

Cite as 2009 Ark. 530

**SUPREME COURT OF ARKANSAS**

No. CR 09-920

THOMAS J. WATERS  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered October 29, 2009

PRO SO MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF  
FAULKER COUNTY, CR 2005-115,  
HON. DAVID L. REYNOLDS, JUDGE]MOTION TREATED AS MOTION FOR  
RULE ON CLERK AND DENIED.**PER CURIAM**

In 2007, petitioner Thomas J. Waters entered a plea of guilty to possession of a controlled substance with intent to deliver, possession of a controlled substance in a drug-free zone, and possession of drug paraphernalia. He was sentenced to an aggregate term of 150 months' imprisonment.

Petitioner, maintaining that he had entered a conditional plea of guilty, sought an appeal of the trial court's ruling on suppression of evidence. *See* Ark. R. Crim. P. 24.3; *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004). The Arkansas Court of Appeals dismissed the appeal after finding that petitioner failed to strictly comply with Rule 24.3. *Waters v. State*, 102 Ark. App. 8, 279 S.W.3d 493 (2008). The court of appeals issued its mandate on April 1, 2008.

Subsequently, petitioner timely filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition in an order entered on August 27, 2008. Prior to entry of the order, petitioner filed a pro se notice of appeal on May 21, 2008. Pursuant to Arkansas Rule of Appellate Procedure—Criminal 2(b)(2), a notice of appeal

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that is filed prior to entry of the order from which the appeal will be taken “shall be treated as filed on the day after” the order is entered. Therefore, appellant’s premature notice of appeal was deemed to be timely filed on August 28, 2008.

On August 14, 2009, petitioner filed in this court a pro se motion for belated appeal. A motion for belated appeal is treated as a motion for rule on clerk to lodge the appeal pursuant to Arkansas Supreme Court Rule 2-2(b) if the notice of appeal was timely filed in the trial court. *See Mitchem v. State*, 374 Ark. 157, 286 S.W.3d 679 (2008) (per curiam). However, this court will not permit an appeal from the denial of postconviction relief to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

Petitioner’s Rule 37.1 petition was not properly verified pursuant to Arkansas Rule of Criminal Procedure 37.1(d) because it did not include the required affidavit. Under Rule 37.1(d), the circuit clerk is not to accept for filing any petition that fails to comply with the requirements of Rule 37.1(c). *See Morris v. State*, 365 Ark. 217, 226 S.W.3d 790 (2006) (per curiam). The trial court properly declined to consider the issues in the petition. *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam); *see also Shaw v. State*, 363 Ark.156, 211 S.W.3d 506 (2005) (per curiam). Because the petition was not verified as required by Rule 37.1(d), denial of the petition was appropriate and petitioner could not prevail if the appeal were allowed to proceed.

Motion treated as motion for rule on clerk and denied.