



## Jeffrey Garcia v. Hon. Gary Arnold

2012 Ark. 253 (2012) | Cited 0 times | Supreme Court of Arkansas | May 31, 2012

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PETITION FOR CERTIORARI DENIED; PETITION FOR WRIT OF MANDAMUS GRANTED.

Petitioner, Jeffrey Garcia, was convicted of two counts of rape and one count of second- degree sexual assault, for which he was sentenced to a total of 100 years' imprisonment. The Arkansas Court of Appeals affirmed. *Garcia v. State*, 2011 Ark. App. 340. Subsequently, petitioner filed a petition for post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), in which he asserted twelve claims of ineffective assistance of counsel and a claim that the trial court had failed to advise petitioner that he had a right to testify. No evidentiary hearing was held, and the petition for post-conviction relief was denied by the circuit court by written order entered September 21, 2011. Because the court's order stated only that '[each] allegation raised by the petitioner . . . is accurately and concisely refuted by the State in its Response,' petitioner subsequently filed a motion for modification on October 3, 2011, seeking specific rulings on each of his asserted claims. Appellant filed a notice of appeal from the September 21, 2011 order on October 24, 2011, but our clerk declined to lodge the record as the notice of appeal was untimely.

Now before us is petitioner's pro se petition for certiorari or, in the alternative, for writ of mandamus, asking this court to compel the circuit court to respond to petitioner's motion for modification and provide a ruling on the issues that were raised in the Rule 37.1 petition. Because a petition for writ of mandamus is the appropriate remedy in such circumstances, we grant that petition, and the petition for writ of certiorari is denied.

The State argues that we should deny the instant petitions because petitioner's notice of appeal was untimely. We disagree; appellant's notice of appeal could not have been untimely where the circuit court never ruled on appellant's motion for modification. Because the failure to obtain a ruling from the trial court precludes this court's review of an issue on appeal, see, e.g., *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006), the fact that petitioner's motion for modification had been in the circuit court for over twenty days when he filed his notice of appeal demonstrates why the State's argument must be incorrect. Indeed, we have held that the proper time for a Rule 37.1 petition to file a motion for modification of the order to obtain rulings on any omitted issues is 'before the notice of appeal [is] filed and the appeal perfected.' *Watkins v. State*, 2010 Ark. 156, \_\_\_ S.W.3d \_\_\_ (per curiam).



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Once a petitioner chooses to file a notice of appeal of an order and the appeal transcript is lodged in the appellate court, the trial court loses jurisdiction to enter any further rulings in the Rule 37.1 proceeding, even if a new order merely provided rulings on the omitted issues. See *id.* Thus, for situations where an appellant has filed a valid timely request for a ruling on an omitted issue in a Rule 37.1 proceeding, we have held that the time for filing a notice of appeal is extended in a manner similar to the extension allowed for filing a notice of appeal after a posttrial motion.<sup>1</sup> See *Lewis v. State*, 2012 Ark. 255, at 3 (per curiam); Ark. R. App. P.-Crim. 2 (b). The filing of the request here did extend the period of time for filing appellant's notice of appeal. Petitioner's notice of appeal was, accordingly, not untimely.

The State is similarly incorrect in its assertion that neither certiorari nor mandamus lies when an appeal is available as an adequate remedy to challenge the order of a circuit court. Because this court could not review on appeal any arguments upon which a petitioner did not obtain a ruling, it is unclear how an appeal from an inadequate order would equal an 'adequate remedy.' More importantly, the State's assertion overlooks that we have explicitly held that, where a petitioner requests the circuit court to provide a ruling on an omitted issue and the circuit court fails to do so, the petitioner may file a petition for writ of mandamus in this court, requesting that this court direct the circuit court to act on the motion to provide the requested ruling(s). See *Strain v. State*, 2012 Ark. 184, \_\_\_ S.W.3d \_\_\_ (per curiam).<sup>2</sup>

Arkansas Rule of Criminal Procedure 37.3(a) requires that, where a Rule 37.1 petition is denied without an evidentiary hearing, the court shall demonstrate that the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief by entering 'written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings.' Because the circuit court in the instant case failed to provide the required rulings on each of the issues raised in petitioner's Rule 37.1 petition, and because petitioner properly filed a motion for modification to obtain the missing rulings, his petition for writ of mandamus is granted. See *Strain*, 2012 Ark. 184, \_\_\_ S.W.3d \_\_\_. His petition for writ of certiorari is denied.

The circuit court is hereby directed to act on petitioner's pending motion. Petitioner's notice of appeal will be treated as having been filed the day after the circuit court enters its order. See *Lewis*, 2012 Ark. 255; Ark. R. App. P. -Crim. 2(b). The record on appeal and appellant's brief-in-chief are due in this court within the time limitations set forth in Arkansas Rule of Appellate Procedure-Criminal 5(b) and Rule 4-4 of the Rules of the Arkansas Supreme Court (2011), respectively.

Petition for writ of certiorari denied; petition for writ of mandamus granted.

1. We note that the holding in *Lewis* was narrow, limited solely to those situations where the trial court is specifically asked in a timely motion or pleading to rule on an unresolved issue raised in a Rule 37.1 petition. See *Lewis*, 2012 Ark. 255, at 3-4.



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2. While Arkansas Rule of Criminal Procedure 37.2(d) states that 'no petition for rehearing shall be considered' following the denial of a petition for post-conviction relief, we have held that a request that the trial court modify its order to include an omitted issue is not a request for a rehearing that is prohibited by this rule. See, e.g., *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

