Cite as 2010 Ark. 392

SUPREME COURT OF ARKANSAS

No. CR 10-896

MARCUS TERRELL ATKINS
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered October 21, 2010

PRO SE MOTION FOR BELATED APPEAL OF ORDER [CIRCUIT COURT OF HOT SPRING COUNTY, CR 2007-102, HON. CHRIS E WILLIAMS, JUDGE]

MOTION GRANTED.

PER CURIAM

In 2007, petitioner Marcus Terrell Atkins was found guilty by a jury of first-degree battery, kidnapping, being a felon in possession of a firearm, and use of a firearm in commission of a felony. An aggregate sentence of 480 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Atkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635.

Subsequently, petitioner timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The court entered an order denying the petition on June 19, 2009. Petitioner did not file a notice of appeal from the order and now seeks leave to proceed with a belated appeal.

Arkansas Rule of Appellate Procedure–Criminal 2(e) (2009) 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. *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 clerk 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. *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, 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 or some other proof that the order was mailed, we must assume that the petitioner was not properly notified. *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.*, *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. at 360, 698 S.W.2d at 802. Our clerk is directed to lodge the record and set a briefing schedule for the appeal.[1]

Motion granted.

[1]Petitioner in his motion raises a number of challenges to the judgment of conviction as well as the order that denied Rule 37.1 relief. The relief granted in the instant opinion is limited to permitting an appeal of the Rule 37.1 order only.