

Cite as 2010 Ark. 229

# SUPREME COURT OF ARKANSAS

No. CR10-379

DWIGHT SHANE KELLEY  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered May 13, 2010

MOTION FOR RULE ON CLERK  
AND FOR BELATED APPEAL;  
MOTION TO WITHDRAW AS  
COUNSEL ON APPEAL AND FOR  
EXTENSION OF TIME

REMANDED; MOTION FOR RULE  
ON CLERK AND MOTION TO  
WITHDRAW AS COUNSEL  
GRANTED; MOTION FOR  
EXTENSION OF TIME MOOT

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## PER CURIAM

Appellant Dwight Shane Kelley, by and through his attorney, John Joplin, has filed a motion for rule on clerk and a motion for belated appeal. In addition, attorney Joplin has filed a motion to be relieved as counsel on appeal or, in the alternative, if that motion is denied, a motion for extension of time.

Following a jury trial, Kelley was convicted of one count of aggravated robbery and sentenced to twenty years in prison. The judgment and commitment order in case No. CR 2007-1461 was entered on September 11, 2009. At the time, Kelley was represented by attorney John VanWinkle in CR 2007-1461 and another criminal matter, case No. CR 2007-494. On September 29, 2009, VanWinkle filed a motion to withdraw as counsel in both criminal cases. After a hearing on September 30, 2009, the circuit court denied

VanWinkle's motion to withdraw. On November 2, 2009, however, VanWinkle filed a second motion to withdraw as counsel. The circuit court granted VanWinkle's motion on November 16, 2009.

The criminal docket reflects that the Sebastian County Public Defender's Office was appointed to represent Kelley on Case No. CR 2007-494 at a hearing on November 12, 2009.<sup>1</sup> The docket further reflects that the circuit court held an "inquiry" on December 30, 2009, at which time the court appointed the Public Defender to represent Kelley on appeal in Case No. CR 2007-1461. Attorney John Joplin of the Sebastian County Public Defender's Office filed a notice of appeal on Kelley's behalf on January 5, 2010. In addition, on March 30, 2010, Joplin filed in the circuit court a motion for extension of time to lodge the record, which the circuit court granted on April 1, 2010. Joplin tendered the record to our clerk's office on April 12, 2010.

Joplin filed the instant motion for rule on clerk and motion for belated appeal on April 13, 2010. Relief from the failure to perfect an appeal is provided as part of the appellate procedure granting the right to an appeal. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). In *McDonald*, we clarified our treatment of motions for rule on clerk and motions for belated appeal in criminal cases, explaining that

[w]here 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

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<sup>1</sup>CR 2007-494 was subsequently nolle prossed.

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.

*Id.* 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 or she has erred and is responsible for the failure to perfect the appeal. *Id.*; *Rasmussen v. State*, 375 Ark. 242, 289 S.W.3d 465 (2008). When it is plain from the motions, affidavits, and record that relief is proper based on error or good reason, the relief will be granted. *Rasmussen, supra*. If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Where, however, a motion seeking relief from the 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. The matter of attorney error will be remanded to the trial court to make findings of fact. *McDonald*, 356 Ark. at 117, 146 S.W.3d at 892 (citing *Frazier v. State*, 339 Ark. 173, 3 S.W.3d 334 (1999)). Upon receipt by this court of the findings, this court will render a decision on attorney error. *Id.*

When a criminal defendant requests a belated appeal, good reason is established where the defendant is not at fault, and his or her attorney has failed to file a timely notice of appeal following a request to do so received within the requisite time to file a notice of appeal. *See*

*Williams v. State*, 366 Ark. 583, 237 S.W.3d 93 (2006). 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 circuit court's docket sheet reflects that a hearing was held on VanWinkle's motion to withdraw on September 30, 2009, at which time the court told Kelley that counsel had done an "excellent job" for him; the notation on the docket sheet further informs that Kelley reconsidered and advised that he did not wish to fire VanWinkle.

The next entry on the docket sheet is VanWinkle's second motion to withdraw, filed on November 2, 2009. There is nothing to indicate why VanWinkle failed to file a timely notice of appeal from the September 11, 2009 judgment and commitment order. Arkansas Rule of Appellate Procedure—Criminal 16(a) makes it clear that "[t]rial counsel, whether retained or court-appointed, *shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.*" (Emphasis added.) Because the trial court denied VanWinkle's September 30, 2009 motion to withdraw as counsel, it was VanWinkle's responsibility to ascertain whether his client wished to appeal his conviction. See *Rogers v. State*, 353 Ark. 359, 107 S.W.3d 166 (2003) (Under no circumstances may an attorney who has not been relieved by the court abandon an appeal.). The record is silent, however, as to whether Kelley informed VanWinkle that he wished to appeal; therefore, we remand the question of attorney error to

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the trial court. See *Thompson v. State*, 2009 Ark. 342, 322 S.W.3d 12. Upon receipt of the findings by this court, it will render a decision on attorney error.

Simultaneously with the motion for belated appeal, Joplin has filed a motion for rule on clerk. Pursuant to *McDonald, supra*, we direct the clerk to accept the record so that the appeal may proceed without delay.

Finally, Joplin has filed a motion to be relieved as counsel based upon the cases of *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000) (holding that full-time, state-salaried public defenders were ineligible for compensation for their work on appeal), and *Tester v. State*, 341 Ark. 281, 16 S.W.3d 227 (2000) (per curiam) (relieving appellant's court-appointed public defender and appointing new counsel on appeal).

Since the time of those decisions, the law was changed by the General Assembly. Act 1370 of 2001 provides in part: “[P]ersons employed as full-time public defenders, who are not provided a state-funded secretary, may also seek compensation for appellate work from the Arkansas Supreme Court or the Arkansas Court of Appeals.” That provision is now codified as Arkansas Code Annotated section 19-4-1604(b)(2)(B) (Repl. 2007).

Joplin's motion states that he is provided with a full-time, state-funded secretary. Accordingly, we grant his motion to withdraw as attorney. Greg Crumpton will be substituted as attorney for appellant in this matter. The clerk will establish a briefing schedule.

*John Joplin*, Sebastian County Public Defender's Office, for appellant.