

**SUPREME COURT OF ARKANSAS**

No. CR 10-265

ROY LEE SMITH

PETITIONER

v.

STATE OF ARKANSAS

RESPONDENT

**Opinion Delivered** May 13, 2010

PRO SE MOTION FOR RULE ON  
CLERK AND FOR BELATED APPEAL  
[CIRCUIT COURT OF ARKANSAS  
COUNTY, NORTHERN DISTRICT,  
CR 2007-54, HON. DAVID G.  
HENRY, JUDGE]

MOTION TREATED AS MOTION  
FOR RULE ON CLERK AND  
GRANTED.

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**PER CURIAM**

On June 17, 2009, judgment was entered reflecting that petitioner Roy Lee Smith had been found guilty by a jury of two counts of possession of a controlled substance with intent to deliver and one count of unauthorized use of property to facilitate a crime. The sentence was enhanced pursuant to Arkansas Code Annotated § 5-64-411(a)(7) (Repl. 2005). An aggregate sentence of 1920 months' imprisonment was imposed. A fine of \$25,000 was also imposed.

Also on June 17, 2009, an order was entered relieving Mark Hampton, the retained attorney who had represented petitioner at trial. On June 29, 2009, petitioner timely filed a pro se notice of appeal from the judgment. On July 2, 2009, the court declared petitioner indigent and appointed public defender Dennis Molock to represent petitioner on appeal.

That appointment, however, was of no effect because pursuant to Arkansas Rule of Appellate Procedure—Criminal 16(a) (2009), once a notice of appeal is filed, only the appellate court can relieve or appoint an attorney on appeal.<sup>1</sup> *Hawthorne v. State*, 2009 Ark. 137, 296 S.W.3d 389 (per curiam); *Strong v. State*, 370 Ark. 87, 257 S.W.3d 80 (2007) (per curiam). An order was entered by the trial court on September 14, 2009, extending the time to lodge the record in the appellate court to January 17, 2010, but it was ineffective in that it did not comply with Arkansas Rule of Appellate Procedure—Criminal 4(b) (2009). There was a stipulation appended to the order indicating that the prosecutor and attorney Jason P. Kearney had agreed to the extension of time to lodge the record pursuant to Arkansas Rule of Appellate Procedure—Criminal 4(c)(1) (2009). Mr. Kearney, however, was not the attorney-of-record for the appeal and did not have authority to agree to the extension.

On February 19, 2010, petitioner tendered the record on appeal to our clerk, who correctly declined to lodge it because it was not timely tendered. The time to lodge the record is ninety days from the date that the notice of appeal was filed. Ark. R. App. P.—Crim. 4(b) (2009). Here, the record was tendered 247 days after the notice of appeal was filed.

Now before us is petitioner’s pro se motion “for rule on clerk and for belated appeal.” As the notice of appeal was timely filed, we treat the motion as a motion for rule on clerk to

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<sup>1</sup>On July 29, 2009, two attorneys, Jack R. Kearney and Jason P. Kearney, filed a joint notice of appeal from the judgment. Even if a notice of appeal had not already been filed, the July 29, 2009, notice would not have been timely as it was not filed within thirty days of the date the judgment was entered as required by Arkansas Rule of Appellate Procedure—Criminal 2(a) (2009).

lodge the record. *See Ray v. State*, 348 Ark. 304, 73 S.W.3d 594 (2002) (per curiam).

The motion is granted. Because an order was entered appointing Dennis Molock to represent petitioner, it is understandable that petitioner believed that he was represented by counsel on appeal. While that order was of no effect, a later order was entered extending the time to lodge the record that relied on the signature of attorney Jason P. Kearney as counsel for petitioner. Even though Mr. Kearney was not attorney-of-record for the appeal, the entry of the order likely had the effect of assuring petitioner that Mr. Kearney was his appellate attorney. Under these circumstances, we find good cause for petitioner's failure to timely tender the record.

Rule 16 requires the trial court to appoint other counsel when it relieves an *appointed* attorney. In the instant case, Mr. Hampton was retained. Nevertheless, the trial court's order entered the same day that the judgment was entered provided:

Following discharge of the Jury, the defendant was then advised of right to appeal and the Court granted the request of the defendant's attorney Mark F. Hampton, to be relieved as counsel for the defendant. The Court further indicated that, due to the defendant's present sentence, the defendant would be considered as an indigent and the Public Defender Commission or other appropriate agency would be contacted concerning representation of the defendant on appeal, *once a Notice of Appeal is filed by current counsel, the last act required of him before his discharge.*

(Emphasis added.)

Clearly, the court under the prevailing rules of procedure could not require Mr. Hampton to file a notice of appeal and also relieve him as counsel. The attorney who files a notice of appeal is attorney-of-record until relieved by the appellate court. Ark. R. App. P.–Crim.

Cite as 2010 Ark. 232

16(a) (2009). If the court found petitioner to be indigent, then an attorney should have been appointed immediately upon relieving the retained attorney. The obvious confusion that existed in this matter could have been easily prevented had the court simply appointed Mr. Molock forthwith. Instead, retained counsel was declared relieved with one final duty—filing a notice of appeal that would have had the effect of nullifying the court’s intention that he be relieved of responsibility for the appeal. Petitioner was ultimately left to protect his right to appeal by timely filing a pro se notice of appeal.

Having been found indigent, attorney Lesley Burleson is appointed to represent petitioner. Our clerk is directed to set a briefing schedule for the appeal.

Motion treated as motion for rule on clerk and granted.

No briefs filed.