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SUPREME COURT OF ARKANSAS

No. CR-10-810

Opinion Delivered March 3, 2011

STATE OF ARKANSAS
APPELLANT/
CROSS-APPELLEE

V.

TODD ROBINSON
APPELLEE/
CROSS-APPELLANT

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION, NO. CR2008-4421

HON. HERBERT T. WRIGHT, JR., JUDGE

APPEAL DISMISSED; CROSS-APPEAL MOOT.

DONALD L. CORBIN, Associate Justice

The State of Arkansas brings the instant appeal from an order of the Pulaski County Circuit Court granting Appellee Todd Robinson's motion for new trial pursuant to Ark. R. Crim. P. 33.3 (2010). For reversal, the State asserts that (1) it is not required to satisfy the procedural requirement of Ark. R. App. P.–Crim. 3 (2010) that this appeal satisfy the uniform-administration rule; and (2) the circuit court's grant of a new trial was an abuse of discretion because Appellee's counsel was not deficient nor was Appellee prejudiced by counsel's failure to obtain certain evidence. Appellee has filed a cross-appeal but, because we dismiss the appeal, his cross-appeal is moot.

The record reveals that Appellee was charged with a felony count of sexual assault in the second degree stemming from allegations that he sexually assaulted L.C. on or about May 25, 2005.[1] After waiving his right to a jury trial, Appellee was tried before the bench.

At trial, L.C. testified that in May 2005, when she was thirteen, she stayed the night with her friend, S.H., who is Appellee's stepdaughter. S.H. lived with Appellee, her mother Natalie Robinson, and two brothers. L.C. stated that S.H.'s mother had given the girls permission to skip school the next day. According to L.C., S.H. fell asleep in her brother's upstairs bedroom, whil0e L.C. remained downstairs watching television. L.C. stated that she fell asleep on the couch and awoke in the night to find Appellee between her legs, licking her vagina. Appellee had pinned her legs apart with his arms and pulled her gym shorts and underpants to the side, according to L.C. L.C. stated that she was startled when she awoke and that Appellee told her "it was okay. It'd be all right," and then continued licking her vagina. L.C. then stated she started to freak out and tried to get Appellee off of her. Appellee finally stopped and asked L.C. if she was going to tell and get him into trouble. He asked if she needed anything and she told him to leave. According to L.C., she went to S.H.'s room and locked the door until the next morning. She testified that she tried to call S.H.'s cell phone after the attack, but that it went directly to voicemail. The next day, according to L.C., she remained at the Robinson home, watching television with S.H., until the two girls walked to a nearby store owned by S.H.'s stepmother, and then to a candy store next door, where the owner asked them to watch the store for a few minutes.

[1]Appellee was originally charged with one count of rape, but that charge was reduced in an amended information.

During this time, L.C. told S.H. what had happened the previous night. L.C. also stated that she told two of her close friends about the attack shortly after it happened. Some time later she also confided in her boyfriend and eventually his mother, who in turn reported the information to authorities and to L.C.'s parents.

S.H. testified and confirmed L.C.'s statements about the time prior to and after the attack, including the fact that the girls planned and did skip school the day after the attack. Several other witnesses testified that L.C. had confided in them about the attack.

In contrast, Appellee and his wife testified that they did not allow overnight guests during the school week and did not allow their children to miss school except for serious illness. They also testified that L.C. continued to visit their home after the incident, most notably to attend S.H.'s birthday party in 2006.

Appellee was found guilty and sentenced to four years' probation, one hundred hours of community service, and a $2,500 fine. Thereafter, he retained new counsel and filed a motion for new trial, alleging inter alia, that he received ineffective assistance of counsel. Specifically, Appellee alleged that his original trial counsel was ineffective in failing to obtain the school-attendance records of L.C. and S.H., which showed that both girls were present at school on May 25, 2005, which contradicted their testimony that they skipped school the day after the assault on L.C.

At a hearing on the motion for new trial, trial counsel for Appellee testified that he was aware that the assault was alleged to have occurred on a weeknight and that he did not attempt to subpoena the school-attendance records. Trial counsel admitted that the matter "flew over his head" and was not a matter of trial strategy or tactical judgment.

The circuit court entered an order granting Appellee's motion for new trial. Therein, the circuit court ruled that Appellee's trial counsel had been ineffective in failing to obtain the school-attendance records. Specifically, the circuit court stated as follows:

> The Court finds that had the attendance records been subpoenaed by defendant's trial counsel, they could have refuted L.C.'s testimony that she skipped school May 25, 2005, and have cast doubt on her recollection of the events she testified took place earlier that same date. The Court does not find that either L.C. or S.H. gave perjured testimony. The Court does find that the defendant suffered prejudice as a result of trial counsel's failure to obtain the attendance records to refute L.C.'s and S.H.'s testimony, and to cast doubt on L.C.'s recollection of the events which she stated occurred that day. The Court finds that the prejudice suffered by the defendant is sufficient to warrant the granting of a new trial.

This appeal followed.

