

SUPREME COURT OF ARKANSAS

No. CR 10-1021

WILLIAM ROY TUBBS
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

Opinion Delivered September 8, 2011

PRO SE MOTION FOR BELATED APPEAL AND MOTIONS TO AMEND MOTION FOR BELATED APPEAL [SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 2009-1282B, CR 2010-107, HON. J. MICHAEL FITZHUGH, JUDGE]

MOTIONS DENIED.

PER CURIAM

Petitioner William Roy Tubbs filed in this court a pro se motion for belated appeal of two orders entered in circuit court on March 10, 2010, and an order entered on May 13, 2010. Petitioner has additionally filed two motions to amend the motion. We remanded for findings on attorney error after the first motion to amend. *Tubbs v. State*, 2011 Ark. 166 (per curiam). The circuit court has now provided its record of the proceedings on remand and found that there was no attorney error.

The orders that petitioner sought to appeal pertain to the amount of restitution to be paid under a judgment entered on petitioner's negotiated plea of guilty to charges of theft by receiving and leaving the scene of a personal-injury accident and fleeing. The judgment ordered restitution in the amount of "FULL," and the later orders set the amount of restitution in each of the two cases. Because there was nothing in the record concerning whether Tubbs informed his counsel that he wished to appeal or whether there was attorney error, we remanded for further proceedings.



On remand, the trial court conducted a hearing at which petitioner and trial counsel testified. Counsel testified that the plea agreement was conditioned on an understanding that the amount of the restitution would be set later by the prosecution. Arkansas Code Annotated section 5-4-205 (Supp. 2009) contemplates a hearing and the taking of evidence by the sentencing authority. Ark. Code Ann. § 5-4-205(b)(4)(A). The statute, however, also allows the defense and prosecution to instead agree upon an amount. Ark. Code Ann. § 5-4-205(b)(1). In this particular instance, counsel testified that the understanding was that, in order to accept the plea offer, Tubbs waived his right to further contest the amount of restitution and would not require a hearing on the amount. At the conclusion of the hearing, the trial court noted that “It is abundantly clear that Mr. Tubbs knew exactly what he was in for.” Because petitioner waived his right to contest the amount of restitution that would be set under his agreement for the plea, his attorney was not remiss in failing to file a notice of appeal for the orders setting restitution.

In his latest amended motion, petitioner complains that he did not receive notice of the entry of the orders setting the amount of restitution. The rule he cites, however, is only applicable to orders on petitions under Arkansas Rule of Criminal Procedure 37.1 (2011), not orders that set an amount of restitution. He also points to his attorney’s admission at the hearing on remand that he did not contact Mr. Tubbs after the time that the restitution amount had been set by the order, apparently referencing counsel’s failure to inquire about petitioner’s desire to appeal the orders. As already noted, however, the trial court accepted counsel’s testimony that petitioner had previously agreed to waive his right to contest the



amount of restitution. There was a factual basis to support the trial court's finding that there was no attorney error.

Because there was no attorney error or other good cause for the failure to file a timely notice of appeal established in petitioner's motions, we need not consider further his request to proceed with an appeal of the orders. Accordingly, petitioner's motions are denied.

Motions denied.