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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-525

Opinion Delivered January 5, 2011

APRIL MARIE ANDERSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE POPE COUNTY CIRCUIT COURT
[NO. CR-2009-321]

HONORABLE WILLIAM M. PEARSON, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellant, April Anderson, was convicted in district court of disorderly conduct, possession of a controlled substance (marijuana), and possession of drug paraphernalia (smoking devices). She appealed those convictions to the Pope County Circuit Court, where a jury convicted her of all offenses. Anderson was fined $100, assessed court costs of $150, and sentenced to fifteen days in jail on the disorderly conduct charge; on the charges of possession of drug paraphernalia and possession of a controlled substance, she was fined $500, assessed court costs of $150, and sentenced to six months in jail for each conviction. Her driver's license was also suspended for six months as a result of her conviction for possession of a controlled substance.

On appeal, Anderson argues that there was insufficient evidence to show that she constructively possessed the marijuana and the smoking devices.[1] She also argues that it was error to admit the marijuana and smoking devices at trial because no chain of custody was established for the contraband (the evidence was packaged differently at trial than when it was seized). She candidly admits that neither argument was preserved below—no motion for directed verdict was made after the State's rebuttal witness in contravention of Rule 33.1 of the Arkansas Rules of Criminal Procedure, and no objection to the chain of custody of the contraband was made at the time it was admitted into evidence during trial. Nonetheless, Anderson argues that this court should still address these arguments under the fourth exception set forth in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), because she will not be able to obtain Rule 37 relief for ineffective assistance of counsel due to the short duration of her sentence. We disagree and affirm her convictions.

Against Anderson's contention that she was denied her fundamental right to effective assistance of counsel under the Sixth Amendment, we point out that she did not raise this issue to the trial court, either. Our supreme court has held that ineffective-assistance-of-counsel claims must first be raised below in order to be considered on direct appeal. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004).

Rule 37 of the Arkansas Rules of Criminal Procedure addresses postconviction relief. Anderson argues that Rule 37.1 requires that a defendant seeking postconviction relief be incarcerated while petitioning for Rule 37 relief, and her sentence would already be served

[1]Anderson does not contest her disorderly conduct conviction on appeal.

before her Rule 37 petition would be considered, thus mooting the petition. It is true that a defendant's release from custody moots a Rule 37 petition. *See Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999). However, as the State points out, a circuit court has the power to grant a Rule 37 petition as long as the petitioner is in custody when the court rules on it, *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998), and the circuit court could conceivably rule on an ineffective-assistance claim in this case during Anderson's incarceration.

We now address Anderson's submission that this court can address her arguments on appeal under the fourth *Wicks* exception. In that case, Justice George Rose Smith wrote:

> A fourth possible exception might arguably be asserted on the basis of Uniform Evidence Rule 103(d): "Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court." Ark. Stat. Ann. 28-1001 (Repl. 1979). That statement, however, is negative, not imposing an affirmative duty, *and at most applies only to a ruling which admits or excludes evidence.* If there is any other exception to our general rule that an objection must be made in the trial court, we have not found it in our review of our case law.

270 Ark. at 787, 606 S.W.2d at 370 (emphasis added).

Our supreme court has narrowly defined the *Wicks* exceptions. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005). Furthermore, the fourth *Wicks* exception applies at most only to a ruling admitting or excluding evidence. To the extent Anderson claims that the fourth exception applies to her ineffective-assistance claim and her sufficiency claim, she is incorrect. Even if her chain-of-custody claim regarding the contraband could be construed to be a ruling admitting evidence, our supreme court held in *Buckley v. State*, 349 Ark. 53, 67, 76 S.W.3d 825, 833 (2002), that the fourth *Wicks* exception did not apply to the trial court's decision to admit evidence, stating that "[e]videntiary rulings simply must be raised below

before this court will consider them on appeal." Because none of Anderson's arguments were preserved for appeal, we affirm her convictions

Affirmed.

VAUGHT, C.J., and HART, J., agree.