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# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CR-19-974

WILLIAM EDWARD GRAY  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered:** December 9, 2020

APPEAL FROM THE POPE  
COUNTY CIRCUIT COURT  
[NO. 58CR-16-429]

HONORABLE WILLIAM PEARSON,  
JUDGE

REMANDED TO SETTLE THE  
RECORD

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## **BART F. VIRDEN, Judge**

A Pope County jury convicted appellant William Edward Gray of first-degree murder in the shooting death of his ex-girlfriend, Rachel Michelle Chisum. Gray was sentenced to forty years' imprisonment with an additional fifteen-year enhancement for using a firearm during the commission of the offense. This court affirmed Gray's conviction on direct appeal. *Gray v. State*, 2018 Ark. App. 544, 564 S.W.3d 289. Gray filed petitions for rehearing and review with both this court and the Arkansas Supreme Court, respectively, which were denied. Gray then filed through counsel a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. His petition was denied without a hearing. He now appeals from the denial of that petition. We remand to settle the record with factual findings concerning the filing of an affidavit verifying the petition.

A petition filed pursuant to Ark. R. Crim. P. 37.1 shall be accompanied by the petitioner's affidavit, sworn to before a notary or other officer authorized by law to administer oaths. Ark. R. Crim. P. 37.1(c). The circuit clerk shall not accept for filing any petition that fails to comply with subsection (c) of this rule. Ark. R. Crim. P. 37.1(d). Moreover, the circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule. *Id.*

The verification requirement for a postconviction petition is of substantive importance to prevent perjury. *Jackson v. State*, 2019 Ark. App. 104, 572 S.W.3d 458. We have held that a circuit court lacks jurisdiction to consider arguments raised in an unverified Rule 37.1 petition. *Williamson v. State*, 2012 Ark. 170. When the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Winnett v. State*, 2012 Ark. 404 (per curiam).

After Gray had filed his brief on appeal, the State filed a motion to dismiss for lack of jurisdiction on the ground that Gray's petition included in the record on appeal, as well as the one filed of record on the circuit court's electronic docket, did not include the necessary verification. Gray filed a response and a motion to correct the record. We denied the State's motion to dismiss and granted Gray's motion, which was treated as a motion to settle the record. A supplemental record was then lodged, and it contains a petition marked as having been filed April 15, 2019. On a separate, unpaginated page is an affidavit that indicates it was signed by Gray on April 12, 2019.

The State contends that the supplemental record does not sufficiently demonstrate that a properly verified petition was timely filed and that the appeal should be dismissed for

lack of jurisdiction. We deny this request but not for the reasons urged by Gray in his reply brief. We specifically reject Gray’s assertion that the law-of-the-case doctrine prevents this court from reconsidering its earlier decision on a motion within the same appeal. See *Hartwick v. Hill*, 77 Ark. App. 185, 73 S.W.3d 15 (2002) (reversed on other grounds by *Villines v. Harris*, 362 Ark. 393, 208 S.W.3d 763 (2005)). Moreover, we reject Gray’s argument that the State waived what would amount to a jurisdictional defect. See *Pitts v. State*, 2014 Ark. 132. We grant the State’s alternative request that this case be remanded for factual findings by the circuit court. See, e.g., *Brown v. State*, 2015 Ark. 97. We direct the circuit court to ascertain whether Gray timely filed with the circuit clerk the affidavit required by Rule 37.1(c) when he filed his petition for postconviction relief.

The purpose in settling the record under Arkansas Rule of Appellate Procedure—Civil 6(e) is to ensure that the record “truly discloses what occurred in the trial court.” See *Tackett v. First Sav. of Ark.*, 306 Ark. 15, 23, 810 S.W.2d 927, 932 (1991) (discussing the predecessor to our current Rule 6(e)). We know what *should* have happened, but what is now required from the circuit court are factual findings as to what *did* happen so that the record conforms to the truth.

Because the issue of whether the affidavit verifying the Rule 37.1 petition was timely filed is determinative of our jurisdiction to hear the instant appeal, we remand to the circuit court for factual findings concerning the timeliness of the filing. The circuit court shall return its findings of fact, along with a transcript of any hearing on the matter, within thirty days from the date of this opinion. Furthermore, if Gray decides to pursue the appeal, he is directed to consult Arkansas Supreme Court Rule 4-2(a)(8)(A) and file a supplemental

addendum containing, at minimum, the Rule 37.1 petition, along with its required verification; the order granting Gray's motion for leave to file a Rule 37.1 petition in excess of ten pages; and the State's response to Gray's petition.

Remanded to settle the record.

KLAPPENBACH and WHITEAKER, JJ., agree.

*J. Thomas Sullivan*, for appellant.

*Leslie Rutledge*, Att'y Gen., by: *Rachel Kemp*, Ass't Att'y Gen., for appellee.