

**SUPREME COURT OF ARKANSAS**

No. CR12-519

ANDREW WAYNE LOVETT  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered January 17, 2013

APPEAL FROM THE UNION  
COUNTY CIRCUIT COURT  
[NO. CR08-373-4]HONORABLE HAMILTON H.  
SINGLETON, JUDGEMOTION TO DISMISS GRANTED.**CLIFF HOOFFMAN, Associate Justice**

Appellant Andrew Wayne Lovett appeals from the denial of his petition for postconviction relief under Ark. R. Crim. P. 37.1 (2012), arguing that the circuit court erred by denying his petition without a hearing. The State has filed a motion to dismiss the appeal, alleging that Lovett's notice of appeal was untimely, and a motion seeking an extension of time in which to file its brief should the motion to dismiss be denied. We agree with the State that Lovett's notice of appeal was not timely filed and grant its motion to dismiss the appeal.

Lovett was convicted by a jury of second-degree murder and possession of a firearm by certain persons. His sentence was also enhanced due to his use of a firearm in the commission of the offense, resulting in a total sentence of 816 months' imprisonment. The Arkansas Court of Appeals affirmed his convictions in *Lovett v. State*, 2011 Ark. App. 275. Lovett filed a pro se petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 on

June 6, 2011. The State was ordered to file a response, which it did on July 20, 2011, and Circuit Judge Susan O. Hickey scheduled a hearing on the petition for August 30, 2011. Lovett subsequently retained an attorney, and after two continuances were granted, the hearing was ultimately rescheduled for December 13, 2011. Prior to the date of the hearing, Judge Hickey resigned her seat as Judge of the Thirteenth Judicial District, Fourth Division, after she accepted a federal appointment. Lovett's case was transferred to the First Division of the Thirteenth Judicial District, where Circuit Judge Hamilton H. Singleton entered an order on November 21, 2011, denying Lovett's petition for postconviction relief without a hearing.

On December 2, 2011, Lovett filed a motion for reconsideration, requesting that the circuit court set aside its order and hold a hearing on the Rule 37 petition as originally scheduled by Judge Hickey. Lovett's motion also requested that the circuit court provide a ruling on an issue that had been raised in his petition and that was not specifically mentioned in the court's order of denial. Lovett's motion was denied on February 2, 2012, and no further findings by the circuit court were contained in this order. Lovett then filed a second motion for reconsideration on February 10, 2012, again requesting a hearing on his petition and seeking a ruling on the same omitted issue referenced in his previous motion. The circuit court denied Lovett's second motion on February 28, 2012. This order again did not provide a specific ruling on the omitted issue raised by Lovett, but instead encouraged him to appeal the court's rulings rather than file further motions for reconsideration on the issues raised.

On March 28, 2012, Lovett filed a notice of appeal from the circuit court's February

28, 2012 order. This notice of appeal did not reference the November 21, 2011 order denying Lovett's Rule 37 petition, or the February 2, 2012 order denying his first motion for reconsideration. The record on appeal was lodged with this court on June 26, 2012, and Lovett's brief was received and filed on August 13, 2012. His sole argument on appeal is that the circuit court erred by denying his petition without a hearing. The State filed a motion on September 5, 2012, to dismiss the appeal, or in the alternative, a motion for an extension of brief time.

In its motion to dismiss, the State argues that Lovett's notice of appeal was untimely under Ark. R. App. P.–Crim. 2(a)(4) (2012), which requires that a notice of appeal be filed in the circuit court within thirty days of the date of entry of an order denying a petition for postconviction relief. The order denying Lovett's petition in this case was entered on November 21, 2011, but his notice of appeal was not filed until March 28, 2012. The State further argues that the two motions for reconsideration filed by Lovett did not extend the time for filing his notice of appeal, as Ark. R. Crim. P. 37.2(d) states that no petition for rehearing will be considered in any proceeding under this rule.

