

# ARKANSAS SUPREME COURT

No. CR 08-711

DENNIS JAMES SMITH  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered February 19, 2009

PRO SE MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF DREW  
COUNTY, CR 2000-123, HON.  
SAMUEL B. POPE, JUDGE]

MOTION TREATED AS MOTION FOR  
BELATED BRIEF; APPEAL  
DISMISSED; MOTION MOOT.

## PER CURIAM

In 2001, appellant Dennis James Smith was found guilty by a jury of three counts of kidnapping, four counts of rape, two counts of attempted capital murder, one count of first-degree battery, and one count of vehicular piracy. Appellant received seven life sentences plus an additional 960 months' incarceration, all to be served consecutively. We modified the battery charge to second-degree battery, but affirmed the judgment as to all other charges. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

In December 2007 and January 2008, appellant filed three petitions in the trial court: a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1; a petition for reduction of sentence under Arkansas Code Annotated § 16-90-111 (1987); a petition for writ of mandamus. The circuit court dismissed all three petitions, and appellant has lodged an appeal in this court.

Now before us is appellant's pro se motion to file a belated appeal. The motion is treated as a motion to file a belated brief because appellant has already lodged this appeal and belatedly

tendered his brief-in-chief to this court. However, as this court has no jurisdiction over the appeal, the appeal is dismissed and the motion to file a belated brief is moot. An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

Whether an appellant has filed an effective notice of appeal is always an issue before the appellate court. *Bilyeu v. State*, 342 Ark. 271, 27 S.W.3d 400 (2000). The filing of a notice of appeal is jurisdictional. *Brady v. Alken*, 273 Ark. 147, 617 S.W.2d 358 (1981). Absent an effective notice of appeal, this court lacks jurisdiction to consider the appeal and must dismiss it. *See Pannell v. State*, 320 Ark. 250, 895 S.W.2d 911 (1995).

Under Arkansas Rule of Appellate Procedure—Criminal 2(a), a notice of appeal must be timely filed and sufficiently identify the judgment or order from which an appeal is being taken. To be timely, Criminal Appellate Procedure Rule 2(a)(4) requires that a notice of appeal be filed within thirty days from entry of a final judgment or order.

Here, the trial court entered orders on February 14, 2008, and February 29, 2008 that disposed of all three requests for relief.<sup>1</sup> Appellant then filed in the trial court a notice of appeal on March 24, 2008. The notice of appeal was not timely filed within thirty days as to the February 14, 2008, order, but was timely filed within thirty days as to the February 29, 2008, order.

Nevertheless, the timely notice of appeal failed to sufficiently identify the order entered on February 29, 2008, as the order from which the appeal was being taken. Close inspection of the

<sup>1</sup>The February 14, 2008, order dismissed the petition for reduction of sentence under section 16-90-111, and declined to find that appellant was entitled to mandamus relief. The February 29, 2008, order dismissed all of the petitions.

notice of appeal reveals that appellant sought an appeal from a 2001 order or judgment, although the specific month and date are unidentifiable. Whether the notice of appeal would have identified the July 18, 2001, judgment of conviction, or any other order entered in 2001, as the order from which he intended to appeal, the notice was untimely filed. We thus have no jurisdiction over this matter as the result of a defective notice of appeal.

Even if appellant had filed a valid notice of appeal from the February 29, 2008, order, we would not proceed with a belated appeal for several reasons. First, Arkansas Criminal Procedure Rule 37.2(c) requires that a Rule 37.1 petition be filed within sixty days of the date the mandate was issued by the appellate court if an appeal was taken. The time frame applicable to a Rule 37.1 petition likewise applies to petitions under section 16-90-111. *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007). Our clerk issued the mandate on March 11, 2003, after we affirmed the appellant's conviction in the direct appeal. Therefore, appellant's petitions for postconviction relief under Rule 37.1 and section 16-90-111 were untimely filed in this matter from the 2003 mandate.

Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and if they are not met, a trial court lacks jurisdiction to consider a Rule 37.1 petition. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). If the trial court lacked jurisdiction to consider the petitions under Rule 37.1 and section 16-90-111, jurisdiction to consider the portion of the appeal from the order that dismissed both petitions could not be vested in this court.

While there is no time limit to file a petition for writ of mandamus, appellant's mandamus petition was utilized as a discovery-motion substitute. The petition for writ of mandamus only concerned evidence allegedly related to the criminal charges for which appellant had been found guilty in 2001. He claimed that the evidence was exculpatory and would support his self-defense

claims in that matter. Through the petition for mandamus relief, appellant wished to have certain evidentiary items produced by the State, but the petition did not seek extraordinary relief for which mandamus was a remedy.<sup>2</sup>

In addition, a trial court loses jurisdiction over a matter when the appeal transcript is lodged in the appellate court. *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996). The trial court in this matter had been divested of its jurisdiction over appellant's criminal trial and all matters directly involved with the appeal to this court. *Id.* (quoting *Bleidt v. 555, Inc.*, 253 Ark. 348, 350-51, 485 S.W.2d 721, 723 (1972) (per curiam)). In the case here, matters directly involved with the appeal to this court included issues related to discovery and evidence. In the order dismissing the petition for writ of mandamus, the trial court noted that the State was no longer obligated to respond to appellant's request for the production of evidence. Because the trial court lacked jurisdiction over appellant's criminal trial at the time appellant filed the petition for writ of mandamus, this court could not have been conferred jurisdiction over the appeal from the order dismissing the petition.

Motion to file belated appeal treated as motion to file belated brief; appeal dismissed; motion moot.

Brown, J., not participating.

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<sup>2</sup>The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty, and it is issued only to compel an official or judge to take some action. *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000). A petitioner must show a clear and certain right to the relief sought and the absence of any other adequate remedy when requesting a writ of mandamus. *Id.* Appellant made no such showing in this matter.

