

SUPREME COURT OF ARKANSAS

No. CR13-265

JAMES EDWARD GREEN, JR.
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 2, 2013

PRO SE MOTIONS TO VOID APPEAL WITHOUT PREJUDICE, FOR APPOINTMENT OF COUNSEL, AND FOR ORDER DIRECTED TO ATTORNEY GENERAL AND THE ARKANSAS DEPARTMENT OF CORRECTION [DREW COUNTY CIRCUIT COURT, CR 10-106, HON. WM. RANDALL WRIGHT, JUDGE]

MOTION TO VOID APPEAL TREATED AS MOTION TO DISMISS APPEAL AND GRANTED IN PART AND DENIED IN PART; MOTION FOR APPOINTMENT OF COUNSEL MOOT; MOTION FOR ORDER DIRECTED TO ATTORNEY GENERAL AND ARKANSAS DEPARTMENT OF CORRECTION DISMISSED.

PER CURIAM

Appellant James Edward Green, Jr., was found guilty by a jury of failure to comply with registration and reporting requirements applicable to sex offenders and with residing within 2000 feet of a daycare facility for children as a level 4 sex offender. An aggregate sentence of 540 months' imprisonment was imposed. Appellant lodged an appeal from the judgment-and-commitment order in the Arkansas Court of Appeals on March 2, 2012. The court of appeals affirmed on February 6, 2013. *Green v. State*, 2013 Ark. App. 63. A petition for review was filed in this court on February 25, 2013. The petition for review was denied

by Per Curiam Order on April 4, 2013, and the mandate in the case was issued on that date.

On March 1, 2013, after the judgment had been affirmed and while the petition for review was pending, appellant filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37.1 (2012). The trial court denied the petition on March 17, 2013, and appellant has lodged an appeal from the order in this court. Appellant now seeks by pro se motion to “void” the appeal on the grounds that the Rule 37.1 petition was filed prematurely. He further asks that the appeal be vacated without prejudice to his filing a timely Rule 37.1 petition and pursuing an appeal if relief is denied. We treat the motion to void the appeal as a motion to dismiss the appeal without prejudice to proceed with a timely Rule 37.1 petition.

Rule 37.2(a) provides that no proceeding under the rule shall be entertained while the direct appeal of a judgment is pending, and a Rule 37.1 petition filed after the judgment is affirmed but before the mandate has been issued, as appellant’s petition was, should be treated as filed on the day after the mandate was issued. *In Re Arkansas Rule of Criminal Procedure 37.2; Arkansas Rule of Appellate Procedure Criminal 3; and Administrative Order No. 8*, 2011 Ark. 58 (per curiam); *Lamar v. State*, 2011 Ark. 310 (per curiam). The trial court ruled on the merits of appellant’s petition while the petition for review was pending, but the correct course of action would have been for the trial court to treat the Rule 37.1 petition as having been filed the day after the mandate issued and act on it at that time, because the trial court did not regain jurisdiction to act until the mandate had issued. *See Washington v. State*, 2010 Ark. 345, 3–4 (per curiam); *see also Johnson v. State*, 2010 Ark. 217 (per curiam); *Butler v. State*, 367 Ark.

318, 239 S.W.3d 514 (2006) (per curiam); *Doyle v. State*, 319 Ark. 175, 890 S.W.2d 256 (1994) (per curiam); see *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (per curiam); see also *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993) (citing *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945)). A court must have jurisdiction before it can do more with respect to a Rule 37.1 petition than examine it to see if it is timely. See *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996) (citing *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989)).

Appellant's motion to dismiss the appeal is granted. As the trial court lacked jurisdiction to act on the merits of the petition filed by appellant after the case was affirmed but before the mandate issued, this court also lacks jurisdiction to review the order on appeal. See *Daniels v. Hobbs*, 2011 Ark. 249 (per curiam); see also *Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005) (citing *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995)).

Petitioner is not entitled, however, to file a second Rule 37.1 petition. Rule 37.2(a) allows the petition that appellant filed on March 1, 2013, to be considered as filed the day after the mandate was issued, April 5, 2013. The trial court's order pertaining to the Rule 37.1 petition entered March 7, 2013, was not a valid order as the trial court did not have jurisdiction at that time to consider it on the merits. The trial court has now acquired jurisdiction to do so. If the ruling in the court's new order is adverse to appellant, he may pursue an appeal to this court.

After appellant filed the pro se motion to void the appeal, he filed two additional motions. One motion seeks appointment of counsel and the other seeks an order directing the Attorney General and the Arkansas Department of Correction not to impede his pursuit

of justice. The motion for appointment of counsel is moot inasmuch as the appeal has been dismissed. As to the motion for an order, the appellant has offered nothing to demonstrate that either party has impeded his pursuit of justice. The motion borders on the frivolous and is dismissed for lack of relevance to this appeal.

Motion to void appeal treated as motion to dismiss appeal and granted in part and denied in part; motion for appointment of counsel moot; motion for order directed to Attorney General and Arkansas Department of Correction dismissed.

James Edward Green, Jr., pro se appellant.

No response.