

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00380-COA

UNDRA PULLIAM A/K/A ANDRE PULLIAM

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 02/01/2018
TRIAL JUDGE: HON. THOMAS J. GARDNER III
COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: JAMES H. POWELL III
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: JEFFREY A. KLINGFUSS
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF
DISPOSITION: REVERSED AND REMANDED - 08/13/2019
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE CARLTON, P.J., GREENLEE AND McCARTY, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Undra Pulliam appeals the Lee County Circuit Court’s denial of his post-conviction petition for an out-of-time appeal. Because the circuit court did not consider the relevant portions of the Uniform Post-Conviction Collateral Relief Act, we reverse and remand for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶2. In February 2015, Pulliam was indicted for the sale, transfer, or distribution of more than 2 grams but less than 10 grams of crack cocaine to a confidential informant in violation of Mississippi Code Annotated section 41-29-139 (Rev. 2013). In August 2016, the indictment was amended to charge Pulliam with being a non-violent habitual offender under

Mississippi Code Annotated section 99-19-81 (Rev. 2015).

¶3. After a jury trial, Pulliam was found guilty as charged, and the trial court sentenced him, as a habitual offender, to serve twenty years in the custody of the Mississippi Department of Corrections (MDOC).¹ The trial court entered its judgment and sentence on August 24, 2016.

¶4. On September 19, 2017, Pulliam filed a post-conviction petition for an out-of-time appeal. In the petition, Pulliam stated that he was never notified of his right to court-appointed appellate counsel, his right to appeal his conviction, or the time limits for filing an appeal. In support of his claims, Pulliam attached a letter from his trial attorney, dated September 12, 2016, to his petition.

¶5. In the letter, Pulliam's attorney informed him that he had been convicted of sale of more than 2 grams but less than 10 grams of crack cocaine. Pulliam's attorney also informed him that he was sentenced, as a habitual offender, to serve twenty years in the custody of the MDOC. His attorney concluded the letter by stating: "Your file is now closed in our office today. I wish you well." The letter indicates that Pulliam's sentencing order was enclosed. The record does not reflect that Pulliam's attorney filed a motion to withdraw from representation.²

¹ The sentencing transcript indicates that the court also ordered Pulliam to pay a \$250,000 fine. But this verbal order was not incorporated into the court's written sentencing order.

² Unless trial counsel properly obtains the trial court's leave to withdraw, counsel has an obligation to file a notice of appeal even if counsel has not agreed to represent the defendant on appeal. *Sellers v. State*, 52 So. 3d 426, 429 (¶10) (Miss. Ct. App. 2011).

¶6. On February 1, 2018, the circuit court entered an order denying Pulliam’s petition without a hearing. On appeal, Pulliam claims that had the trial court granted his petition for an out-of-time appeal, he would have been able to demonstrate that the amendment to his indictment was untimely, his right to confrontation was violated, and that he received ineffective assistance of counsel.

STANDARD OF REVIEW

¶7. When a circuit court summarily denies or dismisses a request for an out-of-time appeal, we review the decision for abuse of discretion. *Johnson v. State*, 137 So. 3d 336, 338 (¶7) (Miss. Ct. App. 2014) (citing *Parker v. State*, 921 So. 2d 397, 399 (¶¶5, 7) (Miss. Ct. App. 2006)). Questions of law are reviewed de novo. *Barnes v. State*, 151 So. 3d 220, 221 (¶5) (Miss. Ct. App. 2014).

DISCUSSION

¶8. Mississippi Rule of Appellate Procedure 4(a) requires that a notice of appeal be filed within thirty days after the entry of the judgment or order appealed from. M.R.A.P. 4(a). In its order denying Pulliam’s post-conviction petition, the trial court noted that Rule 4(g) allows the court to extend the time for filing a notice of appeal upon a timely motion. M.R.A.P. 4(g). “A motion for extension filed before the expiration of the thirty-day period in Rule 4(a) may be granted for good cause” *Hartzog v. State*, 240 So. 3d 462, 465 (¶11) (Miss. Ct. App. 2017) (citing M.R.A.P. 4(g)). Because Pulliam did not request an extension before the expiration of the thirty-day period, the trial court denied his petition for an out-of-time appeal.

¶9. We agree with the trial court that Pulliam was not entitled to relief under Rule 4(g).³ But the Uniform Post-Conviction Collateral Relief Act (UPCCRA) allows an inmate to file a motion for post-conviction relief on the basis that he is entitled to an out-of-time appeal. *See* Miss. Code Ann. § 99-39-5(1)(I) (Rev. 2015). Here, Pulliam filed a post-conviction petition.

