SLIP OPINION

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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-532

CORY RAY LYNCH APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered MAY 11, 2011 APPEAL FROM THE PERRY COUNTY CIRCUIT COURT, [NO. CR-2008-43] HONORABLE RICHARD MOORE, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

On October 28, 2009, appellant Cory Ray Lynch was convicted by a Perry County jury of second-degree sexual assault and sentenced to forty years' imprisonment. He does not challenge the sufficiency of the evidence that led to his conviction; instead, appellant's sole point on appeal is that the trial court erred in denying appellant's posttrial motions filed by John Purtle, a former Arkansas Supreme Court Justice and a lawyer other than appellant's court-appointed counsel. We affirm.

Appellant was charged by Information with sexual assault in the second degree and as a habitual offender, having previously been convicted of four felonies. During the trial held on October 20, 2009, appellant was represented by Lance Sullenberger, III, a court-appointed public defender. After the evidence was presented, including the testimony of the fourteen-

SLIP OPINION

year-old victim regarding the sexual assault and Ray Byrd, a criminal investigator for the Perry County Sheriff's Office, appellant was convicted.

On October 26, 2009, attorney John Purtle filed a "Limited Entry of Appearance," stating that he was entering his appearance as defense counsel due to trial counsel's "overwhelming misconduct" in the case. The document did not assert that Mr. Purtle was acting on appellant's behalf or that appellant was aware that he was filing it, and it did not include any affidavit or other statement signed by appellant asserting that he was aware of or had authorized Mr. Purtle's attempt to intervene in the case.

The judgment and commitment order was filed on October 28, 2009, and two days later, on October 30, 2009, Mr. Purtle filed a notice stating that Mr. Sullenberger was dismissed as attorney for appellant. As with Mr. Purtle's previous pleading, the "notice" did not include any affidavit or other statement signed by appellant asserting that he was aware of or had authorized Mr. Purtle's attempt to intervene in the case. It also cited no authority showing that an independent attorney has any authority to sua sponte "dismiss" a court-appointed public defender. At no point did Mr. Sullenberger move to withdraw from the case, and Mr. Purtle never produced any proof that he was acting on behalf of appellant or had asked to be substituted as counsel for appellant.

Mr. Sullenberger filed a notice of appeal on November 20, 2009. On November 25, 2009, Mr. Purtle filed a motion to vacate the notice of appeal filed by Mr. Sullenberger, alleging that the notice was unauthorized and that appellant had dismissed Mr. Sullenberger.

SLIP OPINION

On November 30, 2009, Mr. Purtle filed a motion for new trial, which contained many witness affidavits regarding what had occurred the night that the alleged sexual abuse took place. An order was entered on December 21, 2009, denying the motion for new trial because Mr. Purtle had not been substituted as attorney of record and the motion was untimely. An objection to that order was filed by Mr. Purtle arguing that the motion was timely because the courthouse had been closed November 26 and 27, 2009, for the Thanksgiving holiday and that November 30, 2009, was the first day that it was open after thirty days from the date that the judgment was filed. An amended order was filed on January 21, 2010, finding that the motion for new trial had been filed in a timely manner; however, the motion was denied because it was not filed by appellant's attorney of record.

A notice of appeal was filed by Mr. Purtle on January 20, 2010, entitled "Authorized Notice of Appeal," and a "Second Authorized Notice of Appeal" was filed on February 1, 2010. On February 22, 2010, Mr. Purtle filed a "Second Authorized Notice of Appeal Supplement." This appeal followed.

Rule 16 (2010) of the Arkansas Rules of Appellate Procedure–Criminal states that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal unless permitted by either the trial court or the appellate court to withdraw "in the interest of justice or for other sufficient cause." The rule goes on to state that, after the notice of appeal of a judgment of conviction has been filed, the appellate

SLIP OPINION

court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. Ark. R. App. P.–Crim. 16(a).

In his sole point on appeal, appellant argues that the lower court erred in ignoring the motions for new trial and other motions filed by Mr. Purtle. He contends that there is no rule or statute that requires an order of substitution before a lawyer can file a pleading on behalf of a client. He claims that any attorney acting for the defendant alleging inadequacy of counsel should be allowed to file a motion as the court should presume that the existing attorney of record would not file a motion alleging his own incompetence nor cooperate in an order of substitution of counsel. Appellant concludes by arguing that Mr. Purtle's motion for new trial and its attached affidavits show that, because of inadequate legal representation, he was denied a fair trial.[1]

The State argues that the trial court's refusal to consider the motions filed by Mr. Purtle was correct pursuant to Rule 16(a). Here, the trial court never permitted Mr. Sullenberger to withdraw from representing appellant, and Mr. Sullenberger never sought to withdraw. Conversely, Mr. Purtle never moved to be substituted as appellant's attorney, and appellant never informed the trial court that he wanted to change attorneys.

The Arkansas Supreme Court addressed a similar situation in *Jackson v. State*, 359 Ark. 248, 195 S.W.3d 926 (2004), where it held that Rule 16 clearly stated that there was no

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[1]To the extent that appellant may be arguing the merits of his ineffective-assistance claims in this appeal, this court cannot consider the merits because they were neither reached nor ruled on by the trial court. *E.g.*, *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

SLIP OPINION

automatic right of withdrawal for trial counsel once a criminal defendant had been convicted. Instead, an attorney who wishes to withdraw from a case must obtain permission from the court to withdraw by means of a petition to withdraw containing a statement of reasons for withdrawing. *Id.* at 250, 195 S.W.3d at 927. In *Jackson*, the supreme court could not determine from the pending motion to substitute counsel whether appellant had been consulted regarding the change in counsel, whether he wanted to be represented by different counsel in general, and by the movant in particular, and what the reasons for the attempted withdrawal were as required by the rules of procedure and case law. *Id.* at 249, 195 S.W.3d at 927. The motion was denied without prejudice, giving the movant an opportunity to comply with the rules. *Id.*

Mr. Purtle's initial pleadings were filed before the notice of appeal was filed by Mr. Sullenberger, but after appellant's conviction. Mr. Purtle's pleadings were not in the form of a motion to substitute counsel, and, as in *Jackson*, they said nothing about whether appellant had been consulted about the proposed change or whether he wanted Mr. Purtle to represent him. Mr. Sullenberger was never permitted to withdraw by the trial court or, after the notice of appeal was filed, by this court. Accordingly, we hold that the trial court did not err in denying appellant's motions filed by Mr. Purtle.

Affirmed.

VAUGHT, C.J., and HOOFMAN, J., agree.