

ARKANSAS SUPREME COURT

No. CR 12-487

ROY LEE SMITH

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered September 13, 2012

PRO SE MOTION FOR BELATED
APPEAL OF ORDER [ARKANSAS
COUNTY CIRCUIT COURT,
NORTHERN DISTRICT, CR 07-54,
HON. DAVID G. HENRY, JUDGE]

REMANDED.

PER CURIAM

On September 2, 2011, an order was entered in circuit court denying a timely, verified petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37.1 (2011) filed by petitioner Roy Lee Smith. Petitioner was represented in the proceeding by his retained attorney, Ronald L. Davis. No appeal was taken from the order, and petitioner now seeks to proceed with a belated appeal pursuant to Arkansas Rule of Appellate Procedure—Criminal 2(e) (2011), which permits a belated appeal in a criminal case in some instances. We have held that Rule 2(e) applies to appeals from Rule 37.1 orders. *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989) (per curiam); *see also Hammond v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002).

Petitioner contends that he instructed Mr. Davis on the day the order was entered to perfect an appeal from the order and paid Mr. Davis to do so. When a pro se motion for belated appeal is filed in which the petitioner contends that petitioner made a request to appeal within the thirty days permitted by Arkansas Rule of Appellate Procedure—Criminal

2(a)(4) (2011) to file a notice of appeal, and the record does not contain an order relieving trial counsel entered before that thirty-day period has elapsed, it is the practice of this court to request an affidavit from the attorney in response to the allegations in the motion. There is no order in the record relieving Mr. Davis.

One of our staff attorneys provided Mr. Davis with a copy of the motion for belated appeal with the request that he submit an affidavit in response to the allegations contained in it. In response, Mr. Davis submitted an unsworn statement in which he states that he was informed by petitioner after trial that petitioner's mother would be the "point of contact" and "source of communication" between petitioner and Mr. Davis. Mr. Davis further states that he advised petitioner's mother that success on appeal from the Rule 37.1 order was unlikely and that it would be more prudent to petition the Governor for executive clemency. He alleges that it was his understanding that petitioner's mother desired to pursue clemency and that she made payments in installments to cover the \$2,500 fee that he charged for representing petitioner in a clemency proceeding. Mr. Davis contends that petitioner's mother has confused the clemency petition with an appeal from the Rule 37.1 order, an apparent suggestion that petitioner may be unclear on what remedy petitioner's mother asked Mr. Davis to pursue.

Arkansas Rule of Appellate Procedure—Criminal 16(a) (2011) provides in pertinent part 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. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to

appeal within the thirty-day period allowed for filing a notice of appeal. *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (per curiam); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (per curiam).

Because the claims in petitioner's motion are in conflict with the assertions made by Mr. Davis in his statement, the proper disposition of the motion for belated appeal requires findings of fact which must be made in the circuit court. Accordingly, we remand this matter to the circuit court for an evidentiary hearing on the issue of whether Mr. Davis was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal from the Rule 37.1 order. The court is directed to enter Findings of Fact and Conclusions of Law within ninety days of the date of this opinion and submit the findings and conclusions to this court with the transcript of the evidentiary hearing.

Remanded.

BROWN, J., not participating.