FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 20, 2003
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LYNWOOD EASTON MOORE, Debtor.	BAP No. EO-02-078
LYNWOOD EASTON MOORE, Appellant, v. DISTRICT ATTORNEY OF LOVE COUNTY, OKLAHOMA, Appellee.	Bankr. No. 02-71630 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before BOULDEN, CORDOVA,[1] and NUGENT, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties[2] did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The Honorable Donald E. Cordova, Chief Bankruptcy Judge for the District of Colorado, passed away February 16, 2003. The remaining two panel judges are in agreement and will act as a quorum in resolving the appeal. See *United States v. Wiles*, 106 F.3d 1516,1516 n.* (10th Cir. 1997); Fed. R. Bankr. P. 8018(b).

[2] Although Bancfirst of Marietta, Oklahoma was included on this Court's docket as an appellee, Bancfirst has neither participated in this appeal nor is it an interested party. Therefore, we have stricken references to Bancfirst from the caption.

would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Appellant and former debtor Lynwood Easton Moore timely appealed the bankruptcy court's order entered October 7, 2002 ("Order") denying a Motion for Reconsideration of a prior order determining that his state criminal prosecution for removal of mortgaged property was excepted from the automatic stay under 11 U.S.C. § 362(b)(1). The appellant did not obtain a stay of the Order pending the appeal and was tried and convicted of that crime in Oklahoma state court.[3]

On December 13, 2002, during the pendency of this appeal, the bankruptcy court dismissed appellant's Chapter 13 bankruptcy case ("Dismissal Order") for failure to make monthly plan payments of $900 pursuant to his Second Amended Chapter 13 Plan filed November 13, 2002.[4] There is no indication in the record before us that the appellant has timely appealed the Dismissal Order. According to the Dismissal Order, at the time of the dismissal the appellant was incarcerated, serving a ninety-day sentence on his felony conviction for removal of mortgaged property.[5]

The Dismissal Order prompted this Court to issue *sua sponte* an Order Requiring Supplemental Briefing to address whether the dismissal of appellant's bankruptcy case renders the appellant's appeal moot. After considering the Supplemental Briefs, this Court concludes that the appeal is moot and must be dismissed because, as discussed below, the appellant failed to obtain a stay of the state court criminal prosecution and, therefore, we are incapable of rendering him any effectual relief.

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[3] *See* Fed. R. Bankr. P. 8005.

[4] *See* 11 U.S.C. § 1307(c)(4) and § 1326(a).

[5] The bankruptcy court states that appellant's release date is February 3, 2003.

This Court has jurisdiction to hear timely appeals from final orders of a bankruptcy court.[6] The parties have consented to this Court's jurisdiction by not opting to have the appeal heard by the United States District Court for the Eastern District of Oklahoma.[7] The Order determining that appellant's state criminal prosecution was excepted from the bankruptcy automatic stay is a final order.[8]

This Court also has an obligation to satisfy itself that it has jurisdiction to hear an appeal and determine whether a case is moot.[9] In *Southwestern Bell Telephone Co. v. Long Shot Drilling, Inc. (In re Long Shot Drilling, Inc.)*,[10] this Court discussed and applied the principles of mootness. A case is moot when the issues presented are no longer "live," meaning that:

> the reviewing court is incapable of rendering effective relief or restoring the parties to their original position. "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed."[11]

The mere fact that the appellant's underlying Chapter 13 case has been dismissed does not necessarily render an appeal related to stay violation issues

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6 28 U.S.C. § 158(a)(1), (b)(1) and (c)(1); Fed. R. Bankr. P. 8001 and 8002.

7 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e).

8 *Eddleman v. United States Dep't of Labor,* 923 F.2d 782, 784-86 (10th Cir. 1991) (Order determining whether DOL's administrative enforcement action was exempted from the automatic stay was a final order), *overruled in part on other grounds, Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992). *See generally* 1 *Collier on Bankruptcy* ¶ 5.08[1], at 5-31-32 (Lawrence P. King ed., 15th ed. rev. 2002) (Orders lifting or granting relief from the automatic stay are uniformly held to be final orders.).

9 *Southwestern Bell Tel. Co. v. Long Shot Drilling, Inc. (In re Long Shot Drilling, Inc.)*, 224 B.R. 473, 477-78 (10th Cir. BAP 1998).

