

Walter MASON *v.* STATE of Arkansas

CR 85-64

687 S.W.2d 849

Supreme Court of Arkansas  
Opinion delivered April 29, 1985

1. **CRIMINAL PROCEDURE — POSTCONVICTION RELIEF — AVAILABLE ONLY TO PRISONERS IN CUSTODY.** — Postconviction relief under Ark. R. Crim. P. 37 is available only to prisoners in custody. [Ark. R. Crim. P. 37.1.]
2. **CRIMINAL PROCEDURE — POSTCONVICTION RELIEF — APPELLANT NOT ENTITLED TO REMAIN FREE.** — An appellant whose conviction is affirmed on appeal is not entitled to remain free merely because he files a petition to proceed under Ark. R. Crim. P. 37.
3. **CRIMINAL PROCEDURE — POSTCONVICTION RELIEF — RELIEF PROVIDED.** — Ark. R. Crim. P. 37 provides a procedure whereby prisoners can raise claims in state courts of violation of constitutional right, jurisdictional questions, claims of excessive sentence and other claims which subject a judgment or sentence to collateral attack.

Petition to Proceed in Franklin Circuit Court Pursuant to Criminal Procedure Rule 37; petition dismissed without prejudice.

*Robert S. Blatt*, for appellant.

No response.

PER CURIAM. Petitioner Walter Mason was found guilty by a jury of first degree murder and sentenced to a term of twenty years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Mason v. State*, CA CR 84-160 (March 20, 1985). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37. He has also filed a motion seeking to remain free on his appeal bond pending disposition of the Rule 37 petition.

Rule 37.1 provides that relief under the rule is available only to prisoners in custody. See *Burkhart v. State*, 271 Ark.

859, 611 S.W.2d 500 (1981). An appellant whose conviction is affirmed on appeal is not entitled to remain free merely because he files a petition to proceed under Rule 37. Our postconviction rule was patterned after federal habeas corpus procedure for prisoners in federal custody to provide a procedure whereby state prisoners could raise claims in state courts of violation of constitutional rights, jurisdictional questions, claims of excessive sentence and other claims which subject a judgment or sentence to collateral attack. It was not intended as a continuation of the direct appeal.

Since petitioner here is not a prisoner in custody, the petition must be dismissed even though we find grounds for an evidentiary hearing on some allegations contained in it. The petition is dismissed without prejudice to filing with this Court a properly verified petition for postconviction relief when petitioner is taken into custody. *See Knappenberger v. State*, 278 Ark. 382, 647 S.W.2d 417 (1983). The motion to remain free on bond is denied.

Petition dismissed without prejudice.

HAYS, J., concurs; PURTLE, J., dissents.