

Brian GOODEN *v.* STATE of Arkansas

CR. 00-845

42 S.W.3d 528

Supreme Court of Arkansas
Opinion delivered May 10, 2001

APPEAL & ERROR — MOTION TO BE RELIEVED AS ATTORNEY OF RECORD — REMANDED. — Where petitioner tendered a motion *pro se* in response to his counsel's motion to be relieved, the supreme court remanded the matter to circuit court for a determination of whether counsel was retained to represent petitioner on appeal and was paid accordingly; the circuit court was directed to file findings of fact and conclusions of law on this point within sixty days.

Gene E. McKissic, respondent's counsel.

Respondent, pro se.

No response.

PER CURIAM. On March 22, 2001, this court granted Brian Gooden a belated appeal and required that Gene E. McKissic remain attorney of record in this case and continue his representation of Gooden. We directed McKissic to file a petition for writ of certiorari to call up the entire record in this appeal.

On April 6, 2001, McKissic moved this court to be relieved as counsel. In his motion, he gave this court the following reasons:

1. He has been sued in federal district court by Gooden in connection with this and other legal matters.
2. Gooden has filed an ethics complaint against him with the Committee on Professional Conduct.
3. He does not believe Gooden's appeal has merit, and it violates his plea agreement.

Citing irreparable differences and a conflict of interest, McKissic prays to be relieved as counsel.

On April 24, 2001, Gooden, *pro se*, tendered a motion in which he disagreed with McKissic's assessment of his appeal and plea agreement and argued that he paid McKissic \$1,500 to represent him at the trial court level and on appeal. He prays that McKissic refund the fee or assist in paying expenses incurred in the appeal. Gooden attaches an affidavit of indigency as an alternative to having McKissic pay for his appeal. We treat Gooden's tendered motion as an answer to McKissic's motion to be relieved.

[1] The appeal in this matter has already been seriously delayed. Nevertheless, we remand this matter to circuit court for a determination of whether McKissic was retained to represent Gooden on appeal and was paid accordingly. We direct the circuit court to file findings of fact and conclusions of law on this point within sixty days. That determination, of course, will be instrumental in our decision of whether to declare Gooden indigent and appoint McKissic or other counsel to represent him.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. We denied Mr. McKissic's prior request to withdraw as counsel in a *per curiam* on March 22, 2001. See *Gooden v. State*, 344 Ark. 291, 40 S.W.3d 271 (2001). Nothing has changed to my knowledge except that Gooden now wants to proceed *in forma pauperis*. I would grant Gooden's motion and appoint McKissic as counsel.