Cite as 2011 Ark. 249

SUPREME COURT OF ARKANSAS

No. 11-121

ANDREW DAVIS
Appellant

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION; JENNIFER DOWNEN, RECORDS SUPERVISOR
Appellee

Opinion Delivered June 2, 2011

PRO SE MOTIONS FOR EXTENSION OF BRIEF TIME, USE OF THE RECORD, AND PHOTOCOPYING AT PUBLIC EXPENSE [LINCOLN COUNTY CIRCUIT COURT, LCV 2010-110, HON. JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

Appellant Andrew Davis pled guilty in 2006 to three counts of aggravated robbery—two in Desha County and one in Chicot County—for which he was sentenced as a habitual offender to a cumulative term of 360 months' imprisonment in the Arkansas Department of Correction ("ADC"). In 2007, appellant filed in the Desha County Circuit Court a pro se motion to correct a clerical mistake in the judgment and commitment order, contending that, under the plea agreement, appellant was to serve his sentences under a "70% rule," wherein he would be required to serve seventy percent of his sentences before being eligible for parole. He complained that the Arkansas Department of Correction had incorrectly applied Act 1805 of 2001, codified at Arkansas Code Annotated § 16-93-609 (Repl. 2006), which would require appellant to serve 100% of his sentences. The trial court

denied this motion, and we affirmed. *Davis v. State*, CR 08-285 (Ark. Oct. 2, 2008) (unpublished per curiam).

In 2010, appellant, who is incarcerated in an ADC facility in Lincoln County, filed in Lincoln County Circuit Court a petition for declaratory judgment and petition for writ of mandamus, alleging that the trial court, in accepting appellant's guilty pleas, had, "in clear and unambiguous language . . . sentenced [appellant] to 70% of 30 years." Moreover, appellant averred that "the motivating factor" in his accepting the plea offer was the assurance by the state that the seventy-percent rule in Arkansas Code Annotated § 16-93-611 (Repl. 2006) would apply. Thus, appellant requested that the Lincoln County Circuit Court issue a declaratory judgment stating that the terms of the plea deal included the seventy-percent rule and issue a writ of mandamus compelling the ADC, through the named appellees, to calculate appellant's parole eligibility based on the seventy-percent rule. Additionally, appellant requested that the court issue a declaratory judgment stating that Arkansas Code Annotated § 16-93-609, which required him to serve one hundred percent of his sentence, did not apply to appellant, and issue a corresponding writ of mandamus to force the ADC to calculate a parole-eligibility date for appellant.

Appellant's petitions for relief were denied by the Lincoln County Circuit Court in a written order dated December 14, 2010. In that order, the court found that appellant was attempting to collaterally attack his guilty plea, as evidenced by his statement that promises regarding parole eligibility were the only reason he accepted the plea offer, and such an attack

should have been brought in a timely petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011).

Appellant timely filed in this court an appeal from the December 14, 2010 order. Now before us are appellant's pro se motions for extension of brief time, use of the record on appeal, and photocopying at public expense. We need not address the merits of appellant's motions, however, because it is clear from the record that appellant could not prevail if his appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

Appellant's arguments about seeking a declaratory judgment on his "legal right" to have the ADC calculate his parole eligibility date under the seventy-percent rule belied the fact that his petition was, in fact, a collateral attack on the sentences imposed by the court in that appellant was suggesting that he would not have accepted the plea offer had he known that he would not be eligible for parole. The gravamen of appellant's entire argument was that his attorney's assertion that appellant would serve only seventy percent of his sentence was "the motivating factor" in appellant's acceptance of the plea offer.

A petition for postconviction relief that attacks a judgment or sentence is considered pursuant to our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2011),

regardless of the label placed on it by the petitioner. *See Musgrove v. State*, 2010 Ark. 458 (per curiam); *see also Jackson v. State*, 2010 Ark. 157(per curiam); *McLeod v. State*, 2010 Ark. 95 (per curiam); *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993) (per curiam). We have held that, where a defendant pleads guilty, claims that allege that the plea was not made voluntarily and intelligently or that it was entered without effective assistance of counsel are cognizable in a proceeding pursuant to Rule 37.1. *See Jamett*, 2010 Ark. 28, 358 S.W.3d 874 ; *French v. State*, 2009 Ark. 443; *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). A declaratory-relief action is not a substitute for an ordinary cause of action. *McKinnon v. Norris*, 366 Ark. 404; 231 S.W.3d 725 (2006) (per curiam) (citing *Martin v. Equitable Life Assurance Society*, 344 Ark. 177, 40 S.W.3d 733 (2001)); *see also Gran v. Hale*, 294 Ark. 563, 745 S.W.2d 129 (1988).

However, Rule 37.2(c)(i) requires that a petition for postconviction relief must be filed in the appropriate circuit court—in this case, either Desha County or Chicot County—within ninety days of the date of entry of judgment. The 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. *Watson v. State*, 2011 Ark. 202 (per curiam); *Sims v. State*, 2011 Ark. 135 (per curiam); *Trice v. State*, 2011 Ark. 74 (per curiam); *Gardner v. State*, 2010 Ark. 344 (per curiam); *McLeod*, 2010 Ark. 95.

The deadline for appellant to file a petition for postconviction relief under Rule 37.1 was October 12, 2006, and there is no provision in our rules for a belated Rule 37.1 petition.

Gardner, 2010 Ark. 344. As such, once the trial court correctly determined that appellant's petition for declaratory judgment was, in effect, a petition for postconviction relief, the court was without jurisdiction to consider the untimely and incorrectly filed petition.

Where, as here, the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Sims*, 2011 Ark. 135; *see Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005). It is clear that appellant could not prevail if his appeal were allowed to proceed, and we dismiss the appeal. Appellant's motions are moot.

Appeal dismissed; motions moot.