

# ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR09-1117

ANDREW FROLOS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** June 16, 2010

APPEAL FROM THE SHARP  
COUNTY CIRCUIT COURT  
[CR-2009-73]

HONORABLE HAROLD S. ERWIN,  
JUDGE

AFFIRMED

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## DAVID M. GLOVER, Judge

The issue on appeal is whether the circuit court erred in dismissing appellant Andrew Frolos's appeal from district court and affirming the two district-court convictions for the offense of harassing communications. We affirm the circuit court.

On April 16, 2009, Frolos pleaded no contest to two counts of harassing communications in the District Court of Sharp County. On May 15, 2009, a notice of appeal was filed in the district court, stating that Frolos was appealing the district court's ruling to the Circuit Court of Sharp County. On June 16, 2009, an affidavit from Frolos's attorney was filed with the circuit court, stating that a notice of appeal had been filed in district court, but that the record had not yet been certified by, or lodged with, the circuit clerk. On June 18, 2009, the State filed a motion to dismiss the appeal as untimely and to affirm the district-court

ruling. After a hearing on the issue, the circuit court granted the State's motion to dismiss the appeal.

Rule 36 of the Arkansas Rules of Criminal Procedure governs appeals from district courts to circuit courts. Subsections (b), (c), (d), and (h) of Rule 36 of the Arkansas Rules of Criminal Procedure provide:

(b) *Time for Taking Appeal.* An appeal from a district court to the circuit court shall be filed in the office of the clerk of the circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment in the district court. The 30-day period is not extended by the filing of a post-trial motion under Rule 33.3.

(c) *How Taken.* An appeal from a district court to circuit court shall be taken by filing with the clerk of the circuit court a certified record of the proceedings in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. The record of proceedings in the district court shall include, at a minimum, a copy of the district court docket sheet and any bond or other security filed by the defendant to guarantee the defendant's appearance before the circuit court. It shall be the duty of the clerk of the district court to prepare and certify such record when the defendant files a written request to that effect with the clerk of the district court and pays any fees of the district court authorized by law therefor. The defendant shall serve a copy of the written request on the prosecuting attorney for the judicial district and shall file a certificate of such service with the district court. The defendant shall have the responsibility of filing the certified record in the office of the circuit clerk. Except as otherwise provided in subsection (d) of this rule, the circuit court shall acquire jurisdiction of the appeal upon the filing of the certified record in the office of the circuit clerk.

(d) *Failure of clerk to file record.* If the clerk of the district court does not prepare and certify a record for filing in the circuit court in a timely manner, the defendant may take an appeal by filing an affidavit in the office of the circuit clerk, within forty (40) days from the date of the entry of the judgment in the district court, showing (i) that the defendant has requested the clerk of the district court to prepare and certify the record for purposes of appeal and (ii) that the clerk has not done so within thirty (30) days from the date of the entry of the judgment in the district court. The defendant shall promptly serve a copy of such affidavit upon the clerk of the district court and

upon the prosecuting attorney. The circuit court shall acquire jurisdiction of the appeal upon the filing of the affidavit. On motion of the defendant or the prosecuting attorney, the circuit court may order the clerk of the district court to prepare, certify, and file a record in the circuit court.

....

(h) *Default Judgment.* The circuit court may affirm the judgment of the district court if (i) the defendant fails to appear in circuit court when the case is set for trial; or (ii) the clerk of the district court fails to prepare and certify a record for filing in the circuit court as provided in subsection (c) of this rule and the defendant fails to move the circuit court for an order to compel the filing of the record within thirty (30) days after filing the affidavit provided in subsection (d) of this rule.

Here, Frolos argues that his notice of appeal was timely filed but that the district clerk who files the records was on vacation during that time and therefore the record was not filed within thirty days as required by subsection (b) of Rule 36. The filing requirement of Rule 36 is strictly enforced and is jurisdictional in nature. *Williams v. State*, 2009 Ark. App. 525, 334 S.W.3d 873. Frolos's counsel acknowledges that it is counsel's duty, not the duty of the judge, clerk, or reporter, to perfect an appeal. *Edwards v. City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

Rule 36 is straightforward. It does not require a notice of appeal in appeals from district court to circuit court. Instead, an appeal from district court to circuit court is taken by filing a certified record of the district-court proceedings with the circuit clerk within thirty days from the date of entry of the district-court judgment. If the district-court clerk fails to compile and certify the district-court record, the defendant must then file an affidavit with

the circuit clerk within forty days from the date the district-court judgment was entered, stating that the defendant requested the district-court clerk to prepare and certify the record for appeal and that the clerk has not done so within thirty days from the date of the entry of the district-court judgment. Frolos's notice of appeal was not the appropriate mechanism of ensuring the appeal, but it did serve as notice to the district clerk that an appeal was being requested. Although Frolos's counsel subsequently filed an affidavit, it was outside the forty-day time limit set forth in subsection (d) of Rule 36, and, therefore, too late under the strict enforcement of Rule 36. *Williams, supra*. The trial court properly dismissed the appeal and affirmed the district-court judgment as provided for in subsection (h) of the rule.

Frolos also argues that he should be granted a belated appeal; however, there is no rule that gives the circuit court authority to accept untimely appeals from district court, *Edwards, supra*, and this court does not have the authority to address that issue.

Affirmed.

GLADWIN, J., agrees.

PITTMAN, J., concurs.