

ARKANSAS SUPREME COURT

No. CR 11-1187

MYCHEAL KINARD
a/k/a MYCHAEL KINARD
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

Opinion Delivered January 26, 2012

PRO SE MOTION FOR BELATED
APPEAL [GARLAND COUNTY
CIRCUIT COURT, CR 2009-569, HON.
LYNN WILLIAMS, JUDGE]

MOTION GRANTED.

PER CURIAM

On July 21, 2010, judgment was entered reflecting that petitioner Mycheal Kinard, who is also known as Mychael Kinard, had entered a conditional plea of guilty to simultaneous possession of drugs and firearms and possession of a controlled substance with intent to deliver. A term of 240 months' imprisonment was imposed. The plea had been entered on July 13, 2010, at which time a statement was filed by petitioner, setting out that petitioner, with the approval of the court, was entering the plea conditioned on an appeal of the issue of whether the denial of his motion to suppress evidence was a correct ruling. Petitioner's attorney, Mark Fraiser, a public defender, also signed the statement. The appeal was never perfected.

On November 28, 2011, petitioner tendered a certified copy of the judgment and the conditional-plea statement and filed the instant motion seeking leave from this court to proceed with a belated appeal of the July 21, 2010 judgment. The motion was timely filed. Ark. R. App. P.–Crim. 2(e) (2011). Petitioner filed a current affidavit of indigency with the motion. The State has not filed a response opposing the motion for belated appeal.

There is no question here that petitioner desired to appeal as of July 13, 2010, when he entered his plea and filed the statement indicating that the plea was conditioned on an appeal of the denial of the motion to suppress evidence. The filing of the statement, which was also signed by Mr. Fraiser, establishes that Fraiser was obligated to perfect an appeal unless he was relieved as counsel by the trial court before the time to file the notice of appeal elapsed or petitioner changed his mind and elected to forego an appeal. As there is nothing to indicate that counsel was relieved, and there was no advantage to petitioner to forego an appeal under the circumstances of this case, we find that counsel was obligated to perfect the appeal.¹

When judgment is entered in a criminal case and the trial attorney is made aware by the convicted defendant that the defendant desires to appeal within the thirty-day period from the date of judgment allowed by Arkansas Rule of Appellate Procedure–Criminal 2(a) for filing a notice of appeal, counsel is obligated to file a timely notice of appeal. *Charland v. State*, 2010 Ark. 233 (per curiam); *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000) (per curiam). Under no circumstances may counsel simply abandon the convicted defendant if timely advised of the desire to appeal from the judgment. *Camp v. State*, 2010 Ark. 193 (per curiam); *Thompson v. State*, 2009 Ark. 342, 322 S.W.3d 12 (per curiam). Arkansas Rule of Appellate Procedure Criminal 16(a) provides that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. *Evans v. State*, 370 Ark. 427, 260 S.W.3d 265 (2007) (per curiam). Mr. Fraiser did not

¹Mr. Frazier was suspended from the practice of law on November 29, 2011, for failure to meet continuing-legal-education requirements. On December 2, 2011, that suspension was stayed, rendering him eligible to represent petitioner in the belated appeal of the judgment entered in this matter.

act to protect petitioner's right to appeal, and thus petitioner was left without the effective appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *See Holland v. State*, 358 Ark. 366, 190 S.W.3d 904 (2004).

Mr. Fraiser is directed to file within fifteen days a petition for writ of certiorari to bring up the remainder of the record necessary for the appeal. If it is counsel's position that no further record is required for the appeal to proceed, he may file within that time period a motion to set a briefing schedule for the appeal.

A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

Motion granted.