

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR11-1187

MYCHAEL KINARD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**OPINION DELIVERED** OCTOBER 3, 2012

APPEAL FROM THE GARLAND  
COUNTY CIRCUIT COURT,  
[NO. CR-2009-569]

HONORABLE MARCIA R.  
HEARNSBERGER, JUDGE

REBRIEFING ORDERED

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**ROBERT J. GLADWIN, Judge**

Mychael Kinard appeals from his conditional plea of guilty to the charges of simultaneous possession of drugs and firearms and possession of a controlled substance with intent to deliver. Appellant argues that the trial court erred in denying his motion to suppress evidence. Appellant's abstract and addendum do not comply with Rule 4-2 of the Arkansas Supreme Court Rules as they do not provide the information essential for the appellate court to confirm its jurisdiction; thus, we are compelled to order rebriefing.

When a defendant pleads guilty to a charge, he or she waives the right to appeal that conviction. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). When a defendant enters a conditional plea pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, he or she may retain the right to appeal an adverse suppression ruling. *Id.* Rule 24.3 provides:

With the approval of the Court and consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right,

on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he should be allowed to withdraw his plea.

Our supreme court has interpreted Rule 24.3(6) to require strict compliance with the requirement that the right to appeal be reserved in writing, otherwise the appellate court does not obtain jurisdiction. *Green, supra* (citing *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996)). There must also be an indication that the conditional-guilty plea was entered with the approval of the trial court and the consent of the prosecuting attorney. *Noble v. State*, 314 Ark. 240, 862 S.W.2d 234 (1993).

With these standards in mind, we address appellant's abstract and addendum. Appellant's addendum contains a document entitled "PLEA AGREEMENT UNDER ARCP 25." This form sets out the recommendation of the State for sentencing. It has a handwritten notation that "this is a conditional plea" and is signed by the defendant, defendant's attorney and the deputy prosecuting attorney. The notation satisfies the requirement that the prosecuting attorney consent to the conditional plea. *See Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006). The addendum also contains a document entitled CONDITIONAL PLEA.<sup>1</sup> This is signed by the defendant and his attorney and satisfies the requirement that there be a contemporaneous writing by the defendant reserving his or her right to appeal. *See Tabor, supra*. The next document in the addendum is the judgment and commitment order. This order makes no mention of the conditional plea and is signed by a judge other

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<sup>1</sup>We note that the conditional plea form is taken from Rule 24.3 but fails to include the approval and signatures of the judge and prosecuting attorney. If the entire form had been used, rebriefing would have been unnecessary.



than the one who ruled on the suppression motion and held the plea hearing. It gives no indication that the trial court consented to the conditional plea.

The trial court can accept a conditional plea in open court. *Green, supra; Gonder, supra*. However, appellant abstracts only the suppression hearing. The abstract does not contain the conditional-plea hearing, which leaves this court without a foundation to find jurisdiction.

Arkansas Rule of the Supreme Court 4-2 (5) states:

The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.

Although we are permitted to go to the record to affirm, our supreme court has strongly discouraged this court from doing so and has encouraged us to order rebriefing. See *Roberts v. Roberts*, 2009 Ark. 306, 319 S.W.3d 234 (Corbin, J., concurring). We therefore order rebriefing and direct appellant to include in the abstract all relevant material necessary for us to confirm our jurisdiction.

Rebriefing ordered.

WYNNE and GRUBER, JJ., agree.

*Mark S. Fraiser*, Chief Public Defender, for appellant.

*Dustin McDaniel*, Att’y Gen., by: *Eileen W. Harrison*, Ass’t Att’y Gen., for appellee.