Error. 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, irrespective of whether the issue is raised by the parties.

4. Jurisdiction: Final Orders: Appeal and Error. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. 5. Final Orders: Appeal and Error. An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Appeal dismissed. Brett McArthur for appellant. Joe Kelly, Lancaster County Attorney, and Jason M. Cooper for appellee. Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, K elch, and Funke, JJ. - 54 - Nebraska Supreme Court Advance Sheets 297 Nebraska Reports STATE v. McCOLERY Cite as 297 Neb. 53 K elch, J. NATURE OF CASE Scott McColery posted a \$5,000 appearance bond for a crime of which he was later convicted.

After posting the bond, McColery assigned the bond funds to his attorney. The State then filed an affidavit of lien for overdue child support. After McColery was convicted, he filed a motion to release the funds to his attorney. That motion was overruled, and McColery appeals. FACTS In September 2015, McColery was charged with strangulation of his girlfriend and was appointed a public defender, though he later obtained a private attorney.

Bond was set at \$50,000. On October 5, 2015, McColery posted a \$5,000 appearance bond. On October 30, McColery filed an “Assignment of Bond” to his “attorney, Brett McArthur, for his services in the above entitled matter.” On November 18, 2015, the State filed an affidavit of lien

for child support indicating that the bond funds held by the court were subject to garnishment for McColery's overdue child support.

Attached to the affidavit, a payment history report reflected that as of November 2015, McColery owed over \$18,000 in overdue child support. In June 2016, McColery filed a motion to release the bond funds to his attorney.

After a hearing, the motion was over-ruled in an order dated October 20, 2016. From that order, McColery appeals. ASSIGNMENT OF ERROR McColery's sole assignment of error is that the district court erred as a matter of law in overruling his motion to release the bond funds to his attorney. - 55 - Nebraska Supreme Court Advance Sheets 297 Nebraska Reports STATE v. MCCOLERY Cite as 297 Neb. 53 STANDARD OF REVIEW [1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.¹ An appellate court independently reviews questions of law decided by a lower court.² ANALYSIS [3] 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, irrespective of whether the issue is raised by the parties.³ [4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.⁴ Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.⁵ [5] The State argues that the order overruling McColery's motion to release the bond funds does not affect a substantial right because it does not affect any party's rights to the bond funds.

We agree. An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.⁶ 1 Big John's Billiards v. State, 283 Neb. 496, 811 N.W.2d 205 (2012). 2 Id. 3 Sutton v. Killham, 285 Neb. 1, 825 N.W.2d 188 (2013); Carlos H. v. Lindsay M., 283 Neb. 1004, 815 N.W.2d 168 (2012).

4 Big John's Billiards v. State, supra note 1. 5 Pearce v. Mutual of Omaha Ins. Co., 293 Neb. 277, 876 N.W.2d 899 (2016). 6 Cattle Nat. Bank & Trust Co. v. Watson, 293 Neb. 943, 880 N.W.2d 906 (2016). - 56 - Nebraska Supreme Court Advance Sheets 297 Nebraska Reports STATE v. MCCOLERY Cite as 297 Neb. 53 Here, the subject matter of the litigation was not affected, because the district court's order did not determine the rights of the parties with respect to the bond funds.

Although the order indicated that the funds would not be released to McColery's attorney at that time, it did not indicate that the attorney was not entitled to the funds. Nor did it indicate that the State was entitled to the funds.

Because the order merely holds the funds in the court, it does not diminish McColery's or his attorney's claim to the funds or eliminate any objection he or his attorney might have to the State's garnishment of the funds for child support.

We conclude that McColery's appeal is premature. The State has not yet initiated garnishment proceedings. When it does, McColery's attorney will be able to intervene pursuant to Neb. Rev. Stat. § 25-1030.03 (Reissue 2016), which allows for a third party claiming ownership to intervene in the garnishment proceedings.

Because we find that the order does not affect a substantial right, it is not a final, appealable order. We therefore dismiss. **CONCLUSION** There is no final order in this case. The appeal is dismissed as premature. Appeal dismissed.