

Gary Lee STEWART v. STATE of Arkansas

CR 04-1199

201 S.W.3d 415

Supreme Court of Arkansas
Opinion delivered January 20, 2005

MOTIONS — MOTION FOR BELATED APPEAL — DENIED — In determining whether appellant had informed his counsel of his desire to appeal, the trial court found the attorney's testimony that appellant had not done so more credible, pointing to the fact that the attorney had kept records of his telephone log, including voice mail and messages taken by his receptionist, and that there was no record of any message from appellant; indeed, the records showed that some sixty-two days after appellant's sentencing, appellant's brother left a message for the attorney in regard to doing an appeal on this case; the trial court found that the call from appellant's brother would not have been necessary had appellant believed that he had already informed the attorney of his desire to appeal; the supreme court accepted the trial court's findings of fact, and concluded that the failure to file a notice of appeal on appellant's behalf was not due to any error on his attorney's part; rather, it was the direct result of appellant's failure to timely inform his attorney of his desire to appeal, thus, the motion for belated appeal was denied.

William R. Simpson, Jr., Public Defender, by *Clint Miller*, Deputy Public Defender, for appellant

No response.

PER CURIAM. On November 5, 2004, Appellant Gary Lee Stewart filed a motion for belated appeal from judgments entered on September 7, 2004, in the Pulaski County Circuit Court. In his motion, Appellant contended that he had informed his trial counsel, Deputy Public Defender Lance Sullenberger, of his desire to appeal. We initially remanded the matter to the trial court to determine if Appellant had in fact informed his attorney of his desire to appeal. See *Stewart v. State*, 359 Ark. 528, 199 S.W.3d 78 (2004) (*per curiam*).

Pursuant to our order, the trial court held a hearing on December 15, 2004, during which both Appellant and Mr. Sullenberger gave testimony. Appellant testified that he had told

counsel that he wanted to appeal. Mr. Sullenberger, however, testified that Appellant had not done so. The trial court found Mr. Sullenberger's testimony more credible. The trial court pointed to the fact that Mr. Sullenberger had kept records of his telephone log, including voice mail and messages taken by his receptionist, and that there was no record of any message from Appellant. Indeed, the records showed that some sixty-two days after Appellant's sentencing, Appellant's brother left a message for Mr. Sullenberger in regard to doing an appeal on this case. The trial court found that the call from Appellant's brother would not have been necessary had Appellant believed that he had already informed Mr. Sullenberger of his desire to appeal.

[1] We accept the trial court's findings of fact, and we conclude that the failure to file a notice of appeal on Appellant's behalf was not due to any error on Mr. Sullenberger's part. Rather, it was the direct result of Appellant's failure to timely inform his attorney of his desire to appeal. We thus deny the motion for belated appeal.
