Cite as 2009 Ark. App. 833

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-704

	Opinion Delivered December 9, 2009
DANIEL SANDERS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION [CR 2006-2975]
V.	HONORABLE JOHN W. LANGSTON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

DAVID M. GLOVER, Judge

Appellant, Daniel Sanders, was tried by a jury and found guilty of the offenses of robbery and second-degree battery (felonies) and theft of property and possession of a controlled substance (misdemeanors). He was sentenced as an habitual offender to 540 months in the Arkansas Department of Correction. Appellant filed a *pro se* motion for new trial, which was denied by the trial court. Appellant did not request a hearing on that motion, and the trial court did not order one. Through attorney error, no notice of appeal was filed in this case — even though appellant expressed his desire for an appeal to his counsel. Our supreme court granted appellant's *pro se* motion for belated appeal and directed the clerk "to lodge the record so that the appeal from the judgment and commitment order may proceed." *Sanders v. State*, CR08-704 (Oct. 9, 2008) (per curiam). His trial counsel was eventually

allowed to withdraw, and substitute counsel was appointed. *Sanders v. State*, CR08-704 (Nov. 20, 2008) (per curiam). As the sole point of this appeal, counsel contends that the trial court "erred in denying appellant's motion for new trial without granting him a hearing, as required by statute, on his claim of ineffective assistance of counsel, thus denying appellant's right to direct appeal." Finding no error, we affirm.

Rule 33.3 of the Arkansas Rules of Criminal Procedure provides in pertinent part: "The trial court *shall* designate a date certain, *if a hearing is requested or found to be necessary*, to take evidence, hear, and determine all of the matters presented." (Emphasis added.) It is undisputed that appellant did not request a hearing on his motion for new trial. Thus, the only portion of the rule that is applicable to the facts presented here is the clause, "if a hearing is ... found to be necessary." The trial court obviously did not believe that a hearing was necessary because he decided the motion in a lengthy order without requiring a hearing. The question for this court is whether the trial court erred in denying the motion without a hearing.

In the first paragraph of his "Grounds for motion for new trial," appellant asserted: "Ineffective assistance of Counsel: By said public defender & paid lawyer John May, letter copy attached to motion with affidavit from paid attorney." He also asserted as grounds the discovery of new evidence, his absence from trial, a verdict prejudicing his substantial rights, a verdict decided by lot, and jury misconduct. In his accompanying motion for new trial, he set out nine numbered sections. Sections I through IV involved subpoenas for telephone records and in section IV, he asserted:

> while in possession of this evidence which would have prove[d] my innocence of the charges against me, Ms. Greta J.H. Falkner failed her duties as my lawyer by not assisting my paid lawyer which was John May after he was retained by defendant's spouse for proper legal assistance on 2/13/07. Ms. Greta Falkner Public defender, didn't turn over my case file until the actual morning of the trial 3/14/07 nor did she advise him of the content in the file such as phone records from Cingular, witnesses on my behalf outside of Anthony Washington who confess to the charges through his own free will, but was threaten by the State Attorney after he had wrote and signed a affidavit and had it notaried, stating he committed the crime I'm charged with.

In section V, he asserted that Ms. Falkner was aware of other witnesses, including Theresa McCall, "which was subpoenaed by defense but somehow ended up being a state witness," but that Falkner did not tell John May and therefore he was unprepared for trial. In section VI, he essentially asserted that the detectives lied about him having an active warrant, upon which they based their arrest. Sections VII and VIII asserted that several jurors were allowed to sit outside and see the victim, thereby prejudicing appellant, and that John May should have asked for a mistrial. Also, he stated that "I asked my said lawyer to present the phone records from my phones and my C.D.L. class A permit into evidence for the second stage of my jury, he refused, so I fired him." Further, he stated that the trial judge allowed the trial to proceed even after appellant refused to return to the courtroom. In section IX, he requested a new trial.

In denying this motion, the trial court explained in pertinent part:

> The defendant requests a new trial based on the fact that his court appointed attorney, Greta Faulkner, subpoenaed cell phone records regarding phone number 501-772-8929, including "tower or relays" information, which was not timely provided to his second attorney, John May, who had been retained to replace Ms. Faulkner. The defendant contends that these records would have proven his innocence. *This allegation is conclusory in that he does not state what these records could have*

shown which would have been exculpatory or even admissible. He is not entitled to a new trial based on this allegation.