As a threshold matter, the State asserts that it need not satisfy the requirement of Rule 3 that the appeal be important to the correct and uniform administration of the criminal law. In this regard, the State argues that Appellee's posttrial motion for a new trial was based on a claim of ineffective assistance of counsel and that such a claim, when asserted in a Rule 37 petition, is not subject to the uniform-administration rule, and the State is entitled to an appeal as a matter of right. The State asserts that basing its right to appeal on Appellee's choice of forum, i.e., Rule 33.3 or Rule 37 of the Rules of Criminal Procedure, is unfair and unjustified and, thus, Rule 3 should not be applied here. Appellee does not challenge the State's claim that it is not required to satisfy the Rule 3 requirement. Nevertheless, we must examine this issue and determine whether Rule 3 applies in a case such as the instant one. *See, e.g.*, *State v. Nichols*, 364 Ark. 1, 216 S.W.3d 114 (2005) (stating that this court must consider whether it has jurisdiction of the State's appeal, even when the parties do not mention the issue in their briefs).

We have long held that there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. *See State v. Thompson*, 2010 Ark. 294, 377 S.W.3d 207; *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000). The former is a matter of right, whereas the latter is neither a matter of right, nor derived from the Constitution, but rather is only granted pursuant to the confines of Rule 3. *Wilmoth*, 369 Ark. 346, 255 S.W.3d 419; *see also State v. Pruitt*, 347 Ark. 355, 64 S.W.3d 255 (2002). When this court is presented with an appeal by the State, we must first determine whether the correct and uniform administration of the criminal law requires our review. *Wilmoth*, 369 Ark. 346, 255 S.W.3d 419. We have thus held that the State's ability to bring such an appeal is limited, and we will only accept appeals that are narrow in scope and involve the interpretation of law. *Id.*; *see also State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

Where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *Thompson*, 2010 Ark. 294, 377 S.W.3d 207. Similarly, where the resolution of the issue on appeal turns on the facts unique to the case or involves a mixed question of law and fact, the appeal is not one requiring interpretation of our criminal rules with widespread ramifications, and the matter is not appealable by the State. *Id.* State appeals are not allowed merely to demonstrate the fact that the trial court erred. *Id.*

We have held, however, that the State is entitled to appeal from a circuit court's grant of a Rule 37 petition, because such postconviction proceedings under Rule 37 are

civil in nature. *See, e.g.*, *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587; *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999). We have explained that when an appeal involves neither a direct nor an interlocutory appeal following a prosecution, but is a civil appeal arising from a collateral proceeding, the appeal is civil in nature, and the State is not required to satisfy Rule 3. *See Wilmoth*, 369 Ark. 346, 255 S.W.3d 419; *State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007).

Here, the appeal by the State is not a civil appeal arising from a collateral matter. Rule 33.3 governs the filing of posttrial motions such as the present one. This court has recognized that, pursuant to this rule, a criminal defendant may file a motion for new trial based on a claim of ineffective assistance of counsel. *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008). Although analyzed from the perspective of a criminal defendant's right to appeal pursuant to Rule 33.3, this court's discussion of the rule in *Rounsaville* is helpful in understanding the distinction between this criminal rule and Rule 37, which we have deemed civil in nature. There, this court stated as follows:

> This court has held that, while Rule 37 of the Arkansas Rules of Criminal Procedure provides the primary vehicle for postconviction relief due to ineffective assistance of counsel, "such relief may be awarded a defendant on direct appeal in limited circumstances" based on a motion for a new trial. *See, e.g.*, *Missildine v. State*, 314 Ark. 500, 507, 863 S.W.2d 813, 818 (1993). This court has also held that the interest of judicial economy may permit a direct appeal when the defendant raises the issue in a motion for a new trial. *Id.* A direct appeal is only appropriate, however, when the facts surrounding the claim were fully developed during the trial or during hearings conducted by the trial court. *See Ratchford v. State*, 357 Ark. 27, 31, 159 S.W.3d 304, 307 (2004). This is because "the trial court is in a better position to assess the quality of legal representation than we are on appeal." *Id.* at 32, 159 S.W.3d at 307. In sum, this court has clearly held that a direct appeal on a claim of ineffective assistance of counsel is appropriate only when it is raised before the trial court and the facts and circumstances surrounding the claim have been fully developed at the trial level. *See Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996).

Id. at 360–61, 288 S.W.3d at 217. Thus, it is clear that a posttrial motion for new trial, even if based on an allegation of ineffective assistance of counsel, is still a part of the criminal process.

The State argues that like allegations ought to be treated alike, regardless of the procedural mechanism by which they are raised. We do not agree with the State because one mechanism is criminal in nature while the other is civil in nature. Moreover, if we were to accept the State's argument that a posttrial motion such as this one was civil in nature, we would have to carve out a specific exception for a posttrial motion that involved a claim of ineffective assistance of counsel, as the rule contemplates a variety of bases for filing a motion for new trial.

Accordingly, in the instant case, the State must satisfy the requirement of Rule 3 that the appeal involves the correct and uniform administration of the criminal law. Notably, the State does not assert that this appeal satisfies the requirement of Rule 3. In fact, the appeal turns on the specific facts of this case and does not involve the interpretation of the criminal rules with widespread ramifications and, thus, is not a proper appeal pursuant to Rule 3. Accordingly, the State's appeal is dismissed.

Appeal dismissed; cross-appeal moot.

Leslie Rutledge, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellant/cross-appellee.

Jeff Rosenzweig, for appellee/cross-appellant.