

David COLEY *v.* STATE of Arkansas.

CR 98-1077

974 S.W.2d 471

Supreme Court of Arkansas
Opinion delivered September 24, 1998

1. APPEAL & ERROR — MOTION FOR RULE ON CLERK TREATED AS ONE FOR BELATED APPEAL — WHEN GRANTED. — Appellant's motion, which was styled as one for rule on the clerk, was treated by the supreme court as a motion for belated appeal; the court will grant such a motion when the attorney admits that the notice of appeal was not timely filed due to an error on his part.
2. APPEAL & ERROR — MOTION FOR RULE ON CLERK TREATED AS ONE FOR BELATED APPEAL — GRANTED. — In light of appellant's attorney's admission of fault for untimely filing, the supreme court granted the motion for rule on the clerk and directed the clerk to accept the record.

Motion for Rule on the Clerk; granted.

Louis Etoch, for appellant.

No response.

PER CURIAM. David Coley, the appellant, has filed this motion for rule on the clerk through his attorney, Louis Etoch. We grant the motion.

In verdicts filed on January 22, 1998, the jury found Mr. Coley guilty on two counts of delivery of a controlled substance and imposed a ten-year prison term and fine of \$5,000. Mr. Etoch filed a notice of appeal on Mr. Coley's behalf on January 23, 1998, prior to the filing of the judgment and commitment order on January 28, 1998. No subsequent notice of appeal was filed. Mr. Etoch tendered the transcript to the clerk of this Court on August 17, 1998, but the clerk correctly refused it because the notice of appeal had been prematurely filed. *See Ark. R. App. P.—Crim. 2(b)*. Mr. Coley now asks that we allow the record to be docketed and the case to proceed.

[1] Mr. Coley's motion is styled as one for rule on the clerk, but we treat it in these circumstances as a motion for belated appeal. *Brown v. State*, 321 Ark. 282, 900 S.W.2d 954 (1995). We will grant such a motion "when the attorney admits that the notice of appeal was not timely filed due to an error on his part." *Brazil v. State*, 332 Ark. 74, 75, 959 S.W.2d 55, 55 (1998). See *Brown v. State*, *supra*.

[2] Mr. Etoch admits that he "inadvertently" calculated the time for filing the notice of appeal from the date on which the jury returned its verdicts and that he "should have" calculated the filing time from the date on which the judgment and commitment order was filed. In light of Mr. Etoch's admission of fault, we grant the motion and direct the clerk to accept the record for filing. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Brazil v. State*, *supra*.

Motion granted.