While Rule 37.2(d) generally prohibits motions for reconsideration or rehearing in postconviction cases, this court has nonetheless held that an appellant may file a valid, timely motion requesting that the circuit court modify its order to include a ruling on an omitted or unresolved issue that was raised in the Rule 37 petition without violating the prohibition in subsection (d). *Lewis v. State*, 2012 Ark. 355 (per curiam); *Garcia v. Arnold*, 2012 Ark. 253 (per curiam). The rationale behind this exception is due to the requirement that an appellant

must obtain a ruling on any omitted issues if they are to be reviewed on appeal. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910. Where an appellant has made such a valid and timely request for a ruling on an omitted issue, the time for filing the notice of appeal is extended in a manner similar to the extension allowed for filing a notice of appeal after a posttrial motion. *Lewis, supra*; see Ark. R. App. P.–Crim. 2(b) (2012).

To be considered as timely, an appellant's motion requesting a ruling on an omitted issue must be filed within the thirty-day time limit for filing the notice of appeal after the order denying the Rule 37.1 petition has been entered. See *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910. Also, this court has stated that the exception to Ark. R. Crim. P. 37.2(d) is narrowly construed and is limited to only those situations where the trial court is specifically asked to rule on an unresolved issue. *Lewis, supra*. Thus, in *Robbins v. State*, 2010 Ark. 312 (per curiam), this court held that the time for filing appellant's notice of appeal was not extended where a request was made by appellant to reopen the Rule 37 hearing to consider newly discovered evidence.

The State, while recognizing this exception to Rule 37.2(d), asserts that Lovett's first motion for reconsideration merely contested the circuit court's decision to render its decision without a hearing. The State argues that it was not until his second motion for reconsideration that Lovett requested a ruling on an omitted issue regarding his trial counsel's failure to object to State's Exhibit 36B, which was admitted during his sentencing hearing as proof of a prior felony conviction. The State is incorrect on this point. Lovett raised this issue in both his first and second motions for reconsideration, claiming that the circuit court

did not specifically rule on the issue of whether the exhibit erroneously included details of his prior conviction and “biased statements heard by the jury.”

The State also contends that this specific argument regarding Exhibit 36B was not raised in Lovett’s Rule 37.1 petition; thus, the circuit court did not mistakenly omit a ruling on this issue in its November 21 order. While Lovett’s arguments on this issue in his petition are not identical to those raised in his motion for reconsideration, in that he did not raise the issue in the context of his asserted defenses of justification and self-defense, he did argue in his petition that he was prejudiced by the admission of Exhibit 36B because it contained biased statements heard by the jury. Because the circuit court failed to specifically address this issue in its order denying the petition, Lovett’s first motion for reconsideration was a valid and timely request for a ruling on an omitted issue, and his time for filing the notice of appeal was thereby extended until after the circuit court ruled on this motion.

The circuit court entered an order denying Lovett’s first motion for reconsideration on February 2, 2012. Lovett then had thirty days, or until March 5, 2012, in which to file a notice of appeal from both the order denying his first motion for reconsideration and the order denying his Rule 37.1 petition. *Lewis, supra*. Instead of filing a notice of appeal within this time period, however, Lovett filed a second motion for reconsideration on February 10, again requesting that the circuit court enter a ruling on the Exhibit 36B issue. The court denied this second motion on February 28, 2012, and on March 28, 2012, Lovett filed his notice of appeal.

We agree with the State that Lovett’s March 28, 2012 notice of appeal was untimely

in this case. While Lovett argues in his response to the State's motion to dismiss that he was attempting to obtain a specific ruling from the circuit court on the omitted issue in order to preserve his argument for appeal, there is no authority to support his argument that the time for filing his notice of appeal continued to be extended while he filed multiple motions for reconsideration.<sup>1</sup> Because Lovett failed to file his notice of appeal within thirty days of the circuit court's order denying his first motion for reconsideration, we grant the State's motion to dismiss the appeal; consequently, the State's motion for an extension of time to file its reply brief is moot.

Motion to dismiss granted; motion for extension of time to file reply brief moot.

*Ernest Sanders, Jr.*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *LeaAnn J. Adams*, Ass't Att'y Gen., for appellee.

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<sup>1</sup>Instead, if Lovett was dissatisfied with the circuit court's ruling on his first motion, he had the option of filing a writ of mandamus to this court, requesting that we direct the circuit court to act on his request for a specific ruling on the omitted issue. *Strain v. State*, 2012 Ark. 184, \_\_\_ S.W.3d \_\_\_; *Hall v. Simes*, 350 Ark. 194, 85 S.W.3d 509 (2002).