

Cite as 2018 Ark. 140
SUPREME COURT OF ARKANSAS
No. CR-17-986

DARWIN GAYE

APPELLANT

Opinion Delivered April 26, 2018

V.

STATE OF ARKANSAS

APPELLEE

PRO SE MOTION FOR EXTENSION OF
TIME TO FILE BRIEF [PULASKI
COUNTY CIRCUIT COURT, SECOND
DIVISION, NO. 60CR-06-2226]

HONORABLE CHRIS PIAZZA, JUDGE

APPEAL DISMISSED; MOTION MOOT.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Darwin Gaye pleaded guilty to rape, residential burglary, and kidnapping, for which he was sentenced to an aggregate sentence of 1080 months' imprisonment in the Arkansas Department of Correction (ADC) as reflected in a judgment-and-commitment order filed on January 24, 2007. Gaye seeks to appeal the denial of a pro se petition for permission to proceed with a belated appeal that he filed in the trial court.¹ Gaye has filed

¹ The trial court's order in this case was entered on August 18, 2017. Gaye's notice of appeal, filed on September 14, 2017, references the circuit court's order entered on "9-11-2017." When it is clear what order the appellant was appealing from given the issues raised in the notice of appeal, an inaccurate date listed for the order appealed from in the notice of appeal was merely a scrivener's error. See *Edwards v. State*, 2014 Ark. 185 (per curiam). Here, it is clear that Gaye intended to appeal the trial court's August 18, 2017 order, and Gaye's notice of appeal contains a scrivener's error with the date "9-11-2017," as there is no corresponding order with that date.

a motion for extension of time to file his brief. We need not address the merits of the motion because it is clear from the record that Gaye cannot prevail on appeal. We dismiss the appeal, and the motion for extension of time to file a brief is thereby rendered moot.

Arkansas Rule of Appellate Procedure –Criminal (2)(a) (2017) provides that a notice of appeal must be filed within thirty days of the date of entry of the order from which the appeal is taken. This court “may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit.” Ark. R. App. P.–Crim. 2(e). If a notice of appeal is not timely filed, the burden is on the petitioner to establish good cause for the failure to comply with proper procedure. *Matar v. State*, 2017 Ark. 278. Only the supreme court has authority to grant a belated appeal. See *Gray v. State*, 277 Ark. 442, 642 S.W.2d 306 (1982); *Finnie v. State*, 265 Ark. 941, 582 S.W.2d 19 (1979).

Gaye filed a motion for writ of error coram nobis in the trial court alleging that his plea had not been voluntary, and the trial court entered an order denying the motion on August 3, 2016. Gaye filed the petition for permission to file belated appeal in the trial court, claiming that his failure to file a timely notice of appeal was the fault of the Pulaski County Circuit Clerk because the clerk failed to promptly mail him a copy of the order, which he claimed was mailed on September 9, 2016.² The trial court denied Gaye’s

² Gaye cited Arkansas Rule of Appellate Procedure–Criminal 2(a)(4) (2017) in his petition. Subsection 2(a)(4) references filing a notice of appeal within thirty (30) days of

petition for permission to file belated appeal, noting that there is no statutory requirement that the circuit clerk “promptly forward” the denial order to Gaye on the denial of a petition for writ of error coram nobis.³

Here, however, the trial court was without authority to rule on Gaye’s petition for belated appeal. Motions for belated appeal should be filed in this court. See Ark. R. App. P.–Crim. 2(e); see also *Gray*, 277 Ark. 442, 642 S.W.2d 306 (addressing motions for belated appeal under Arkansas Rule of Criminal Procedure 36.9, which was superseded by Rule 2(e) of the Rules of Appellate Procedure–Criminal). Because only this court has the authority to grant a belated appeal, the trial court lacked jurisdiction to decide the motion below, and the appeal must be dismissed.⁴

Appeal dismissed; motion moot.

HART, J., concurs.

the date of entry of an order denying a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.

³ The trial court cited *Bannister v. State*, 2013 Ark. 412 (per curiam), as a basis for its authority to rule on the petition for belated appeal, finding that Gaye’s argument that the circuit clerk’s failure to perform his or her duty fell within its purview. However, the petition filed by Gaye is clearly a petition for belated appeal seeking to belatedly appeal the denial of his error coram nobis petition and explaining his failure to timely file a notice of appeal and comply with Rule 2 of the Arkansas Rules of Appellate Procedure–Criminal.

⁴ The dismissal is without prejudice.

JOSEPHINE LINKER HART, JUSTICE, concurring. I concur with the majority that this appeal should be dismissed, but I write separately to address a separate basis that would warrant dismissal of Gaye's appeal. While the majority is correct that the trial court lacked jurisdiction to rule upon Gaye's Petition for Permission to File Belated Appeal, based upon the record before us, it appears that the trial court also lacked jurisdiction to entertain Gaye's Petition for Error Coram Nobis, which was originally filed in the trial court. As a general matter and in this case,¹ a petition for a writ of error coram nobis must be filed and granted in this court before the trial court regains jurisdiction to consider any such argument by the petitioner. See, e.g., *Howard v. State*, 2012 Ark. 177, 403 S.W.3d 38.

¹ This case is somewhat atypical, since Gaye pled guilty to the charges against him. When a conviction was entered on a plea of guilty or nolo contendere or when the conviction was not appealed, the general rule is that a petition for writ of error coram nobis should be filed directly in the trial court. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001). However, this rule does not apply when the record is filed with the appellate court. See *Noble v. State*, 2015 Ark. 141, 460 S.W.3d 774; *Green v. State*, 2015 Ark. 25, 453 S.W.3d 677 (per curiam). Here, this court has had occasion to review the record in Gaye's case on multiple occasions since his guilty plea, most recently in 2009. See *Gaye v. State*, 2009 WL 277663. That said proceeding resulted in the dismissal of Gaye's appeal is immaterial. See *Noble*, 2015 Ark. 141, 5-6, 460 S.W.3d 774, 778-79.