

SUPREME COURT OF ARKANSAS

No. 12-222

R.R.

APPELLANT

Opinion Delivered April 19, 2012

V.

STATE OF ARKANSAS

APPELLEE

CONCURRING OPINION.

ROBERT L. BROWN, Associate Justice

In the instant case, it is unclear whether R.R. notified attorney Michael Lameroux that he wished to pursue an appeal before proceeding to file a pro se notice of appeal. Mr. Lameroux's motion states that R.R., who is a minor, and his parents agreed that the scope of representation would not include an appeal. Such an agreement, however, does not release an attorney from the responsibility to preserve an appeal for a client in a criminal case where the client states that he or she wishes to appeal. Ark. R. App. P.–Crim. 16(a)(i) (2010) (“Trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.”). Hence, it is doubtful that the parents of R.R. could file a notice of appeal on his behalf while he had retained counsel. See *Trowbridge v. State*, 368 Ark. 36, 38, 242 S.W.3d 613, 614 (2006) (per curiam) (“It is well settled that under no

circumstances may an attorney who has not been relieved by this court abandon an appeal.”); *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000) (per curiam) (holding that retained counsel is obligated to perfect and appeal unless the client waives his right to appeal).

This court has been inconsistent, however, in how we handle situations where a retained attorney or appointed counsel fails to file a timely notice of appeal or fails to perfect an appeal in a criminal case, absent any fault on the client’s behalf. *See, e.g., Trotter v. State*, 2011 Ark. 116 (2011) (per curiam) (granting motion for belated appeal where attorney candidly admitted fault for failing to file a timely notice of appeal and referring the attorney to the Committee on Professional Conduct); *Childs v. State*, 2010 Ark. 57 (2010) (per curiam) (granting motion for rule on clerk where attorney candidly admitted to failing to timely file the record and forwarding a copy of the opinion to the Committee on Professional Conduct); *Lawson v. State*, 367 Ark. 235, 238 S.W.3d 931 (2006) (per curiam) (finding appellant in criminal case was not at fault for his attorney’s failure to file a timely notice of appeal, granting motion for belated appeal, and referring attorney to Committee on Professional Conduct); *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004) (holding that an attorney is responsible for filing the appeal, cannot shift that responsibility to another, and referring the attorney to the Committee on professional Conduct). At times, when a notice of appeal is timely filed but the attorney of record subsequently fails to perfect the appeal, this court has treated a pro se motion for belated appeal as a motion for rule on clerk, granted the motion, and referred the attorney to the Committee on Professional Conduct. *See, e.g., Gooden v. State*, 344 Ark. 291, 40 S.W.3d 271 (2001).

When a movant seeks relief from the failure to file a notice of appeal or to perfect an appeal, and it is not plain from the motion, affidavits, and record whether there is attorney error, this court may allow the appeal to proceed without delay and remand the matter of to the trial court for findings of fact on whether attorney error occurred. *Kelley v. State*, 2010 Ark. 229 (2010) (per curiam) (citing *McDonald*, 356 Ark. at 117, 146 S.W.3d at 892). Upon receipt by this court of the findings, we will render a decision on attorney error. *Kelley*, 2010 Ark. 229, at 2 (remanding to the trial court to determine the issue of attorney error where the record was silent as to whether the defendant informed the attorney that he wished to appeal).

It is not clear from the record before us whether Mr. Lameroux's client notified him that he wished to pursue an appeal before proceeding pro se. Because the notice of appeal was timely filed, I too would grant the motion for rule on clerk, direct the supreme court clerk to lodge the record tendered, and remand the matter to the trial court to make findings of fact regarding whether R.R. notified Lameroux that he wished to appeal. Based on the trial court's findings, this court could then render a decision on the issue of attorney error.

For these reasons, I would not simply accept the late record and be done with it. I would treat the matter as a motion for rule on clerk and remand for fact-finding regarding attorney error. I further would refer the matter to the Criminal Practice Committee to determine the proper procedure to follow when an attorney has not withdrawn as counsel and the client files a timely pro se notice of appeal.