

SUPREME COURT OF ARKANSAS

No. CR 11-1191

MITCHELL SCOTT JOHNSON
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

Opinion Delivered February 2, 2012

PRO SE MOTION FOR BELATED
APPEAL OF ORDER [BENTON
COUNTY CIRCUIT COURT, NO. CR
2008-274, HON. ROBIN GREEN,
JUDGE]

MOTION GRANTED.

PER CURIAM

Petitioner Mitchell Scott Johnson entered a plea of guilty to financial identity fraud, theft by receiving, and misdemeanor possession of a controlled substance. He was sentenced by the court to an aggregate term of twelve years' imprisonment. Imposition of an additional eighteen years' imprisonment was suspended. Petitioner appealed the sentence, and the Arkansas Court of Appeals affirmed but modified the judgment to correct a typographical error. *Johnson v. State*, 2010 Ark. App. 606.

After the court of appeals issued its mandate on appeal, petitioner timely filed in the trial court a pro se verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The court entered an order denying the petition on January 12, 2011. Petitioner did not timely file a notice of appeal from the order, and he now seeks leave to proceed with a belated appeal.

Arkansas Rule of Appellate Procedure—Criminal 2(e) (2011) permits a belated appeal when good cause for the failure to file a notice of appeal is shown. If a notice of appeal is not

timely filed, the burden is on the petitioner to establish good cause for the failure to comply with proper procedure. *Cummings v. State*, 2010 Ark. 123 (per curiam); *Hale v. State*, 2010 Ark. 17 (per curiam); see *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (per curiam). We have consistently held that this burden applies even where the petitioner proceeds pro se, as all litigants must bear the responsibility for conforming to the rules of procedure or demonstrating good cause for not so conforming. *Smith v. State*, 2011 Ark. 367 (per curiam); *Cummings*, 2010 Ark. 123; *Hale*, 2010 Ark. 17 (citing *Daniels v. State*, 2009 Ark. 607 (per curiam)); see also *Peterson v. State*, 289 Ark. 452, 711 S.W.2d 830 (1986) (per curiam); *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984) (per curiam); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983) (per curiam).

Petitioner contends that the circuit court failed to send him a copy of the order denying petitioner's Rule 37.1 petition, which the court is required to do under Arkansas Rule of Criminal Procedure 37.3(d). We have previously held that the language of Rule 37.3(d) is mandatory. *Atkins v. State*, 2010 Ark. 392 (per curiam); *Cummings*, 2010 Ark. 123; *Hale*, 2010 Ark. 17 (citing *Tarry v. State*, 353 Ark. 158, 114 S.W.3d 161 (2003) (per curiam)). The rule is intended to "provide for prompt, consistent notice to petitioners." See *Scott v. State*, 281 Ark. 436, 438, 664 S.W.2d 475, 476 (1984) (per curiam).

Nothing in the record suggests that petitioner was properly notified under Rule 37.3 that the order had been entered, and the Attorney General, representing the respondent State, has not filed a response to petitioner's instant motion to refute the allegations contained in it, including the alleged failure to give notice that the order was entered. Where the record is silent and the respondent is unable to provide an affidavit from the clerk of the circuit court or some

other proof that the order was mailed, we must assume that the petitioner was not properly notified. *Fernandez v. State*, 2011 Ark. 17 (per curiam); *Atkins*, 2010 Ark. 392; *Cummings*, 2010 Ark. 123; *Hale*, 2010 Ark. 17 (citing *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985) (per curiam)); *see also Kelly v. State*, 301 Ark. 294, 783 S.W.2d 369 (1990) (per curiam). We have consistently held that failure of the circuit court to abide by Rule 37.3(d) may establish good cause for a petitioner's failure to timely file a notice of appeal. *See, e.g., Fernandez*, 2011 Ark. 17; *Atkins*, 2010 Ark. 392; *Cummings*, 2010 Ark. 123; *Hale*, 2010 Ark. 17; *Chiasson v. State*, 304 Ark. 110, 798 S.W.2d 927 (1990) (per curiam); *see also Porter*, 287 Ark. 359, 698 S.W.2d 801. Our clerk is directed to lodge the record and set a briefing schedule for the appeal.

Motion granted.