

Brian K. HOWARD v. STATE of Arkansas

CR 92-1236

847 S.W.2d 717

Supreme Court of Arkansas
Opinion delivered March 29, 1993

CRIMINAL PROCEDURE — POST-CONVICTION RELIEF — JURISDICTION. — The circuit court's determination that it did not have jurisdiction over appellant's post-conviction relief petition where appellant's chief allegation had been ruled on by the Court of Appeals during the initial appeal was reversed and remanded because the issue had not been raised at trial and was, therefore, not properly before the Court of Appeals when addressed.

Appeal from Garland Circuit Court; *Walter Wright*, Judge; reversed and remanded.

Campbell and Campbell, by: *J. Calvin Campbell*, for appellant.

Winston Bryant, Att'y Gen., by: *Catherine Templeton*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant Brian K. Howard was convicted of theft by receiving and burglary. He was sentenced as an habitual offender to serve twenty years imprisonment. A "no merit" appeal was filed with the Arkansas Court of Appeals where Howard's convictions were affirmed in an opinion not designated for publication. *Howard v. State*, CACR 91-265 (April 29, 1992). Howard then filed a petition for post-conviction relief in the trial court. It was denied, and Howard brings this appeal.

Howard's petition to the trial court alleged that his counsel was ineffective in numerous ways. His chief allegation was that his counsel had a conflict of interest since she represented all three co-defendants. The state responded to the petition by stating that the petition was longer than permitted by the rule and that the allegation was ruled upon by the Arkansas Court of Appeals in its opinion. The trial court held that "the responses" raised the issue of jurisdiction and concluded that it did not have jurisdiction. Although the allegation of conflict of interest was mentioned in its opinion, the issue was not properly before the Court of Appeals

because it had not been raised at trial. The case is remanded so that the trial court can consider Howard's Rule 37 petition on its merits. The record of the hearing should be filed in this court together with the court's findings of fact and conclusions of law.

Reversed and remanded.
