

ARKANSAS SUPREME COURT

No. CR 08-225

WENDELL LEE ROGERS
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered May 22, 2008

PRO SE MOTION FOR BELATED
APPEAL AND TO PROCEED *IN*
FORMA PAUPERIS [CIRCUIT
COURT OF UNION COUNTY, CR
2005-531, HON. HAMILTON H.
SINGLETON, JUDGE]

MOTION GRANTED.

PER CURIAM

In 2006, a jury found petitioner Wendell Lee Rogers guilty of aggravated robbery and the firearm enhancement conditions under Ark. Code Ann. § 16-90-120 (Repl. 2006) and sentenced him to an aggregate term of 540 months' imprisonment in the Arkansas Department of Correction. The partial record contains no notice of appeal. Petitioner brings this pro se motion for belated appeal and requests that his appeal proceed, despite his failure to file a notice of appeal in the trial court within the prescribed thirty-day period. *See* Ark. R. App. P.–Crim. 2(a). With his motion, petitioner has included a request to proceed *in forma pauperis*.

There are only two possible reasons for an appeal not to be timely. Either the party or attorney filing the appeal is at fault or there is good reason. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). If the party believes there is good reason the appeal was not perfected, the case for good reason can be made in a motion for belated appeal, and this court will decide whether good reason is present. *Id.* at 116, 146 S.W.3d 891. When it is plain from the motion, any affidavits, and record that relief is proper under the rule based upon attorney error or good reason, then relief will

be granted. *Id.* at 117, 146 S.W.3d 892.

Petitioner contends that he failed to timely file his notice of appeal because of error on the part of his attorney. Petitioner asserts that he advised his retained counsel, Mr. Don Gillaspie, that he wished to appeal the judgment on the same day that he was convicted. Petitioner claims that Mr. Gillaspie did not pursue the appeal, in spite of that request.

In keeping with our practice, Mr. Gillaspie was provided a copy of petitioner's motion and asked to provide an affidavit in response to petitioner's allegations. Mr. Gillaspie did not respond within the time allowed, and petitioner's allegation that he notified Mr. Gillaspie on the day of his trial that he wished to appeal is therefore deemed admitted. There is no indication in the record that Mr. Gillaspie was relieved by the trial court. Under Ark. R. App. P.–Crim.16(a), once an attorney represents a defendant, the attorney is obligated to continue representing the defendant until relieved by the appropriate court. *See Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002). Under no circumstances may an attorney who has not been relieved by the court abandon an appeal. *Rogers v. State*, 353 Ark. 359, 107 S.W.3d 166 (2003) (per curiam). Mr. Gillaspie was still obligated to represent petitioner and failed to timely file a notice of appeal.

When a criminal defendant requests a belated appeal, good reason is established where the defendant is not at fault and the defendant's attorney has failed to timely file a notice of appeal. *Williams v. State*, 366 Ark. 583, 237 S.W.3d 93 (2006) (per curiam). Under these circumstances, petitioner was not at fault, and petitioner's attorney erred by failing to file the notice of appeal. Petitioner has established good reason for granting the motion for belated appeal.

Petitioner has included with his motion an affidavit in support of a request to proceed *in forma pauperis*, which complies with Rule 6-6 of our Supreme Court Rules. The State has filed no response contesting his assertion that he is indigent, and we therefore grant the request. As Mr.

Gillaspie surrendered his license after petitioner's motion was filed,¹ we appoint Brett Watson to represent petitioner in this appeal. We direct our clerk to lodge the partial record. Mr. Watson is directed to file a petition for writ of certiorari within thirty days to call up the entire record, or that portion of it necessary for the appeal to proceed in this court.

Motion granted.

¹ We accepted Mr. Gillaspie's petition and surrender of law license in an opinion rendered on May 1, 2008. *In re Gillaspie*, ___ Ark. ___, ___ S.W.3d ___ (May 1, 2008) (per curiam).