¶10. Mississippi Code Annotated section 99-39-9 (Rev. 2015) sets forth the requirements for a petition under section 99-39-5. And Mississippi Code Annotated section 99-39-9(4) provides:

If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the petitioner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

Miss. Code Ann. § 99-39-9(4).

¶11. Our supreme court has held that where the affidavits of a petitioner and attorney were contradictory *and where the petitioner had met the pleading requirements of the UPCCRA*, the petitioner was entitled to an evidentiary hearing as to whether he had been advised of his right to appeal and whether he requested an appeal. *See Summerville v. State*, 667 So. 2d 14, 15 (Miss. 1996); *see also Wright v. State*, 577 So. 2d 387 (Miss. 1991). And this Court has held that an evidentiary hearing is also necessary when there is no documentary evidence that

³ We also note that Pulliam was not entitled to relief under Rule 4(h). This rule allows the circuit court to reopen the time for appeal if the defendant did not receive notice of the entry of judgment or order within twenty-one days of its entry and no party would be prejudiced. Pulliam does not claim that he did not receive notice of the entry of judgment. Furthermore, Pulliam's trial attorney enclosed the sentencing order in the September 12, 2016 letter.

contradicts a petitioner's claim that he asked his attorney to appeal his conviction. *Sellers v. State*, 52 So. 3d 426, 428-29 (¶9) (Miss. Ct. App. 2011).

¶12. In this case, we do not have conflicting affidavits. Rather, we have Pulliam's post-conviction petition for an out-of-time appeal, the letter that he attached to his petition, and the trial transcript. None of these documents indicate that Pulliam was advised of his right to appeal. Because no documentary evidence contradicts Pulliam's claim, he may be entitled to an evidentiary hearing.

¶13. The court below did not address whether Pulliam was entitled to an out-of-time appeal under the UPCCRA. The trial judge should determine whether Pulliam's petition meets the requirements of section 99-39-9 and states a ground for relief. *See* Miss. Code Ann. § 99-39-11 (Rev. 2015). We make no determination of these questions, however, as they should be first addressed by the trial judge. *See Ragland v. State*, 586 So. 2d 170, 173 (Miss. 1991). We therefore reverse and remand this case to the Lee County Circuit Court for proceedings consistent with this opinion.

¶14. **REVERSED AND REMANDED.**

BARNES, C.J., CARLTON AND J. WILSON, P.JJ., WESTBROOKS, McDONALD, LAWRENCE, McCARTY AND C. WILSON, JJ., CONCUR. TINDELL, J., CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, McDONALD, LAWRENCE AND McCARTY, JJ.

TINDELL, J., CONCURRING:

¶15. I agree with the majority's opinion and write separately to suggest a preventative measure for future matters of this nature. The sole issue of Pulliam's petition for post-conviction relief is his failure to be advised of his appellate rights and his time limit to file

an appeal. After a defendant is tried and found guilty by a jury, the best way to ensure that the defendant is advised of these rights is for the trial judge to do so on the record at the sentencing hearing. Such an advisement by the trial judge is mandatory in federal courts.⁴ The practice is also routine in other states.⁵ Should Mississippi adhere to such a routine, it would likely minimize post-conviction-relief petitions based upon this issue and ensure that defendants are properly advised of their rights to appeal. While this may not presently be required by our rules, such advisement may be the best practice for a trial court to incorporate into its sentencing procedures.

WESTBROOKS, McDONALD, LAWRENCE AND McCARTY, JJ., JOIN THIS OPINION.

⁴ Federal Rule of Criminal Procedure 32(j)(1)(A) states that “[i]f the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.”

⁵ See Illinois Supreme Court Rule 605(a)(1) (“In all cases in which the defendant is found guilty and sentenced to imprisonment . . . the trial court shall . . . advise the defendant of the right to appeal.”); Indiana Rule of Criminal Procedure 11(1) (“Following the sentence of a defendant after trial . . . the judge shall immediately advise the defendant . . . that he is entitled to take an appeal”); Kansas Statutes Annotated 22-3424(f) (Rev. 2015) (“After imposing a sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant’s right to appeal”); Alabama Rule of Criminal Procedure 26.9(b)(4) (“In pronouncing sentence, the court shall . . . [i]nform the defendant as to the defendant’s right to appeal”); Oklahoma Statute Annotated Title 22 § 1076 (1969) (“The court shall at the time of entering judgment and sentence notify the defendant of his right to appeal.”).