

Cite as 2010 Ark. 311

# SUPREME COURT OF ARKANSAS

No. CR10-379

DWIGHT SHANE KELLEY,  
APPELLANT,

VS.

STATE OF ARKANSAS,  
APPELLEE,

**Opinion Delivered** June 24, 2010

MOTION FOR RULE ON CLERK  
AND FOR BELATED APPEAL

MOTION FOR BELATED APPEAL  
DENIED; APPEAL DISMISSED

## PER CURIAM

Appellant Dwight Shane Kelley was convicted of one count of aggravated robbery and sentenced to twenty years in prison. The judgment and commitment order was entered on September 11, 2009. Kelley's attorney at the time, John VanWinkle, filed a motion to be relieved as counsel on September 29, 2009, but the circuit court denied his motion. VanWinkle filed a second motion to be relieved as counsel on November 2, 2009, which the circuit court granted on November 16, 2009. The circuit court subsequently appointed the Sebastian County Public Defender's Office to represent Kelley on appeal. Attorney John Joplin of the Public Defender's Office filed a notice of appeal on Kelley's behalf on January 5, 2010 and tendered the record to this court on April 12, 2010. Because the notice of appeal was untimely, our clerk's office rejected the record, and Joplin filed a motion for rule on clerk and motion for belated appeal on April 13, 2010, as well as a motion to be relieved as counsel.

In a per curiam opinion handed down on May 13, 2010, this court granted the motion for rule on clerk pursuant to *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), permitting the clerk's office to accept the record and allowing the appeal to proceed for the time being. *Kelley v. State*, 2010 Ark. 229, at 3.<sup>1</sup> In doing so, however, the court noted that we could not tell from the record whether there had been attorney error in the failure to file a timely notice of appeal, so as to warrant the granting of the motion for belated appeal:

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.

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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 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.

*Kelley*, 2010 Ark. 229, at 3–5.

Upon remand, the circuit court held a hearing on June 11, 2010. At that time, Kelley testified that he informed VanWinkle that he desired to appeal; VanWinkle, in contrast,

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<sup>1</sup> The court also granted Joplin's motion to be relieved. *Kelley*, 2010 Ark. 229, at 5.

testified that Kelley seemed satisfied with the verdict and did not inform VanWinkle that he wished to appeal. In an order entered on June 22, 2010, the circuit court found that VanWinkle has satisfied his obligations to Kelley regarding his right to appeal the verdict of the jury and that Kelley failed to advise counsel of his desire to appeal. The court noted that the testimony was in conflict, but stated that it found the testimony of VanWinkle to be more credible and persuasive.

While it is settled that a defendant has the right to appeal the judgment, a belated appeal is not proper when a defendant waives his right to appeal by failing to inform trial counsel of his intent to appeal within thirty days of the entry of the judgment. *Peters v. State*, 369 Ark. 421, 255 S.W.3d 476 (2007) (citing *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002)). The circuit court here made a factual determination that Kelley did not communicate his desire to appeal within the time allowed, and we must therefore conclude that Kelley waived his right to appeal when he failed to timely inform VanWinkle of his intent to appeal. Consequently, Kelley's motion for belated appeal is denied, and the appeal is dismissed.

CORBIN, J., not participating.