10 224 B.R. 473, 477-78 (10th Cir. BAP 1998).

11 *Id.* at 478 (citations omitted) (quoting *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1203 (10th Cir. 1994)); *see also In re K.D. Co., Inc.*, 254 B.R. 480, 486 (10th Cir. BAP 2000) (citing cases).

moot.[12] Yet, the Tenth Circuit has held appeals from orders granting relief from the stay are moot where the bankruptcy court also denied confirmation of the debtors' Chapter 12 plan and dismissed the case.[13] Similarly, this Court has dismissed as moot appeals from orders granting stay relief where the debtor failed to obtain a stay pending appeal and the creditor completed a foreclosure sale.[14]

The Court concludes that this line of cases is persuasive and applicable, by analogy, to the fact variation presented in the case at bar. Here, the bankruptcy court ruled that continuation of state criminal proceedings was excepted from the automatic stay. Instead of granting stay relief against the appellant, the bankruptcy court held that the automatic stay did not apply to the criminal

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[12] In *Javens v. City of Hazel Park (In re Javens),* 107 F.3d 359 (6th Cir. 1997), the court states:

> We do not think that the dismissal of the case in bankruptcy affects the appealability of the orders recognizing the cities' exemption from the automatic stay. An action under § 362(h) for damages for willful violation of an automatic stay survives dismissal of the case in bankruptcy. *See Price v. Rochford*, 947 F.2d 829, 830-31 (7th Cir. 1991). "Since dismissal of an underlying bankruptcy case does not automatically strip a federal court of residual jurisdiction to dispose of matters after the underlying bankruptcy case has been dismissed, exercise of such jurisdiction is left to the sound discretion of the trial court. *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992); *In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992); *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989)." *In re Lawson*, 156 B.R. 43, 45 (9th Cir. BAP 1993).

Id. at 364 n.2. This point has been recognized by this Court in an unpublished order and judgment. *In re Flores*, BAP No. NM-00-069, 2001 WL 543677, at **4 (10th Cir. BAP May 23, 2001) (where the underlying case has been dismissed, a bankruptcy court retains discretionary subject matter jurisdiction over a complaint alleging a § 362(h) willful violation of the stay).

[13] *In re Ames*, 973 F.2d 849, 852 (10th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

[14] *See In re Egbert Development, LLC*, 219 B.R. 903, 905-06 (10th Cir. BAP 1998) (citing numerous jurisdictions where appeal was dismissed as moot when debtor failed to obtain stay pending appeal and creditor with stay relief sold property at foreclosure sale during pendency of appeal).

prosecution.[15] The criminal prosecution went forward because the appellant did not obtain a stay pending appeal of the bankruptcy court's determination. During the pendency of the appeal, appellant's criminal trial was held, and he was convicted. It further appears from the record that appellant has completed serving his ninety-day sentence during the pendency of this appeal.[16]

Typically, the relief afforded by an appellate court in automatic stay cases consists of either: (1) the imposition of the stay, (2) damages for violation of the stay, or (3) disallowance of any action sought to be taken against the appellant. Here, the Court cannot offer, and the appellant does not request, any of these remedies. The stay may not now be imposed because the appellant's Chapter 13 case has been dismissed.[17] The appellant does not seek damages for a willful violation of the automatic stay under § 362(h).[18] Finally, the act to be disallowed by the imposition of the stay–appellant's criminal prosecution–cannot be accomplished because appellant's criminal trial went forward, he was convicted, and he served the sentence imposed by the state court. This, of course, is a direct consequence of appellant's failure to seek and obtain a stay pending appeal.

Despite these realities, the appellant argues that his appeal is not moot

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[15] In the Court's view, there is little practical difference between an order lifting the stay and an order finding a state court action is excepted from the stay. Either way, the debtor or estate is deprived of the stay's benefits. *See Eddleman v. United States Dep't of Labor,* 923 F.2d 782, 785 (10th Cir. 1991), *overruled in part on other grounds, Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992).

[16] The appellant was to be released from jail on February 3, 2003. *See* Dismissal Order entered December 13, 2002.

[17] *See* 11 U.S.C. § 362(c)(2).

