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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2008-2009

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Brent Andre Parris

v.

Prison Health Services, Inc., William Hobbs, and Debbie Hunt

**Appeal from Limestone Circuit Court
(CV-07-0249)**

PER CURIAM.

Brent Andre Parris appeals from the trial court's dismissal of the amended complaint, in which he sought to amend his earlier "filing," which was captioned "Motion for

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Injunctive Relief (For Specialized Medical Care)" ("the initial pleading").

Parris is an inmate at Limestone Correctional Facility. In the initial pleading, he alleged that defendants Prison Health Services, Inc. ("Prison Health"), Dr. William Hobbs, and Debbie Hunt (collectively, "the defendants") had denied him medical treatment after he had injured his shoulder playing basketball. The defendants moved for a dismissal of the action pursuant to Rule 12(b)(6), Ala. R. Civ. P., arguing that the initial pleading failed to state a claim upon which relief could be granted. The trial court granted the defendants' motion on July 31, 2007.

On August 7, 2007, Parris filed an "amended complaint," and on August 9, 2007, he filed a motion asking the court to set aside its July 31 order. The trial court denied Parris's August 9 postjudgment motion, but it did not dismiss the amended complaint. Parris appealed. On appeal, this court concluded that because the trial court's order dismissing the initial pleading had not expressly limited Parris's right to amend the initial pleading, Rule 78, Ala. R. Civ. P., provided Parris with an "automatic right of amendment" within ten days

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after service of the trial court's order dismissing his initial pleading. Parris v. Prison Health Servs., Inc., 991 So. 2d 270, 272-73 (Ala. Civ. App. 2008). This court held that Parris had timely exercised his right to amend; therefore, because the timely amended complaint was still pending in the trial court, this court dismissed the appeal as being from a nonfinal judgment. Id. at 273.

Thereafter, on April 4, 2008, the defendants filed a motion to dismiss the amended complaint pursuant to Rules 8(a) and 12(b)(6), Ala. R. Civ. P, asserting that Parris had again failed to state a claim for which relief could be granted. On April 7, 2008, the trial court entered an order dismissing Parris's amended complaint. The record does not indicate that Parris filed a postjudgment motion. The case-action summary shows that on May 27, 2008, some 50 days after the trial court entered its order dismissing the amended complaint, Parris filed his notice of appeal. The defendants contend that Parris's notice of appeal was untimely because it was filed eight days after the expiration of the 42-day period in which Parris had to timely file the notice of appeal. See Rule

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4(a)(1), Ala. R. App. P. (requiring appeals to be filed within 42 days of the entry of judgment).

In the case of an inmate's filing a notice of appeal, the date the notice is filed in the court clerk's office is not necessarily controlling. In Houston v. Lack, 487 U.S. 266 (1988), the United States Supreme Court held that a pro se prisoner-litigant's notice of appeal was deemed filed on the day that the notice was accepted by the prison mail system and not when it arrived at the court clerk's office. The Alabama Supreme Court adopted this rule, known as the "mailbox rule," in Ex parte Williams, 651 So. 2d 569 (Ala. 1992), in which the court held that a pro se prisoner-litigant's petition for a writ of certiorari directed to the Alabama Court of Criminal Appeals under Rule 25, Ala. R. App. P., was timely filed on the date that the petition was delivered to the prison officials for mailing. The "mailbox rule" governs as to the time of filing of the pro se prisoner-litigant's notice of appeal in both criminal and civil cases. See Ex parte Jones, 773 So. 2d 989 (Ala. 1998) (inmate's notice of appeal was deemed filed on the date he gave it to prison authorities for mailing); Veteto v. Yocum, 793 So. 2d 814 (Ala. Civ. App.

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2001) (extending to civil cases the rule that a pro se prisoner-litigant's notice of appeal is deemed filed when that document is delivered to a prison official for mailing).

The "mailbox rule" was incorporated into Rule 4(c), Ala.

