

Cite as 2010 Ark. 233

SUPREME COURT OF ARKANSAS

No. CR 10-365

BRIAN CHARLAND

Petitioner

v.

STATE OF ARKANSAS

Respondent

Opinion Delivered May 13, 2010PRO SE MOTION FOR RULE ON
CLERK [CIRCUIT COURT OF
CARROLL COUNTY, EASTERN
DISTRICT, CR 2007-164, HON.
GERALD K. CROW, JUDGE]MOTION FOR RULE ON CLERK
GRANTED; COUNSEL APPOINTED.**PER CURIAM**

On March 18, 2009, judgment was entered reflecting that petitioner Brian Charland had been found guilty by a jury of three counts of rape. An aggregate sentence of 75 years' imprisonment was imposed. Petitioner was represented at trial by his retained attorney, Cindy Baker, who timely filed a motion for new trial. The motion was denied on April 21, 2009. Counsel filed a timely notice of appeal from the judgment on May 15, 2009. On May 20, 2009, the trial court declared petitioner indigent for the purposes of the appeal.

On September 16, 2009, Ms. Baker tendered to this court a copy of the four-volume record on appeal.¹ Our clerk correctly declined to lodge the appeal inasmuch as it was tendered 124 days after the notice of appeal was filed, and the original record was not

¹In the letter that accompanied the tendered record, Ms. Baker said that the original and three copies of the record were being tendered, but a copy of the record, which consisted of four volumes, was the only enclosure.

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received. Rule 4(b) of the Arkansas Rules of Appellate Procedure—Criminal (2009) requires that a record be tendered within ninety days of the date of the notice of appeal, unless the record contains a timely order entered in the trial court extending the time to lodge the record. There was no such order noted in the Index to the tendered record. Ms. Baker's office was promptly informed by telephone of the late tender of the record and that the original record was required to perfect the appeal. Despite numerous attempts to contact Baker by telephone and letter since September 16, 2009, the original record has not been received, and Baker has not filed a motion for rule on clerk explaining the late tender of the record.

On April 7, 2010, petitioner Charland filed the pro se motion which is now before us, seeking to have the appeal docketed, to have the tendered copy of the record accepted as the record for the appeal, and to have counsel appointed to represent him.² We find good cause to grant the pro se motion.

Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Baker filed a notice of appeal

²Although approximately seven months elapsed between the filing of the notice of appeal and the filing of the instant motion, we will entertain a motion for rule on clerk at any time because the timely filing of a notice of appeal bestows jurisdiction on this court to permit an appeal if the convicted defendant's attorney failed to perfect the appeal when obligated to do so. *See Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (per curiam); *Jones v. State*, 318 Ark. 44, 883 S.W.2d 452 (1994) (per curiam).

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and was thus obligated to represent petitioner until such time as she was permitted by the appellate court to withdraw pursuant to Arkansas Supreme Court Rule 4-3(k)(1) (2009). Baker did not act to protect petitioner's right to appeal, and thus petitioner was left without the effective appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *Holland v. State*, 358 Ark. 366, 190 S.W.3d 904 (2004) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). The direct appeal of a conviction is a matter of right, and a state cannot penalize a criminal defendant by declining to consider his or her first appeal when counsel has failed to follow mandatory appellate rules. *Id.*; *Gossett v. State*, 375 Ark. 240, 289 S.W.3d 463 (2008) (per curiam); *Rasmussen v. State*, 375 Ark. 242, 289 S.W.3d 465 (2008) (per curiam); see *Evitts v. Lucey*, 469 U.S. 387 (1985). It is well settled that under no circumstances may an attorney who has not been relieved by the court abandon an appeal. *Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (per curiam); *Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000) (per curiam); *Ragsdale v. State*, 341 Ark. 744, 19 S.W.3d 622 (2000) (per curiam); *Mallett v. State*, 330 Ark. 428, 954 S.W.2d 247 (1997) (per curiam); *James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997) (per curiam); *Jackson v. State*, 325 Ark. 27, 923 S.W.2d 280 (1996) (per curiam).

Our clerk is directed to lodge the copy of the record tendered September 16, 2009, and set a briefing schedule for the appeal. As attempts to contact Ms. Baker have been unfruitful and we take judicial notice that she is currently suspended from the practice of law for failure to complete continuing legal education requirements, attorney Sharon Kiel is

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appointed to represent petitioner on appeal.

Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two choices. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with a motion for rule on clerk or in the motion itself. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present. *Tucker v. State*, 2010 Ark. 12 (per curiam) (citing *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004)). While this court no longer requires an affidavit admitting fault before we will consider a motion for rule on clerk, an attorney should candidly admit fault where the attorney has erred and is responsible for the failure to perfect the appeal. *McDonald*, 356 Ark. at 117, 146 S.W.3d at 891. Here, it is clear without further consideration of the matter that counsel is at fault. Accordingly, a copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted; counsel appointed.