

# ARKANSAS SUPREME COURT

No. CR 08-964

DOYLE HOLT, SR.  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered February 19, 2009

PRO SE MOTION TO FILE BELATED  
REPLY BRIEF [CIRCUIT COURT OF  
JEFFERSON COUNTY, CR 2005-579,  
HON. JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTION  
MOOT.

## PER CURIAM

As reflected in a judgment entered on April 6, 2006, appellant Doyle Holt, Sr., entered negotiated guilty pleas to one count of pandering or possession of material depicting sexually explicit conduct involving a child, and seventy-nine counts of pandering or possession of material depicting sexually explicit conduct involving a child as to subsequent offenses. Appellant received an aggregate sentence of 160 years' imprisonment. On May 5, 2006, appellant filed a pro se motion to correct an illegal sentence under Arkansas Code Annotated § 16-90-111 (Supp. 2003). The trial court entered an order denying the motion on April 18, 2008, and appellant lodged an appeal of the order in this court. Appellant brings this motion in which he requests permission to file a belated reply brief. Because it is clear that appellant cannot prevail, we dismiss the appeal and the motion is moot.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Whether we were to permit appellant to file a reply

brief or not, appellant's petition and the record are inadequate to support appellant's arguments in order for those arguments to be persuasive on appeal.<sup>1</sup>

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

The trial court treated appellant's motion as a petition under Arkansas Rule of Criminal Procedure 37.1.<sup>2</sup> Appellant does not contest that aspect of the order, and raises two points on appeal. First, he contends that trial counsel was ineffective for failure to call a potential witness at a suppression hearing. Appellant's second point alleges ineffective assistance concerning appellant's understanding of the length of the sentence for the negotiated plea.

When a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to a Rule 37.1 petition are those which allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). Appellant must have shown in his petition that there was a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

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<sup>1</sup> The issues to be addressed are limited to those presented in appellant's brief-in-chief. We do not address the merits of a question where the argument is raised for the first time in a reply brief. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000).

<sup>2</sup> The trial court considered the petition as one under the rule because it found that the statute had been superseded. Where a petitioner's arguments are issues that would be cognizable in a petition under Rule 37.1, section 16-90-111 is superseded to the extent that it conflicts with the time limitations for postconviction relief under Arkansas Rule of Criminal Procedure 37.2(c). *Grant v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Feb. 7, 2008) (per curiam).

at 251, 964 S.W.2d at 397; *see also Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). Appellant's petition was clearly deficient in regard to such a showing.

The State contends that appellant's first argument on appeal concerns a claim not cognizable in a petition under Rule 37.1 where the petitioner entered a guilty plea. Appellant did not allege in his petition that he would not have entered the guilty plea but for the alleged error. Even had he done so, the petition failed to set forth the specific testimony the proposed witness would have provided to show how that testimony would have had any bearing on the outcome of the hearing or appellant's ultimate decision to enter a guilty plea.

The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). It is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Harris v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 26, 2008) (per curiam). Appellant failed to provide a summary of the testimony, offering only conclusory statements that a witness had lied concerning some of the testimony. Conclusory statements cannot be the basis of postconviction relief. *Id.*; *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

Furthermore, the record does not contain a transcript of either the suppression hearing appellant references, or the plea hearing. Appellant's second point concerning trial counsel's alleged error in advising appellant as to the length of his sentence turns upon the voluntary nature of the plea and appellant's understanding the sentence. As the State notes, appellant has included in his brief abstracts of hearings, but the transcripts are not contained within the record before this court.

This court has repeatedly stated that it is the appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error, and where the appellant fails to meet its burden, this court has no choice but to affirm the trial court. *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005). Without a transcript of the plea hearing, the record here is clearly deficient and appellant cannot demonstrate error by the trial court. Accordingly, we must affirm the denial of postconviction relief. The appeal is dismissed and appellant's motion is moot.

Appeal dismissed; motion moot.

Brown, J., not participating.