

SUPREME COURT OF ARKANSAS

No. CR 10-909

BILLY V. WILBURN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 26, 2011

PRO SE MOTION FOR
APPOINTMENT OF COUNSEL
[MILLER COUNTY CIRCUIT
COURT, CR 96-200, HON. KIRK D.
JOHNSON, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

On July 30, 1996, appellant Billy V. Wilburn pled guilty to three counts of rape and one count of first-degree sexual abuse. He was sentenced to a cumulative 480 months' incarceration in the Arkansas Department of Correction for the three rape convictions, and he received 120 months' incarceration for the sexual-abuse conviction, with all sentences to run concurrently.

On January 28, 2010, appellant filed in the trial court a pleading entitled "Petition for Reduction of Sentence pursuant to Ark. Code Ann. § 16-90-111."¹ The trial court properly treated appellant's petition as one for postconviction relief under Arkansas Rule of Criminal

¹ Appellant also filed in the trial court a motion for appointment of counsel, a motion for default judgment, and a "Motion Requesting an [sic] Ruling in the Above." These motions were rendered moot by the trial court's dismissal of the petition for postconviction relief.

Procedure 37.1 (2011), and it denied appellant's requested relief. Appellant timely filed an appeal from that order.

Now before us is appellant's motion for appointment of counsel. Because it is clear that appellant could not prevail if his appeal were allowed to proceed, we dismiss the appeal, and the motion for appointment of counsel is accordingly moot.

Arkansas Rule of Criminal Procedure 37.2(b) provides that all grounds for postconviction relief, including claims that a sentence is illegal or illegally imposed, must be raised in a petition under Rule 37.1. *See Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (per curiam). Arkansas Code Annotated section 16-90-111 (Repl. 2006), which permits the trial court to correct a sentence imposed in an illegal manner within ninety days after the sentence is imposed and to correct an illegal sentence at any time, is in conflict with the time limits imposed by Rule 37.2, which requires that a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety days of the date of entry of judgment when a defendant pleads guilty.

We have consistently held that Ark. Code Ann. § 16-90-111 has been superseded to the extent that it conflicts with the time limitations for postconviction relief under Rule 37.1. *Robertson v. State*, 2010 Ark. 300 (per curiam); *DeLoach v. State*, 2010 Ark. 79 (per curiam) (citing *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam)). A claim that a sentence was illegal must be raised in a petition filed in the trial court within ninety days of the date that the judgment was entered on a plea of guilty in accordance with Rule 37.2(c). *Robertson*, 2010 Ark. 300. Time limitations imposed in Rule 37.2(c) are jurisdictional in

nature, and, if they are not met, a trial court lacks jurisdiction to grant postconviction relief. *McLeod v. State*, 2010 Ark. 95 (per curiam); *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

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. *Meraz v. State*, 2010 Ark. 121(per curiam); *French v. State*, 2009 Ark. 443 (per curiam); *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam). While the trial court order was phrased as a denial of the relief sought based on the petition being untimely, the practical effect was a dismissal of the petition for want of jurisdiction. *See generally Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996) (per curiam) (stating that, where “appellant did not file his petition for postconviction relief with the circuit clerk within the . . . period set by Rule 37 to file such a petition, the trial court did not have authority to consider it.”). If the trial court lacks jurisdiction to consider a petition under Rule 37.1, then this court similarly lacks jurisdiction to consider an appeal of the trial court’s order. *See Smith v. State*, 2009 Ark. 85 (per curiam); *Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179; *see also Kemp v. State*, 2009 Ark. 631. Accordingly, we dismiss the appeal, and the motion is moot.

Appeal dismissed; motion moot.