

SUPREME COURT OF ARKANSAS

No. CR 10-1021

WILLIAM ROY TUBBS,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered April 14, 2011

PRO SE MOTION FOR BELATED
APPEAL; MOTION TO AMEND
MOTION FOR BELATED APPEAL

REMANDED FOR FINDINGS ON
ATTORNEY ERROR.

PER CURIAM

William Roy Tubbs, pro se, moves this court for a belated appeal and also to amend his motion for belated appeal. On February 22, 2010, a judgment and commitment order was filed reflecting Tubbs's negotiated plea of guilt to theft by receiving, leaving the scene of a personal-injury accident, and fleeing, and sentencing him to a total of 120 months' imprisonment. In addition, the order reflected that Tubbs was ordered to pay restitution in the amount of "FULL" in installments of \$75 per month after payment of the public defender's fee.

On March 10, 2010, the circuit court entered its order noting the State's determination of the amount of restitution in the amount of \$4,069.68, and directing payment in accordance with the judgment and commitment order. In a separate order of the same date, the circuit court directed that the amount of restitution, as determined by the State, was \$2,105.70.

Subsequently, an amended judgment and commitment order was filed May 13, 2010, showing that Tubbs's sentence was to run concurrent with a parole violation. No notice of appeal was filed as to any of the orders.

In his motion, Tubbs seeks a belated appeal of the orders entered by the circuit court. However, Arkansas Rule of Appellate Procedure–Criminal 1(a) (2010) provides that there is no direct appeal from a plea of guilty. An exception is created when a conditional plea of guilty is premised on an appeal of the denial of a suppression motion pursuant to Arkansas Rule of Criminal Procedure 24.3 (2010). *See Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004). Two additional exceptions to the general rule, as set out in *Seibs* and *Grissom v. State*, 2009 Ark. 328 (per curiam), are (1) when there is a challenge to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself, and (2) when the appeal is from a posttrial motion challenging the validity and legality of the sentence itself. *See Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). Absent one of the exceptions, a defendant waives his right to appeal when he pleads guilty. *Grissom*, 2009 Ark. 328; *see also Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999).

Recently, though, we held that an appeal may be taken after a guilty plea when it alleges evidentiary errors which arose after the plea and during the sentencing phase, regardless of whether or not a jury was impaneled for that phase of trial. *See Johnson v. State*, 2010 Ark. 63. Here, Tubbs states in his motion that he seeks to appeal from the circuit court's orders relating to the order of restitution.

This court clarified its treatment of motions for rule on clerk and motions for belated appeal in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we said:

Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.* However, where a motion seeking relief from failure to perfect an appeal is filed and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record, and the appeal will proceed without delay. *See id.* At that time, the matter of attorney error will be remanded to the trial court to make findings of fact. *See id.* Upon receipt of the findings by this court, it will render a decision on attorney error. *See id.*

In the present case, no reason for the failure to file a notice of appeal is cited in the motion; fault is not admitted, and we cannot tell from the record whether there was attorney error. The record is further silent as to whether Tubbs even informed his counsel that he wished to appeal; therefore, we remand the question of attorney error to the circuit court.

Remanded for findings on attorney error.