

ARKANSAS SUPREME COURT

No. CR 06-192

NOT DESIGNATED FOR PUBLICATION

TOMMY D. HALL
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered April 20, 2006

PRO SE MOTION FOR BELATED APPEAL
[CIRCUIT COURT OF MILLER COUNTY, CR
2001-319-1, HON. JOE E. GRIFFIN, JUDGE]

MOTION DENIED

PER CURIAM

In 2003, petitioner Tommy D. Hall entered a plea of guilty to possession of a controlled substance with intent to deliver and was placed on probation for a period of 120 months. In 2004, the state filed a petition to revoke probation.

Petitioner retained attorney David L. James to represent him in the revocation proceeding. After a hearing on August 24, 2005, the petition was granted, and petitioner was sentenced to 300 months' imprisonment. On September 16, 2005, the judgment reflecting the revocation of probation and the imposition of sentence was entered of record.

No appeal was taken from the September 16, 2005, order, and petitioner filed the instant *pro se* motion to proceed with a belated appeal of the judgment pursuant to Ark. R. App. P.–Crim. 2(e), which permits a belated appeal in a criminal case in some instances. Petitioner contends in the motion that he asked James to appeal but James refused.¹

It is the practice of this court when a *pro se* motion for belated appeal is filed and the record does not contain an order relieving trial counsel to request an affidavit from the trial attorney in

¹Petitioner further notes that he filed a *pro se* “timely direct of appeal,” which he appears to have intended to be in the nature of a *pro se* notice of appeal. The pleading filed September 23, 2005, was entitled “Motion to Appeal Probation Revocation Hearing.” It consisted of allegations of error in the revocation proceeding and did not conform to procedural rules governing the content of a notice of appeal.

response to the allegations in the motion. The affidavit is needed to act on a motion for belated appeal because Ark. R. App. P.–Crim. 16(a) 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. Nevertheless, a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty days allowed for filing a timely notice of appeal under Ark. R. App. P.–Civ. 4(a). *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (*per curiam*).

In his affidavit James avers that he was retained to represent petitioner in the revocation proceeding only and not for appeal. He appended to the affidavit an order of the court entered September 7, 2005, relieving him as counsel. As James was relieved in accordance with Rule 16(a) before petitioner filed the *pro se* notice of appeal, James was not obligated to represent petitioner on appeal.

Petitioner argues in his response to counsel’s affidavit that James did not afford him effective assistance of counsel in the revocation proceeding. A motion for belated appeal, however, is not a substitute for a timely petition for postconviction relief pursuant to Criminal Procedure Rule 37.1, which is the appropriate remedy in this state for raising claims of ineffective assistance of counsel. *Carrier v. State*, 278 Ark. 542, 647 S.W.2d 449 (1983) (*per curiam*).

Petitioner makes the statement that the trial court did not appoint other counsel when it relieved James, suggesting that the court was obligated to appoint an attorney for him to pursue an appeal. To the contrary, the obligation to appoint counsel did not arise because James was a retained attorney, and Ark. R. App. P.–Crim. Rule 16(b) provides that the court will appoint counsel when it relieves an *appointed* attorney. *See Wrenn v. State*, 355 Ark. 558, 141 S.W.3d 362 (2004) (*per curiam*).

Once counsel was relieved, the burden was on petitioner, if he was incapable of proceeding *pro se* on appeal and desired representation by counsel, to retain other counsel. If he had become

indigent since retaining James, it was his responsibility to file in the trial court a motion for appointment of counsel with his affidavit of indigency appended. He neither retained other counsel nor sought appointment of counsel, and he has failed to establish that there was good cause for his failure to perfect the appeal. A belated appeal will not be allowed absent a showing by the *pro se* petitioner of good cause for the failure to comply with proper procedure. *See Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (*per curiam*). Accordingly, the motion for belated appeal is denied.

Motion denied.