

SUPREME COURT OF ARKANSAS

No. CR12-487

ROY LEE SMITH

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered April 18, 2013

PRO SE MOTIONS FOR BELATED
APPEAL OF ORDER AND FOR
LEAVE TO RESPOND TO
ATTORNEY'S RESPONSE TO
MOTION FOR BELATED APPEAL
AND PRO SE PETITION FOR WRIT
OF CERTIORARI [ARKANSAS
COUNTY CIRCUIT COURT,
NORTHERN DISTRICT, CR 07-54,
HON. DAVID G. HENRY, JUDGE]

PRO SE MOTION FOR BELATED
APPEAL GRANTED; PRO SE
MOTION TO RESPOND TO
ATTORNEY'S RESPONSE TO
MOTION FOR BELATED APPEAL
AND PRO SE PETITION FOR WRIT
OF CERTIORARI MOOT.

PER CURIAM

On September 2, 2011, an order was entered in the circuit court denying a timely, verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 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 filed a motion in this court seeking 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. This court has 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 *Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002).

Petitioner contended in his motion that he instructed Mr. Davis on the day that the order was entered to perfect an appeal from the order, and he 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 that was entered before that thirty-day period had elapsed, it is the practice of this court to request an affidavit from the attorney in response to the allegations in the motion. There was no order in the record relieving Mr. Davis.

Mr. Davis was provided with a copy of the motion for belated appeal. In response to it, Mr. Davis submitted a statement that was not sworn, in which he stated 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 stated 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 alleged 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 contended that petitioner's mother had confused the clemency petition with an appeal from the Rule 37.1 order, an apparent suggestion that petitioner may have been unclear on what remedy petitioner's mother had asked Mr. Davis to

pursue.

Arkansas Rule of Appellate Procedure—Criminal 16(a) (2012) 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 were in conflict with the assertions made by Mr. Davis in his statement, we determined that the proper disposition of the motion for belated appeal required findings of fact. Accordingly, the matter was remanded 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 petitioner desired to appeal from the Rule 37.1 order.¹ The circuit court was asked to enter Findings of Fact and Conclusions of Law and to submit the findings and conclusions to this court with the transcript of the evidentiary hearing. *Smith v. State*, 2012 Ark. 331 (per curiam). The Findings of Fact and Conclusions of Law and transcript of the hearing are now before us.

The circuit court took testimony at the hearing from petitioner, petitioner’s mother, Mr.

¹Petitioner filed a motion for leave to respond to Mr. Davis’s response to the motion for belated appeal. As the matter was remanded for an evidentiary hearing and findings by the circuit court, that motion is moot.

Davis, and others on the questions of fact to be resolved. In its Findings of Fact and Conclusions of Law, the circuit court found that petitioner had sufficiently informed Mr. Davis of his desire to appeal from the Rule 37.1 order and concluded that Mr. Davis was required by Rule 16 to continue to represent petitioner until he was allowed to withdraw, and that Mr. Davis was obligated to file a notice of appeal from the Rule 37.1 order. As the merit of the motion for belated appeal rested on the credibility of the witnesses, and this court recognizes that it is the circuit court's task as fact-finder to assess the credibility of witnesses and to resolve any conflicts of fact, we accept the trial court's findings. *See Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002); *see also Frazier v. State*, 339 Ark. 173, 3 S.W.3d 334 (1999) (per curiam). The motion for belated appeal is granted.

Petitioner has filed a pro se petition for writ of certiorari. Because Mr. Davis is responsible for the appeal from the Rule 37.1 order, we direct Mr. Davis, who is more familiar in his position as counsel with designating the proper record for the appeal, to file within fifteen days a petition for writ of certiorari to bring up the record necessary for the appeal. In light of the fact that counsel will file a petition for writ of certiorari, petitioner's pro se petition is moot.

Pro se motion for belated appeal granted; pro se motion to respond to attorney's response to motion for belated appeal and pro se petition for writ of certiorari moot.

Roy Lee Smith, pro se petitioner.

No response.

