

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-17-912

JAMES EDWARD GREEN, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered: February 28, 2018

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT
[NO. 22CR-10-106]

HONORABLE RANDY WRIGHT,
JUDGE

APPEAL DISMISSED

KENNETH S. HIXSON, Judge

Appellant James Edward Green, Jr., appeals after the Drew County Circuit Court entered an order denying his “Motion for Credit for Time Spent in Custody – Pursuant to an ‘Amended’ Sentencing Order,” which the circuit court treated as a petition for postconviction relief filed pursuant to Arkansas Rule of Criminal Procedure 37.1 (2017), as untimely. For reversal, he contends that the circuit court erred in finding his petition untimely. Because we agree with the circuit court, we must dismiss this appeal.

Appellant was convicted of failure to comply with registration and reporting requirements applicable to sex offenders and with residing within 2000 feet of a day-care facility as a level-4 sex offender. He was sentenced as a habitual offender to serve a total sentence of 540 months’ imprisonment in the Arkansas Department of Correction. Appellant’s judgment-and-commitment order reflects that he was awarded 348 days of jail-time credit. We affirmed his direct appeal, holding that there was sufficient evidence to

support a finding that appellant lived in a particular trailer at an address within 2000 feet of a day-care facility without reporting a change in address. *Green v. State*, 2013 Ark. App. 63. Appellant subsequently filed a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011) on March 1, 2013, asserting a number of claims stemming from the State’s introduction of the “Risk Assessment and Offender Profile Report” into evidence during the sentencing phase at trial and for ineffective assistance of counsel. His petition was ultimately denied by the circuit court without a hearing, and our supreme court affirmed. *Green v. State*, 2013 Ark. 455 (per curiam).

On September 18, 2017, appellant filed a pro se “Motion for Credit for Time Spent in Custody – Pursuant to an ‘Amended’ Sentencing Order.” In his petition, appellant argued that the circuit court failed to properly award him 348 days in jail-time credit on both of his sentences, essentially arguing that the circuit court should have awarded him a total of 696 days jail-time credit because his sentences were to be served consecutively. Appellant further argued that his remedy was a nunc pro tunc order, which “is not a modification of sentence outside [the circuit court’s] jurisdiction, but a valid act doing what should have been done.” The circuit court treated appellant’s motion as a petition for postconviction relief and denied the petition as untimely. This appeal followed.

Appellant now argues on appeal that the circuit court incorrectly treated his petition as filed pursuant to Rule 37.1 and instead argues that he was entitled to relief pursuant to Arkansas Rule of Civil Procedure 60(b), which permits correction of an error by nunc pro tunc order. We disagree.

Our supreme court has specifically held that a request for credit against a sentence for time spent in custody is a request for modification of a sentence imposed in an illegal manner. *Perez v. State*, 2015 Ark. 120 (per curiam). A claim that a sentence was illegally imposed must be raised in a petition under Arkansas Rule of Criminal Procedure 37.1. *Id.* Regardless of the label placed on a pleading by the petitioner, a pleading that mounts a collateral attack on a judgment seeking to correct a sentence imposed in an illegal manner is governed by the time provisions of Rule 37.2. *Id.* Rule 60(b), on the other hand, permits a circuit court to correct at any time clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. *Cason v. State*, 2016 Ark. 387, 502 S.W.3d 510 (per curiam). Although a nunc pro tunc order may be entered to correct a misprision of the clerk, the circuit court cannot change an earlier record with a nunc pro tunc order to correct something that should have been done but was not. *Id.* Furthermore, a motion to correct a judgment that is based on a substantive claim falls within the purview of Rule 37.1, not Rule 60. *Id.*

Here, appellant did not cite Rule 60(b) in his petition. Furthermore, contrary to his assertions now on appeal, appellant requested that he be granted additional jail-time credit in the amount of 696 days. He further argued in his petition that he was entitled to the additional credit because that was “what should have been done.” He does not argue that the circuit court’s decision to limit his jail-time credit to 348 days was the result of a clerical mistake. With regard to the circuit court’s ruling on appellant’s Rule 37.1 petition, appellant is limited to the scope and nature of the arguments that he made below that were considered by the circuit court in rendering its ruling. *Pedraza v. State*, 2016 Ark. 85, 485 S.W.3d 686

(per curiam). Therefore, we hold that appellant's request for jail-time credit was a request for modification of a sentence imposed in an illegal manner, and the circuit court correctly treated appellant's petition as filed pursuant to Rule 37.1. See *Cason, supra*; *Perez, supra*.

Now that we have determined that appellant's pro se petition is a Rule 37.1 petition, we must turn to whether appellant's Rule 37.1 petition was timely. We hold that it was not. Arkansas Rule of Criminal Procedure 37.2(c) requires that, if an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty days of the date the mandate is issued by the appellate court. Ark. R. Crim. P. 37.2(c)(ii). The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and if they are not met, the circuit court lacks jurisdiction to grant postconviction relief. *Perez, supra*. Because appellant's motion was untimely filed, the circuit court had no jurisdiction to grant the relief sought.¹ *Id.* When the lower court lacks jurisdiction, the appellate court also lacks jurisdiction. *Id.* Accordingly, this appeal must be dismissed.

Appeal dismissed.

GRUBER, C.J., and WHITEAKER, J., agree.

James Edward Green, Jr., pro se.

Leslie Rutledge, Att'y Gen., by: Brooke Jackson Gasaway, Ass't Att'y Gen., for appellee.

¹We also note that appellant's second request for postconviction relief was unauthorized. Arkansas Rule of Criminal Procedure 37.2(b) provides that all grounds for relief available to a petitioner under the Rule must be raised in his or her original petition unless the original petition was denied without prejudice to filing a second petition. *Woods v. State*, 2017 Ark. 5 (per curiam). If a first petition under the Rule is denied without leave to proceed with a second petition, a petitioner under the Rule is barred from submitting a subsequent petition. *Id.* Appellant failed to demonstrate that his first Rule 37.1 petition was denied without prejudice; therefore, a subsequent Rule 37.1 petition would be prohibited. *Id.*