

Court of Appeals of the State of Georgia

ATLANTA,

April 3, 2009

The Court of Appeals hereby passes the following order:

A09A1387. JAMES G. MATIATOS v. THE STATE.

On July 25, 2006, James G. Matiatos was convicted of multiple counts of sexual exploitation of children. On December 27, 2006, Matiatos filed a pro se motion for out-of-time appeal, contending that trial counsel had refused to file an appeal on his behalf. On October 20, 2008, newly appointed appellate counsel filed an “amended motion for new trial,” even though no motion for new trial had been filed and there was thus no motion to be amended. On January 9, 2009, the trial court denied the amended motion for new trial. Matiatos filed this appeal.

A motion for new trial may extend the time in which appellate relief may be sought, but only if the motion is *timely* filed. See OCGA § 5-6-38 (a). In order to be timely, such motion must be made within 30 days of the entry of the judgment. OCGA § 5-5-40 (a). An untimely motion for new trial, such as Matiatos’ motion filed more than two years after entry of the judgment of conviction, is void and does not operate to toll the time for filing a notice of appeal. See *Wright v. Rhodes*, 198 Ga. App. 269 (401 SE2d 35) (1990). Rather, an out-of-time appeal is the proper remedy when a deficiency involves the denial of the right of post-conviction relief, such as Matiatos alleges here. *Rowland v. State*, 264 Ga. 872 (452 SE2d 756) (1995).

Therefore, we **REMAND** this case to the superior court to rule on Matiatos’ motion for out-of-time appeal. We remind Matiatos, in accordance with *Rowland, supra*, that should the superior court enter an order granting the motion for out-of-time appeal, he will have 30 days from the filing date of that order to initiate appropriate post-conviction remedies, including a motion for new trial to raise his claim of ineffective assistance of trial counsel. See *Ponder v. State*, 260 Ga. 840, 841 (1) (400 SE2d 922) (1991).

If the superior court enters an order denying his request for out-of-time appeal, he will have 30 days from the filing date of that order to file a notice of appeal referencing the denial of his request for an out-of-time appeal. The Clerk of Court is directed to send a copy of this order to Matiatos as well as to his attorney, and the latter is also directed to send a copy to Matiatos.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta APR - 3 2009

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Willi Z. Matiatos , Clerk.