

ARKANSAS SUPREME COURT

No. CR 09-140

Opinion Delivered March 19, 2009

BRANDON CARTER
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE MOTION FOR BELATED
APPEAL OF JUDGMENT OF
CONVICTION [CIRCUIT COURT OF
COLUMBIA COUNTY, CR 2006-64,
HON. LARRY W. CHANDLER,
JUDGE]

REMANDED.

PER CURIAM

On December 13, 2007, judgment was entered reflecting that petitioner Brandon Carter had been found guilty by a jury of battery in the first degree and two counts of aggravated robbery for which an aggregate sentence of 1200 months' imprisonment was imposed. Petitioner was represented at trial by his retained attorney Don Gillaspie. No appeal was taken from the judgment of conviction, and petitioner now seeks to proceed with a belated appeal pursuant to Arkansas Rule of Appellate Procedure—Criminal 2(e), which permits a belated appeal in a criminal case in some instances. Petitioner contends that he asked Mr. Gillaspie to file an appeal from the judgment but he does not specify when the request was made.

It is the practice of this court when a pro se motion for belated appeal is filed in which the petitioner contends that he made a request to appeal, and the record does not contain an order relieving trial counsel, to request an affidavit from the trial attorney in response to the allegations

in the motion. There is no order relieving Mr. Gillaspie in the record filed in this case, but Mr. Gillaspie was not asked to submit an affidavit because on May 1, 2008, he surrendered his license to practice law in this state.

Arkansas Rule of Appellate Procedure–Criminal 16 provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period allowed for filing a notice of appeal under Arkansas Rule of Appellate Procedure--Criminal 2(a)(4). *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (per curiam); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (per curiam). We will grant petitioner in the instant case leave to proceed with a belated appeal if Mr. Gillaspie knew of petitioner's desire to appeal within the thirty-day period but failed to act to perfect the appeal.

Because the proper disposition of the motion for belated appeal in this case requires findings of fact which must be made in the trial court, we remand this matter to the circuit court for an evidentiary hearing on the issue of whether Mr. Gillaspie was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal. The trial court is directed to enter Findings of Fact and Conclusions of Law within ninety days and submit the findings and conclusions to this court with the transcript of the evidentiary hearing.

Petitioner has also filed in this court a motion for appointment of counsel to represent him on appeal and a motion for transcript that is in the nature of a petition for writ of certiorari to bring

up the record for appeal. He has also submitted an affidavit of indigency.¹ A decision on those motions will be made when the matter is returned to this court.

Remanded.

¹As the State has not filed a response to the motion for belated appeal taking issue with petitioner's contention that he is now indigent, we accept petitioner's declaration and will permit him to proceed as an indigent if the motion for belated appeal is granted.