[18] The appellant states that "it is unlikely that [he] would seek or the Court would grant punitive damages in this case." Appellant's Supplemental Brief at 3. This statement must take into consideration that any violation of the stay could not be "willful" as required under § 362(h) inasmuch as the prosecuting attorney and the state court acted in reliance on the bankruptcy court's Order in proceeding with the criminal case.

because the Court can afford him effective relief. Specifically, the appellant maintains that if this Court were to conclude that the stay did apply to his criminal prosecution, the conviction in that case would be void as having been entered in violation of the stay. Appellant would therefore rely on the criminal prosecution being void to have his conviction stricken from the record. This argument is without merit.

The appellant assumes that a reversal of the Order being appealed renders acts done pursuant to that Order void. Although appellant cites no legal authority for this proposition, he presumably relies on Tenth Circuit authority holding that actions taken in violation of the stay are void *ab initio*.[19] This case differs from cases where actions are taken without regard to the automatic stay and without any attempt to obtain stay relief. Here, the state court in the criminal case required and the prosecutor in fact obtained a bankruptcy court order excepting the criminal prosecution from the stay in the first instance. An action taken in reliance on a bankruptcy court's order holding the stay to be inapplicable cannot be void even if the order relied on is subsequently reversed on appeal.

At the time that the state court convicted the appellant of removal of mortgaged property, the Order was a valid,[20] final[21] order conclusively deciding

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[19] *See Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 373 (10th Cir. 1990); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994).

[20] A leading commentator states:

> The question whether a judgment is valid should not be confused with the question whether the judgment is correct on the merits. A valid judgment is one that is not void based on a constitutional infirmity, lack of jurisdiction or power of the rendering court, fraud, or some other fundamental reason. Thus, a judgment is valid if:
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> (1) the judgment was rendered by a court that possessed jurisdiction (subject matter, personal, and/or in rem),

(continued...)

the single issue of whether the automatic stay applied to appellant's criminal case. As a valid, final order determined on the merits, the Order must be given full faith and credit by the state court.[22] By proceeding to hear and determine the criminal case after being assured that its actions in no way violated the automatic stay, the Oklahoma state court validly exercised its powers, and its judgment may not be vacated as void.[23] Because the appellant did not seek and obtain a stay pending appeal, his appeal of the Order did not affect its validity or finality for purposes of assuring the state court and the prosecutor that they could proceed with the criminal case. Accordingly, even assuming the bankruptcy court's decision that

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[20] (...continued)

(2) the judgment was rendered in compliance with due process requirements,

(3) the judgment was rendered pursuant to an exercise of power granted to the court that rendered it, and

(4) the judgment was not rendered as a result of extrinsic fraud.

18 James Wm. Moore et al., *Moore's Federal Practice* § 130.04[3], at 130-14.1 (3d ed. 2001) (footnotes omitted).

It is uncontested that the bankruptcy court possessed jurisdiction to enter and properly exercised its power in entering the Order. Nor does appellant argue that the Order is void for having been rendered in violation of due process requirements or as a result of fraud. Thus, the Order is a "valid" order. A valid order may never be set aside as void. *Id.* (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)).

[21] The Order is "final" under 28 U.S.C. § 158(a)(1). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (Order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938) ("where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'").

[22] U.S. Const. art. IV, § 1, *implemented by* 28 U.S.C. § 1738 (State courts must give full faith and credit to valid, final judgments rendered by federal courts on the merits.); *See Stoll,* 305 U.S. at 170-71 (State court must recognize bankruptcy court order allowing reorganization of debtor.).

[23] *See supra* note 20.

the automatic stay did not apply was incorrect, a point we may not and need not reach in light of today's decision, the state court was within its jurisdiction and power to conduct appellant's criminal trial and enter a disposition. A conviction or judgment entered by a court of competent jurisdiction is never void.[24] Therefore, even if the bankruptcy court's Order were reversed, the criminal conviction and sentence would not be void. The relief requested by the appellant is impossible to render, and the appeal must be dismissed as moot.

For all of the foregoing reasons, this Court concludes that it cannot render effective relief to appellant. The appellant has been prosecuted, tried, and convicted of the crime charged and has served his sentence. The appellant's appeal is moot. The appeal is DISMISSED for lack of jurisdiction.

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[24] *See* Moore, *supra* note 20, § 130.04[3].