

SUPREME COURT OF ARKANSAS

No. CR 09-418

GEORGE LEMOIN RHOADES
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 2, 2010

APPELLEE'S MOTIONS TO DISMISS
APPEAL AND TO STAY BRIEF TIME
AND APPELLANT'S PRO SE MOTION
FOR RULE ON CLERK TO FILE
TENDERED RESPONSE TO MOTION
TO DISMISS [LITTLE RIVER COUNTY
CIRCUIT COURT, CR 92-84, CR 92-85,
HON. CHARLES A. YEARGAN,
JUDGE]

MOTION TO DISMISS APPEAL
GRANTED; MOTIONS TO STAY
BRIEF TIME AND FOR RULE ON
CLERK MOOT.

PER CURIAM

Appellant George Lemoin Rhoades, proceeding pro se, lodged an appeal in this court of an order that denied a motion that he filed in Little River Circuit Court after the court had denied appellant's request for scientific testing under Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). The appellee State has filed a motion requesting this court dismiss the appeal and a motion seeking an extension of time in which to file appellee's brief should the motion to dismiss be denied.

Appellant tendered a response to the motion to dismiss that was rejected as untimely. He later filed a pro se motion for rule on clerk in which he offered an excuse for the delay

in tendering his response and sought to have our clerk file the response. We need not consider appellant's reason for delay because the State filed a response indicating that it does not object to consideration of the tendered response. Although the State contends the response should not be filed, as it does not object to consideration of appellant's arguments, the issue is moot. Because it is apparent that the order appealed was not a valid, appealable order, we grant the motion to dismiss, and appellee's motion to stay brief time is moot.

This court affirmed a judgment in Little River Circuit Court against appellant that imposed a sentence of life without parole for two counts of capital murder. *Rhoades v. State*, 319 Ark. 45, 888 S.W.2d 654 (1994). In 2008, appellant filed in the trial court a pro se petition that sought a writ of habeas corpus under Act 1780 and a pro se motion to amend the petition. The court denied the petition and motion by order entered on December 31, 2008. Appellant then filed on February 27, 2009, a "request for modification/reversal" of the order. In that motion, appellant sought to challenge the form of the order denying Act 1780 relief as improper, rendering the order unappealable. Appellant additionally challenged as incorrect the basis for denial cited in that order. The court denied the February 27, 2009 motion by order entered March 4, 2009.

The State moves for dismissal of this appeal on the basis that appellant's notice of appeal was not timely, and this court therefore lacks jurisdiction. The State contends that appellant's motion for modification was a motion for reconsideration that was invalid and rendered his notice of appeal as to the order denying that motion invalid. The State also

contends that the notice of appeal was ineffective as to the December 31, 2008 order.

The notice of appeal contained in the record was filed on March 25, 2009, and referenced only the March 4, 2009 order denying appellant's motion for modification. There is no notice of appeal in the record that references the December 31, 2008 order. Section 16-112-206(a), in addition to our criminal rules of appellate procedure, requires that any notice of appeal must be filed within thirty days of the entry of the order.¹ The sole issue then is whether the trial court retained jurisdiction, after the time for filing a notice of appeal had passed, to entertain appellant's motion and enter an appealable order that could potentially modify the order as appellant requested. We hold that it did not.

Appellant's motion for modification was based upon the premise that the trial court was required to provide a ruling on a number of issues and failed to do so. Appellant cited a number of cases concerning appeals of proceedings under Arkansas Rule of Criminal Procedure 37.1 (2010) in support of that position, and he complained that the trial court's order was not sufficient to provide rulings on a number of his claims. Appellant also included in the motion allegations of error in the court's rulings on the issues that were included in the order; to that extent, the motion did seek reconsideration.

Section 16-112-205(a) contains language somewhat similar to that in Arkansas Rule

¹Arkansas Rule of Appellate Procedure—Civil 4(a) (2010) and Arkansas Rule of Appellate Procedure—Criminal 2(a) (2010) both set the time for filing a notice of appeal at thirty days. This court, however, does not apply the rules of civil procedure in postconviction habeas proceedings. *Cater v. State*, 2010 Ark. 29 (per curiam); *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

of Criminal Procedure 37.3 (2010), in that the trial court is required to make findings of fact and conclusions of law. Under Rule 37.3, however, the findings are required to be in writing, and an initial noncomplying order is not rendered unsuitable for appeal; the omitted issues are merely procedurally barred. *See Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam). In addition, motions that request the court to comply with those requirements must be made in a timely manner, before the filing of a notice of appeal. *See id.*

Despite appellant's assertion in his motion that the December 31, 2008 order was not an appealable order, any deficiency concerning the appropriate rulings in the order did not render it unappealable. Appellant could have appealed the order by filing a timely notice of appeal. An analysis similar to that in *Watkins* is applicable here. While there may be circumstances where an appellant may file an appropriate request under Act 1780 that the court comply with the requirements of the statute,² such a motion for compliance must have been filed prior to the appellant's filing of a timely notice of appeal. Appellant in this case did not file his motion until well after expiration of the time in which to file a notice of appeal for the December 31, 2008 order. Appellant could not file such a motion after the expiration of the mandated period in which to file a timely notice of appeal and effectively extend the period of time in which to file a notice of appeal.³ Because appellant's motion, if otherwise

² We do not examine whether the request that appellant made for additional rulings and for reconsideration of rulings made were indeed appropriate under the circumstances presented here.

³ We need not determine whether appellant's motion otherwise fell within the definition of a posttrial motion under Arkansas Rule of Criminal Procedure 33.3 (2010) because the

Cite as 2010 Ark. 472

cognizable, would not have been timely, the trial court was without authority to consider it.

Motion to dismiss appeal granted; motions to stay brief time and for rule on clerk moot.

motion clearly was not filed within thirty days after the date of entry of the judgment. Because the motion was not a posttrial motion under Rule 33.3, it did not serve to extend the time for filing a notice of appeal under Arkansas Rule of Appellate Procedure–Criminal 2(b) (2010).