

Cite as 2010 Ark. 395

SUPREME COURT OF ARKANSAS

No.

Opinion Delivered October 21, 2010

IN RE SUPREME COURT
COMMITTEE ON CRIMINAL
PRACTICE – PROPOSED RULE
CHANGES

PER CURIAM

The Supreme Court Committee on Criminal Practice has submitted several proposals to the court as set out in detail below. We express our gratitude to the members of the Criminal Practice Committee for their work. These proposals are being published for comment, and the comment period shall end on December 31, 2010. (New language is underlined in the rules set out below.)

Comments should be submitted in writing to: Clerk of the Arkansas Supreme Court, Attention: Criminal Practice Committee, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

Arkansas Rules of Criminal Procedure

1. Proposed amendment to Arkansas Rule of Criminal Procedure 27.3 to encourage hearing on motion for continuance. The committee was asked to reconsider a previous recommendation regarding this rule and has submitted a revised proposal.

Rule 27.3. Continuances.

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(a) The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

(b) If prior to granting a continuance, the court conducts a hearing at which the defendant is afforded a reasonable opportunity to object to the continuance and the defendant fails to object to the continuance, the defendant is barred under the contemporaneous objection rule from thereafter arguing that the period of the continuance is not an excluded period under Rule 28.3.

Reporter's Notes, 2010. The 2010 amendment added subsection (b) to the rule. The purpose of subsection (b) is to encourage, but not require, the court to conduct a hearing at which the defendant is given an opportunity to object to a continuance.

2. Proposed amendments to Arkansas Rule of Criminal Procedure 37.2(c) to clarify date by which petition for post-conviction relief must be filed and to address premature filings.

Rule 37.2(c) Commencement of proceedings; pleadings.

(c) (i) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition

claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. ~~If the judgment was not entered of record within ten (10) days of the date sentence was pronounced, a petition under this rule must be filed within ninety (90) days of the date sentence was pronounced.~~ If a petition is filed before the entry of judgment, the petition shall be treated as filed on the day after the entry of judgment.

(ii) If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate ~~was~~ is issued by the appellate court. If a petition is filed after a conviction is affirmed by the appellate court but before the mandate is issued, the petition shall be treated as filed on the day after the mandate is issued.

(iii) In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed.

(iv) If the appellate court affirms the conviction but reverses the sentence, the petition must be filed as provided in subsection (ii) within sixty (60) days of a mandate following an appeal taken after resentencing. If no appeal is taken after resentencing, then the petition must be filed as provided in subsection (i) with

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the appropriate circuit court within ninety (90) days of the entry of the judgment.

***Reporter’s Notes, 2010.** In addition to minor, nonsubstantive editorial revisions, the 2010 amendments made two major changes to the period within which a Rule 37 petition must be filed. First, the amendments struck confusing language in subsection (c)(i) pursuant to which the 90-day period for filing a petition commenced from the date sentence was “pronounced” when judgment was not entered within 10 days of the date sentence was pronounced. Second, the amendments adopted the “deemed filed” rule that Arkansas Rule of Appellate Procedure–Criminal 2(b)(1) applies to a premature notice of appeal. Thus, the amendment changes the result announced in *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996) (“[Rule 37] does not allow for holding allegations in abeyance for future consideration when the [circuit] court obtains jurisdiction.”)*

Note that the “deemed filed” rule only applies to appealed cases if the petition is filed with the circuit court after the conviction is affirmed, but before the mandate is issued. If the Rule 37 petition is filed before the appellate court has issued its decision on the appeal, then the circuit court is limited to dismissing the petition as untimely.

Arkansas Rules of Appellate Procedure–Criminal

3. Proposed amendments to Arkansas Rule of Appellate Procedure–Criminal 3 to clarify that the “correct and uniform administration of the criminal law” requirement does not apply to appeals regarding a victim’s prior sexual conduct.

(a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P. 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or (3) grants a motion under Ark. Code Ann. 16-42-101(c) to allow evidence of the victim's prior sexual conduct. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that ~~the correct and uniform administration of the~~

~~criminal law requires~~ review by the Supreme Court is desirable under this rule, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(d) The Supreme Court will not consider an appeal filed under either subsection (a)(1) or (2) or subsection (b) of this rule unless the correct and uniform administration of the criminal law requires review by the court.

~~(d)~~ (e) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsections (a)(1) and (a)(2) shall bar further proceedings against the defendant on the charge; however, a decision sustaining an order appealed under subsection (a)(3) shall not bar further proceedings against the defendant on the charge.

Reporter's Notes, 2010. *The 2010 amendment added subsection (d) of the rule to make clear that the "correct and uniform administration of the criminal law" requirement applies only to appeals permitted under court rule. Compare State v. Parker, 2010 Ark. 173, where the court refused to apply the requirement to an interlocutory appeal under Ark. Code Ann. 16-42-101(c).*

Administrative Orders

4. Proposed amendment to Administrative Order Number 8, Forms for Reporting Case Information in All Arkansas Trial Courts, to clarify form when final disposition does not result in commitment to Department of Correction.

Section III of Administrative Order No. 8 requires the prosecuting attorney to submit to the circuit judge a “Judgment and Disposition Order” when the final disposition includes probation or suspended imposition of sentence. However, various statutes allowing probation or suspended imposition of sentence specifically state that no judgment is to be entered. See, for example, Ark. Code Ann. §§ 5-4-301(d), 5-4-311, 5-64-413, and 16-93-303. The committee endorsed revisions to the current Judgment and Disposition Order Form as well as the possible creation of other reporting form(s). The committee recommends the following amendment to Administrative Order Number 8:

Administrative Order Number 8

Section III. Procedure.

a. Criminal cases.

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Where the final disposition does not result in a commitment to the Arkansas Department of Correction but may include any of the following - an order of probation, suspended imposition of sentence, commitment to the Department of Community Punishment or to the county jail, a fine,

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restitution, and/or court costs - the office of the prosecuting attorney shall be responsible for completion of the Order of Probation, Order of Suspended Imposition of Sentence, or Judgment and Disposition Order consistent with the disposition of the case, applicable statutes, and intent of the court, which shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION II. b. and to counsel of record for the defendant.

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