The defendant next requests a new trial based on his contention that Ms. Faulkner did not assist Mr. May by promptly turning over the case file to his new attorney, or advising Mr. May of the contents of the file. The defendant states that Ms. Faulkner did not advise Mr. May of the phone records or any witnesses other than Anthony Washington. *The defendant states Ms. Faulkner was aware of other potential witnesses, but identifies only one by name, Theresa McCall. The defendant does not provide any indication of what Ms. McCall could have testified to, other than stating she (McCall) became a witness for the State. The record reflects that a Thelma McCall did in fact testify at trial as a witness for the State. The defendant has not demonstrated any prejudice or shown that a new trial is warranted based on this allegation.*

The defendant next requests a new trial based on the allegation that he was improperly arrested. He alleges that police officers altered evidence and lied regarding the existence of an outstanding warrant on which he was arrested. *Although the defendant's motion states he will prove the allegations with "new evidence," he does not identify what the new evidence is, or how it would warrant a new trial.*

The defendant also requests a new trial based on the allegation that the victim gave "3 to 4 different stories" regarding the incident. *This is a challenge to the credibility of a witness and is not a basis for a new trial.*

The defendant also alleges there was contact between the potential jurors and the victim and other witnesses in the trial prior to jury selection. The defendant alleges this contact unfairly prejudiced him and deprived him of a fair trial. The record reflects that the witnesses were brought into the courtroom, or were identified by name if not physically present. *The Court inquired of the jury panel if anyone knew any of the witnesses, or had had any business or social contact with any of the witnesses. There was no response from any juror indicating that any of the potential jurors knew, or had had any contact with any of the witnesses. The defendant has not demonstrated a new trial is warranted based on this conclusory allegation.*

The defendant next requests a new trial based on his assertion that when he asked his attorney to introduce the phone records and documents regarding an application for a commercial driver's license into evidence in the sentencing stage of the trial, his attorney refused and the defendant states he fired his attorney at that point, and refused to return to the courtroom. The defendant requests a new trial based on the fact that the trial continued in his absence. The record reflects that the Court, defense counsel, the prosecuting attorneys, and the Court reporter went to the lockup

> area where the defendant was being held after the verdict of guilty had been rendered by the jury in the first stage of the trial. The record reflects that the Court personally addressed the defendant and advised him that he had a right to be present in the second stage of the proceedings, and the Court inquired of the defendant if he was going to come into the courtroom. The defendant refused to respond to the Court's question, and the defendant was advised that his silence would be considered a waiver of his right to attend the proceedings. The defendant was advised by the Court that the proceedings would continue whether he attended or not. The record reflects that the defendant was advised that if he changed his mind at any time and wished to be present, he would be brought into the courtroom. A bailiff was stationed in the lockup area to notify the Court if the defendant changed his mind. The record reflects that after the jury had retired to deliberate the sentences, the Court, defense counsel, the prosecuting attorneys, and the Court reporter went to the lockup area a second time to again inquire if the defendant wished to be present in the courtroom. The defendant again refused to respond. He was again advised that if he so wished, he would be brought to the courtroom to attend the proceedings. *The defendant's absence during the proceedings was the result of his own actions and by his own choice. He is not entitled to a new trial on this ground.*

(Emphasis added.)

The trial court's order is well considered and well reasoned, addressing appellant's grounds for a new trial, many of which did not involve claims of ineffective assistance. The three primary cases relied upon by appellant in the appeal to this court, *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008), *Halfacre & Duty v. State*, 265 Ark. 378, 578 S.W.2d 237 (1979), and *Crouch v. State*, 62 Ark. App. 33, 968 S.W.2d 643 (1998), are distinguishable in that in each of those cases, a hearing was specifically requested by the defendant. Here, as noted previously, it is undisputed that no hearing was requested. A hearing under Rule 33.3 is mandatory only when requested. If a hearing is not requested, then the decision of whether to hold a hearing is a matter of discretion for the trial court. *Kozal v. State*, 264 Ark. 587, 573 S.W.2d 323 (1978). We will not reverse the actions of the trial court unless the trial court

has abused its discretion. *Id*. We find no abuse of the trial court's discretion in denying without a hearing appellant's motion for a new trial.

Affirmed.

GLADWIN and BROWN, JJ., agree.