

SUPREME COURT OF ARKANSAS

No. CR 10-1254

ROBERT JOSEPH MOTEN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 26, 2011

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE BRIEF
[ARKANSAS COUNTY CIRCUIT
COURT, NORTHERN DISTRICT,
CR 2007-109, HON. DAVID G.
HENRY, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2010, appellant Robert Joseph Moten was found guilty in a trial to the bench of battery in the first degree and battery in the second degree. He was sentenced to an aggregate term of 264 months' imprisonment. A timely notice of appeal was filed, and, on September 24, 2010, appellant lodged a direct appeal from the judgment in the Arkansas Court of Appeals.¹

On the day the appeal was lodged, appellant filed in the trial court a pro se "Motion for Belated Appeal for a New Trial." On September 27, 2010, the motion was denied by the court. Appellant filed a motion for reconsideration that was denied by the court on October 8, 2010. On October 15, 2010, appellant timely filed a notice of appeal from both the September 27, 2010 order and the October 8, 2010 order.

¹*Moten v. State*, CACR 10-980. Appellant is represented by counsel on appeal.

On October 26, 2010, appellant filed in the trial court a motion seeking at public expense a copy of the transcript of his trial. On October 28, 2010, the motion was denied, and appellant timely filed a notice of appeal from that order.

Subsequently, appellant lodged in this court a pro se appeal that encompassed the orders entered September 27, 2010, October 8, 2010, and October 28, 2010. Now before us is appellant's motion for extension of time to file his brief-in-chief in the appeal.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. For that reason, the appeal is dismissed, and the motion is moot.

The motion for belated appeal for a new trial that appellant filed on the day he lodged the appeal from the judgment was in some aspects a motion for new trial, but it also had grounds for relief, such as claims of ineffective assistance of counsel, that are properly raised under our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2010). The trial court correctly concluded that the motion was not timely if considered as a motion for new trial, inasmuch as such motions must be filed within thirty days of the date the judgment is entered pursuant to Arkansas Rule of Criminal Procedure 33.3 (2010).

With respect to the allegations cognizable under Criminal Procedure Rule 37.1, the court correctly ruled that appellant was not entitled to pursue postconviction relief while his direct appeal of the judgment was pending. Rule 37.2(a); *Haynes v. State*, 311 Ark. 651, 846

Cite as 2011 Ark. 238

S.W.2d 179 (1993); *Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981) (per curiam). As appellant was clearly entitled to no relief, the court did not err in denying the motion for reconsideration of the September 27, 2010 order.

Moreover, as to the motion appellant filed seeking at public expense a copy of the transcript and the September 24, 2010 motion, the trial court did not have jurisdiction of the motions because appellant had lodged an appeal from the judgment in the court of appeals. Any motion he desired to file should have been filed in the appellate court. *See Green v. State*, 2011 Ark. 134 (per curiam) (holding that the filing of the transcript in the appellate court deprives the trial court of jurisdiction).

Because it is evident from the record that appellant could not prevail on appeal from any of the three orders entered by the trial court in this matter, there is no cause to permit the appeal to continue. Accordingly, it is dismissed. *See Gilcrease v. State*, 2011 Ark. 108 (per curiam); *see also Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam).

Appeal dismissed; motion moot.