

Terry Wayne PORTER v. STATE of Arkansas

CR 85-226

712 S.W.2d 304

Supreme Court of Arkansas
Opinion delivered July 14, 1986

1. CRIMINAL PROCEDURE — POST-CONVICTION RELIEF — LABEL OF PETITION IRRELEVANT. — Although appellant labeled the first petition a petition pursuant to A.R.Cr.P. Rule 26.1, the trial court was free to consider it as a petition under Rule 37 since it raised grounds within the purview of Rule 37.
2. CRIMINAL PROCEDURE — POST-CONVICTION RELIEF — ONLY ONE PETITION ALLOWED. — A petitioner is not entitled to file a second petition containing Rule 37 grounds unless his original petition was specifically denied without prejudice to filing a subsequent petition. [A.R.Cr.P. Rule 37.2(b).]

Appeal from Pulaski Circuit Court, First Division; *Floyd J. Lofton*, Judge; affirmed.

Grant & Berry, by: *Sandra T. Berry*, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant Terry Wayne Porter pleaded guilty to capital murder in January 1984. The following May he filed a petition seeking to vacate the plea pursuant to A.R.Cr.P. Rule 26.1. The petition was denied without written findings of fact. In 1985, petitioner filed a Rule 37 petition raising allegations similar to those raised in the earlier Rule 26.1 petition. The petition was denied with the docket notation "previous Rule 37's have been denied and the subsequent motion is likewise denied, because defendant is entitled to only one Rule 37 and has had more than that." Appellant brings this appeal. His sole argument is that the trial court erred in refusing to hold an evidentiary hearing on the petition. We affirm the trial court.

[1, 2] The trial court had already considered and denied one petition for post-conviction relief filed by the petitioner before he filed the petition in question. Although he labeled the first petition a petition pursuant to Rule 26.1, the trial court was free

to consider it as a petition under Rule 37 since it raised grounds within the purview of Rule 37. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984). A petitioner is not entitled to file a second petition containing Rule 37 grounds unless his original petition was specifically denied without prejudice to filing a subsequent petition. A.R.Cr.P. Rule 37.2(b); *Williams v. State*, 273 Ark. 315, 619 S.W.2d 628 (1981). The rule governing second petitions applies to all petitioners, including those convicted of capital murder. *Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983).

Affirmed.