

Cite as 2009 Ark. 442

ARKANSAS SUPREME COURT

No. CR 09-447

WILLIE RAY ESTER
Petitioner

v.

STATE OF ARKANSAS
Respondent**Opinion Delivered** September 24, 2009PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
CLEVELAND COUNTY, CR 2006-49,
HON. LARRY CHANDLER, JUDGE]MOTION TREATED AS MOTION FOR
RULE ON CLERK AND DENIED.**PER CURIAM**

In 2006, petitioner Willie Ray Ester was found guilty by a jury of four counts of delivery of a controlled substance and sentenced to an aggregate term of 960 months' imprisonment. The Arkansas Court of Appeals affirmed. *Ester v. State*, CACR 07-866 (Ark. App. May 28, 2008).

Subsequently, petitioner timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied and dismissed the petition in an order entered on September 25, 2008. Petitioner timely filed a notice of appeal on October 22, 2008, from the order.

On January 22, 2009, petitioner tendered the record on appeal to this court and the clerk declined to lodge it because it was not timely tendered. Now before us is petitioner's pro se motion for belated appeal in which he seeks leave to lodge the record belatedly and proceed with an appeal of the trial court's order. A motion for belated appeal will be treated as a motion for rule on clerk if the notice of appeal is timely filed. *Mitchem v. State*, 374 Ark. 157, 386 S.W.3d 679 (2008) (per

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curiam). We thus treat the petitioner's motion as one for rule on clerk pursuant to Arkansas Supreme Court Rule 2-2(b).

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). Here, the record was required to be lodged with our clerk on or before Tuesday, January 20, 2009. Petitioner tendered the record on January 22, 2009.

Petitioner places the blame for the late tender on the circuit court clerk and the mail room employees at the Arkansas Department of Correction (“ADC”) unit where he is housed. Petitioner alleges that although he acted in an expeditious manner, the court clerk and ADC workers failed to do likewise, causing the record to be tendered late to our clerk.

All litigants, including those who proceed pro se, must bear the responsibility of conforming to the rules of procedure. Ark. R. App. P.–Crim. 2(e); *Skinner v. State*, 344 Ark. 184, 40 S.W.3d 269 (2001) (per curiam) (citing *Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (per curiam)). If a petitioner fails to tender the record in an appeal in a timely fashion, the burden is on the petitioner to make a showing of good cause for the failure to comply with proper procedure. *Skinner v. State, supra*. The fact that a petitioner is proceeding pro se does not in itself constitute good cause for the failure to conform to the prevailing procedural rules. *Id.* Furthermore, when proceeding pro se, it is not the responsibility of the circuit clerk, circuit court or anyone other than the petitioner to perfect an appeal. *Sullivan v. State*, 301 Ark. 352, 784 S.W.2d 155 (1990) (per curiam).

Here, petitioner contends that he attempted to compel the clerk to complete the record and to seek additional time to lodge the record, but he incorrectly tendered those pleadings to this court. Such motions or petitions were required to be filed in circuit court as this court had not yet obtained

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jurisdiction over the appellate case. Lodging the record on appeal deprives a trial court of jurisdiction, not the filing of the notice of appeal. *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996).

Petitioner also contends that he placed the record in the ADC mail box in sufficient time to be received by our clerk on or before January 20, 2009. This court has never adopted the “prison mailbox rule” which provides that a pro se inmate files his or her petition at the time the petition is placed in the hands of prison officials for mailing. *Hamel v. State*, 338 Ark. 769, 1 S.W.3d 434 (1999). An item tendered to a court is considered filed on the date it is received by the clerk, not on the date it may have been placed in the mail. *Id.* (citing Arkansas Rule of Criminal Procedure 37.2(c)); *but see Arkansas Game and Fish Com’n v. Eddings*, 2009 Ark. 359.

Petitioner was solely responsible for ensuring that all the requirements in Appellate Criminal Rule 4(b) were met. *Sullivan v. State, supra*. He has stated no good cause for his failure to comply with the rules of procedure or to timely lodge the record on appeal.

Motion treated as motion for rule on clerk and denied.