

Shane PACK *v.* STATE of Arkansas

CR 98-1358

983 S.W.2d 125

Supreme Court of Arkansas
Opinion delivered December 10, 1998

1. APPEAL & ERROR — MOTION FOR RULE ON CLERK — WHEN GRANTED. — The supreme court will grant a motion for rule on the clerk when the attorney admits that the record was not timely filed due to an error on his or her part.
2. APPEAL & ERROR — RECORD FILED UNTIMELY— MOTION FOR RULE ON CLERK DENIED. — Where appellant's attorney, in his second motion for belated appeal, which was in reality a motion for rule on the clerk, did not admit fault on his part but argued that he was not counsel of record when he filed his notice of appeal and that a subsequent notice of appeal filed by the public defender as counsel of record was timely, the supreme court noted that the present attorney, as counsel for appellant, filed the first notice of appeal, which governed, and, declaring the record untimely, denied appellant's motion.
3. APPEAL & ERROR — ATTORNEY DIRECTED TO FILE MOTION & AFFIDAVIT ACCEPTING RESPONSIBILITY FOR UNTIMELY FILING. — The supreme court directed appellant's attorney to file within thirty days a motion for rule on the clerk and an affidavit accepting full responsibility for not timely filing the transcript, at which time the motion would be granted.

Motion for Rule on the Clerk; denied.

Clarence W. Cash, for appellant.

No response.

PER CURIAM. Shane Pack, by his attorney, Clarence W. Cash, has filed two motions for belated appeal, which are, in reality, motions for rule on the clerk.

The first motion admits that the record was not timely filed from counsel's notice of appeal and that this was error. The second motion asks that the first motion be set aside because a second notice of appeal was filed by the public defender, and the record would be timely if calculated from that date. Mr. Cash contends that only the public defender was counsel of record when the two notices of appeal were filed.

[1, 2] This court has held that we will grant a motion for rule on the clerk when the attorney admits that the record was not timely filed due to an error on his or her part. *See, e.g., Tarry v. State*, 288 Ark. 172, 702 S.W.2d 804 (1986). Here, the attorney's second motion does not admit fault on his part. Rather, he argues that he was not counsel of record when he filed his notice of appeal and that the subsequent notice of appeal filed by the public defender as counsel of record was timely. We disagree. Mr. Cash filed the first notice of appeal as counsel for the appellant and that notice of appeal governs. The record was, therefore, untimely, and appellant's motion must be denied.

[3] The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the transcript, and upon filing same, the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

The present motions for rule on the clerk are denied.