R. App. P., which states:

"(c) Appeals by Inmates Confined in Institutions. If an inmate confined in an institution and proceeding pro se files a notice of appeal in either a civil or a criminal case, the notice will be considered timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for 'legal' mail to be processed by the United States Post Office, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement that sets forth the date the filing was deposited in the institution's mail system."

The defendants claim that to take advantage of the "mail box" rule Parris's filing "must" contain a notarized statement setting forth the date he placed his notice of appeal in the prison's mail system. The Alabama Supreme Court has held otherwise, however.

"While Rule 4(c), Ala. R. App. P., includes a provision that '[t]imely filing may be shown by a notarized statement that sets forth the date the filing was deposited in the institution's mail system' (emphasis added), this rule does not mandate such a notarized statement as the only way to establish the timeliness of a filing. Such a

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mandate would create still further issues about the availability and expense of a notary public that the rule is not drawn to resolve. The nonmandatory nature of the provision for the notarized statement is connoted by the use of the word may in contradistinction to the use of the word must elsewhere in the very same rule to connote a measure that is mandatory--the inmate's use of the 'legal' mail system, if one is available in the institution, instead of the general mail system there."

Ex parte Wright, 860 So. 2d 1253, 1257 (Ala. 2002).

In this case, the unverified certificate of service on Parris's notice of appeal states that the notice was placed in the "U.S. Mail" on May 8, 2008. There is no evidence in the record as to when Parris delivered his notice of appeal to the prison's mail system. In his reply brief, Parris claims that he filed his notice of appeal with the circuit clerk and simultaneously filed a copy of his notice of appeal with this court. The records of this court tend to support Parris's claim. On May 19, 2008, which would have been the 42nd day after the order dismissing the amended complaint was entered, this court sent a letter to Parris returning his notice of appeal and informing him of the proper forum in which to file his notice of appeal. If Parris did file his notice of appeal simultaneously in this court and in the circuit court, then the notice had to have been delivered in a timely manner to

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the prison mail system because the notice had reached this court by the 42nd day after the entry of the order from which Parris appealed.

In Ex parte Wright, supra, the Alabama Supreme Court noted that "the filing of [Wright's] notice of appeal in the court required no judicial action" and that the parties did not contest the timeliness of the notice of appeal before the trial court. Wright, 860 So. 2d at 1257. In reversing the Court of Criminal Appeals's judgment dismissing Wright's appeal for untimeliness, the supreme court pointed out that the Court of Criminal Appeals had been the first court to have the opportunity to consider the timeliness of Wright's appeal, and that there had been no evidence before it to contradict the averments in Wright's "Declaration of Mailing," which, if true, established that his notice of appeal was timely under the mailbox rule. Therefore, the supreme court remanded the cause with instructions for the trial court to determine whether Wright had timely deposited his notice of appeal in the internal mail system of the prison. Id.

The record in this case indicates that this court is the first to consider the timeliness of Parris's notice of appeal.

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The certificate of service included with Parris's notice of appeal indicates that he "mailed" the notice on May 8, 2008, within the time allowed by law for the filing of a notice of appeal in this case. The letter to Parris from the clerk of this court returning his notice of appeal is dated on the last date that a filing of the notice of appeal would have been timely; thus, the letter suggests that Parris's notice was placed in the prison mail system in a timely manner. However, we cannot verify that Parris delivered his notice of appeal to the prison mail system by May 19, 2008, the day on which the period for filing his notice lapsed. As was the case with the Court of Criminal Appeals in Ex parte Wright, this court has no evidence before it to contradict Parris's assertion. Accordingly, on the authority of Ex parte Wright and the cases cited therein, we must remand this cause for the trial court to determine, as expeditiously as possible, whether Parris did in fact deposit his notice of appeal in the appropriate prison mail system or hand the notice of appeal to an appropriate officer of the prison for that officer to make the deposit in the mail on or before May 19, 2008. On remand, the trial court may conduct such proceedings and take such evidence as

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it deems necessary to make its findings of fact. A written return to remand, including the trial court's findings of fact, shall be filed with this court as expeditiously as possible.

REMANDED WITH INSTRUCTIONS.

All the judges concur.