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SUPREME COURT OF ARKANSAS
No. CR-19-51

JAMES D. CRIBBS

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered: May 23, 2019

PRO SE MOTION FOR BELATED
APPEAL

[PULASKI COUNTY CIRCUIT COURT,
SEVENTH DIVISION, NOS. 60CR-16-
3944; 60CR-16-3964]

REMANDED FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW.

JOHN DAN KEMP, Chief Justice

Petitioner James D. Cribbs was found guilty of several drug charges and fleeing. His bench trials were conducted on the same day in two criminal cases. The judgments entered on February 21, 2018, reflect that he was sentenced, as a habitual offender in both instances, to an aggregate sentence of 120 months' imprisonment. Cribbs filed a pro se motion for belated appeal in which he contends that his retained trial counsel, Josh Hurst, failed to pursue an appeal on his behalf, and he requests permission to proceed as a pauper. Because proper disposition of the matter requires findings of fact, we remand the matter to the trial court for an evidentiary hearing.

Cribbs contends that, following the guilty verdict at trial, he requested that Hurst file an appeal in the matter. Cribbs alleges that Hurst agreed to do so and that Hurst indicated about a month later that it had been done, but when Cribbs's mother later made

inquiries at this court concerning the status of the appeal, she discovered that Hurst had not filed anything. Cribbs indicates that, after confirming that an appeal had been filed, Hurst “disappeared” and that he has not heard from him.

When a pro se motion for belated appeal is filed in which the petitioner contends that he made a timely request to appeal and the record does not contain an order relieving trial counsel, it is the practice of this court to request an affidavit from the trial attorney in response to the allegations in the motion. *Beene v. State*, 2018 Ark. 120. There is no order relieving Hurst in the partial record filed.¹

In his affidavit, Hurst contends that, although he did initially tell Cribbs that he would file a notice of appeal for the two cases, in later discussions with Cribbs and Cribbs’s mother, a decision was made not to pursue an appeal. Hurst alleges that he was given information from Cribbs’s mother concerning the Arkansas Department of Correction’s calculation of a release date and that the ultimate decision was based on the risk that an appeal might result in a potentially longer period of incarceration.

Arkansas Rule of Appellate Procedure–Criminal 16 (2018) provides in pertinent part that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Ark. R. App. P.–Crim. 16(a)(i). A defendant may nevertheless waive his right to appeal by his

¹The record submitted with the motion for belated appeal contains only the two sentencing orders in the cases that Cribbs would appeal and a judgment-and-commitment order reflecting Cribbs’s conviction in an earlier case.

failure to inform counsel of his or her desire to appeal within the thirty-day period allowed for filing a notice of appeal under Arkansas Rule of Appellate Procedure–Criminal 2(a). *Beene*, 2018 Ark. 120.

Although Hurst concedes that he was initially directed to appeal in the two cases, the claims pertaining to whether Cribbs rescinded that direction and communicated to Hurst his desire not to appeal are in direct conflict. There remains a question of whether and when Cribbs communicated to Hurst that he did not wish to appeal and whether Hurst complied with Rule 16: that is, whether Hurst acted within an objective standard of reasonableness in not pursuing an appeal. See *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002). Because proper disposition of the motion for belated appeal in this case requires findings of fact, which must be made in the trial court, we remand this matter to the trial court for an evidentiary hearing on the issue of whether and when counsel was informed by petitioner that petitioner desired not to appeal and whether counsel complied with Rule 16.

Also, because Hurst was retained after another attorney was initially appointed to represent Cribbs, additional findings of fact are required concerning Cribbs's request to proceed on appeal as a pauper. If there was a change in Cribbs's circumstances or if Hurst was paid by someone other than Cribbs, there are many factors to be considered. See *Berger v. Kelley*, 2018 Ark. 381, 563 S.W.3d 557 (noting that the ability of bystanders such as friends and family members to assist with expenses is not a factor in determining a petitioner's indigency, although an exception may be made if the petitioner has control or

complete discretionary use of funds raised by others); *see also* *Birmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000) (setting out the criteria to be used in determining the indigency of a defendant). The evidentiary hearing should therefore also address Cribbs’s claim that he is indigent. The trial court is directed to enter “Findings of Fact and Conclusions of Law” within ninety days and submit those findings and conclusions to this court with the transcript of the evidentiary hearing.

Remanded for findings of fact and conclusions of law.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. Mr. Cribbs has a constitutional right to appeal his criminal conviction. The only strict time limitation on this right to appeal is found in Rule 2(e) of the Arkansas Rules of Appellate Procedure–Criminal, which states that a criminal appeal must be pursued within eighteen months of a conviction. However, even this deadline may be “equitably tolled.” *Id.* No matter what Mr. Cribbs may have discussed with his attorney, those discussions do not constitute a waiver of his right to appeal because he filed his motion for a belated appeal well within the eighteen months specified by Rule 2(e).

I am mindful that Mr. Cribbs’s trial counsel is worried about being sent to the Professional Conduct Committee. However, a close reading of our case law shows that this is a practice that we have quietly abandoned. The bottom line is Mr. Cribbs’s right to an appeal is not jeopardized by what he—or his mother—may have told his retained counsel. In my view, the evidentiary hearing that this court has ordered is an abdication by this

court of our responsibility to safeguard the rights that Mr. Cribbs is guaranteed by our constitution and seek justice. I respectfully dissent.