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**ARKANSAS COURT OF APPEALS**

DIVISION III

No. CR-17-1010

KENNETH STUART

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 18, 2018

APPEAL FROM THE HEMPSTEAD  
COUNTY CIRCUIT COURT  
[NO. 29CR-15-73]

HONORABLE DUNCAN  
CULPEPPER, JUDGE

AFFIRMED

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**PHILLIP T. WHITEAKER, Judge**

Kenneth Stuart appeals pro se from an order of the Hempstead County Circuit Court denying his “petition to reconsider and/or modify sentence.” Because his motion was not timely filed under our rules pertaining to postconviction proceedings, and because the sentences imposed on him by the circuit court were legal, we affirm.

Stuart pleaded guilty to multiple drug-related felony counts in September 2016 and was sentenced to fifty years in the Arkansas Department of Correction (ADC) with fifteen years’ suspended imposition of sentence (SIS). His sentencing order was entered on October 24, 2016. On January 30, 2017, Stuart filed a “petition seeking the writ of error coram nobis and/or to vacate judgment.” His petition alleged numerous deficiencies in his proceedings, including ineffective assistance of counsel, prosecutorial misconduct, and abuse of the circuit

court's discretion. The State responded, contending that the petition was, in essence, a Rule 37 petition that had not been timely filed. The circuit court agreed and entered an order dismissing Stuart's petition without holding a hearing.<sup>1</sup>

Subsequently, on July 20, 2017, Stuart filed a "petition to reconsider and/or modify sentence" in the circuit court, asking the court to reconsider or modify his sentence and to grant him a hearing "to make the court aware of new and mitigating circumstances to reconsider." A handwritten copy of the same pleading was file-marked on July 24, 2017. Once again, the State responded that Stuart's motion was untimely and should be dismissed.

The circuit court agreed and entered an order denying Stuart's petition for reconsideration. First, the court found that Stuart's motion was not timely, having been filed 273 days after the entry of judgment. Second, the court determined that it lacked jurisdiction to modify Stuart's sentence, as more than ninety days had elapsed since the entry of the sentence. Finally, the court found that Stuart's sentences were legal and enforceable, and therefore Arkansas Code Annotated section 16-90-111(a) (Repl. 2016), which allows correction of an illegal sentence at any time, did not apply. Stuart filed a timely notice of appeal.

On appeal, Stuart argues that the circuit court erred in denying his petition under Arkansas Code Annotated section 16-90-111 because he was denied effective and adequate assistance of counsel. Our supreme court has held that all "grounds for postconviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was

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<sup>1</sup>Stuart filed a notice of appeal from this order, but he appears not to have pursued that appeal.

illegally imposed,” must be raised pursuant to Arkansas Rule of Criminal Procedure 37. *Bailey v. State*, 312 Ark. 180, 182, 848 S.W.2d 391, 392 (1993) (per curiam) (A petition for postconviction relief attacking a judgment, regardless of the label placed on it by the petitioner, is considered pursuant to our postconviction rule.). As such, Stuart’s pleading, which was captioned as a petition to reconsider or modify his sentence, was in actuality a collateral attack on his conviction under Rule 37.1, regardless of its label. *See Millsap v. Kelley*, 2016 Ark. 406, at 3–4 (per curiam).

Rule 37 permits collateral attacks upon a final conviction and appeal by means of a postconviction challenge to determine whether a sentence was void because it violated fundamental rights guaranteed by the constitutions or laws of Arkansas or of the United States. *Davis v. State*, 345 Ark. 161, 168, 44 S.W.3d 726, 729 (2001). Other provisions of Rule 37 govern the time in which a petitioner may assert such a collateral attack on his or her conviction. In particular, Rule 37.2(c)(i) provides that “if a conviction was obtained on a plea of guilty . . . a petition claiming relief under this rule must be filed in the appropriate circuit court within 90 days of the date of entry of judgment.”

Here, as noted above, Stuart’s sentencing order was entered on October 24, 2016. Ninety days from that date would have been January 22, 2017. As Stuart did not file his petition to reconsider or modify sentence until July 20, 2017, his posttrial collateral attack on his judgment was clearly untimely, and the circuit court properly dismissed it.

Alternatively, as suggested by the State’s response to Stuart’s petition, the petition could have been construed as seeking relief pursuant to Arkansas Code Annotated section 16–

90-111(b)(1). This statute provides that a circuit court “may reduce a sentence within ninety (90) days after the sentence is imposed[.]” Again, however, even assuming Stuart’s July 2017 petition for modification of his sentence was a proper plea for relief pursuant to this statute, it was likewise untimely and was correctly dismissed.

Stuart could have availed himself of section 16-90-111 only if his sentence had been illegal. Under section 16-90-111(a), “[a]ny circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct *an illegal sentence* at any time.” (Emphasis added.) None of Stuart’s sentences were illegal, however.

Stuart pleaded guilty to eight felony counts: two Class Y felonies, one Class A felony, four Class B felonies, and one Class C felony. Moreover, Stuart was sentenced as a “large habitual” offender under Arkansas Code Annotated section 5-4-501(b) (Repl. 2013), thus subjecting his sentences to enhancements. For his Class Y felonies, Stuart could have been sentenced to ten years to life imprisonment. Ark. Code Ann. § 5-4-501(b)(2)(A). For his Class A felony, Stuart was subject to a sentencing range of six to sixty years. Ark. Code Ann. § 5-4-501(b)(2)(B). His Class B felonies were subject to a range of five to forty years, Ark. Code Ann. § 5-4-501(b)(2)(C), and his Class C felony was subject to a range of three to thirty years. Ark. Code Ann. § 5-4-501(b)(2)(D).

Here, Stuart was sentenced to 420 months in the ADC with 180 months’ SIS, for a total of fifty years for his Class Y felonies.<sup>2</sup> He was sentenced to 420 months in the ADC plus

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<sup>2</sup>A circuit court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment. Ark. Code Ann. § 5-4-

180 months' SIS, for a total of fifty years for his Class A felony. He received sentences of 420 months in the ADC plus 60 months' SIS, totaling forty years for three of his Class B felonies, and his fourth Class B felony merited a sentence of 360 months, or thirty years. Finally, Stuart was sentenced to 360 months, or thirty years, in the ADC for his Class C felony. As can be seen from the preceding paragraph, each of these sentences was within the statutory sentencing range and thus legal. Accordingly, Stuart is entitled to no relief pursuant to Arkansas Code Annotated section 16-90-111(a).

We therefore agree with the circuit court that Stuart's postconviction petition was untimely and that Stuart's sentences were legal. The circuit court's dismissal of Stuart's petition to reconsider and/or modify his sentence is affirmed.

Affirmed.

HIXSON and MURPHY, JJ., agree.

*Kenneth Stuart*, pro se appellant.

*Leslie Rutledge*, Att'y Gen., by: *Michael A. Hylden*, Ass't Att'y Gen., for appellee.

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104(e)(3) (Repl. 2013). If a court suspends imposition of sentence, the period of suspension cannot exceed the maximum prison sentence for the offense. Ark. Code Ann. § 5-4-306(a)(1). While a circuit court can impose a suspended sentence for up to the maximum term of imprisonment allowed, when the suspended sentence is combined with a period of imprisonment, the total period of imprisonment is subject to the limitations of section 5-4-401 (or, as in this case, section 5-4-501). *Ward v. State*, 2016 Ark. 8, at 6, 479 S.W.3d 9, 14.