

ARKANSAS SUPREME COURT

No. 08-1071

JIMMY E. NELSON
Appellant

v.

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION
Appellee

Opinion Delivered January 22, 2009

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE BRIEF [CIRCUIT
COURT OF LINCOLN COUNTY, LCV
2008-52, HON. ROBERT H. WYATT,
JR., JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2004, appellant Jimmy E. Nelson was found guilty by a jury of possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine. He was sentenced as a habitual offender to an aggregate term of fifty years' imprisonment. We affirmed. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). Appellant subsequently filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1, which was denied. He appealed to this court. The appeal was dismissed on the ground that the Rule 37.1 petition was not timely filed. *Nelson v. State*, CR 07-418 (Ark. Sept. 27, 2007) (per curiam).

In 2008, appellant, who was incarcerated in Lincoln County, filed a pro se petition for writ of habeas corpus in the circuit court in that county. The court denied the petition, and appellant has lodged a pro se appeal here from the order.

Now before us is appellant's pro se motion for extension of time to file his brief-in-chief. After filing the motion, appellant tendered his brief. Nevertheless, as appellant could not be

successful on appeal, the appeal is dismissed and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

Appellant's habeas petition contained the following arguments: (1) that appellant was subjected to double jeopardy by being convicted of both possession of pseudoephedrine and possession of drug paraphernalia with intent to manufacture methamphetamine; (2) that the traffic stop that resulted in his arrest was pretextual and thus illegal under the Fourth Amendment.

Unless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam). The petitioner must plead either facial invalidity or lack of jurisdiction and make a "showing, by affidavit or other evidence, [of] probable cause to believe" that he is illegally detained. Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006); *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case and is not a substitute for direct appeal or a timely petition for postconviction relief. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam).

In the instant matter, appellant's claim that he was placed in double jeopardy is not well founded in that each charge required a proof of an element not common to the other.¹ Moreover,

¹Appellant was convicted of possession of drug paraphernalia with intent to manufacture methamphetamine, a violation of Arkansas Code Annotated § 5-64-403(c)(1) (Repl. 1997), and possession of pseudoephedrine, a violation of Arkansas Code Annotated § 5-64-1101 (Repl. 1997). Arkansas Code Annotated § 5-64-403(c)(1) (Repl. 1997) required proof that appellant possessed drug paraphernalia with intent to manufacture a controlled substance. Arkansas Code Annotated § 5-64-1101 required possession of more than five grams of ephedrine and did not require, as section 5-64-403(c)(1) (Repl. 1997) did, any evidence that the ephedrine was intended to manufacture a controlled substance.

such claims do not raise a question of jurisdiction for purposes of habeas corpus relief. *Johnson v. State*, 298 Ark. 479, 769 S.W.2d 3 (1989).

Appellant's second argument regarding the traffic stop did not implicate the court's jurisdiction. The legality of the stop was also a matter settled on appeal. Neither of the allegations contained in appellant's petition raised a question of a void or illegal sentence such as may be addressed in a habeas corpus proceeding.

Appeal dismissed; motion moot.

Accordingly, the two offenses required proof of an element not common to the other, and appellant was not placed in double jeopardy by being charged with the two offenses. *See Cothorn v. State*, 344 Ark. 697, 42 S.W.3d 543 (2001).