

Cite as 2011 Ark. 310

SUPREME COURT OF ARKANSAS

No. CR 11-582

ANTHONY LAMAR
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered July 27, 2011

PRO SE MOTION FOR
TRANSCRIPT [PULASKI COUNTY
CIRCUIT COURT, CR 2000-1608,
HON. BARRY SIMS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2001, appellant Anthony Lamar was found guilty by a jury of rape and sentenced to 360 months' imprisonment. We affirmed. *Lamar v. State*, 347 Ark. 846, 68 S.W.3d 294 (2002).

On September 7, 2001, while the direct appeal was pending, the trial court entered an order noting that appellant had filed a petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37.1 (2011) before the appeal was completed. Because Rule 37.2(a) provided that no proceeding under the rule would be entertained while the direct appeal of a judgment was pending, the trial court said that it would withhold its ruling on the petition until after the appeal was completed.¹ The judgment was affirmed on March 7, 2002, and the mandate was issued on March 26, 2002.

¹Effective April 1, 2011, Rule 37.2(c) was amended to provide that a Rule 37.1 petition filed after the judgment is affirmed but before the mandate has been issued will be treated as filed on the day after the mandate was issued. *In re Arkansas Rule of Criminal Procedure 37.2; Arkansas Rule of Appellate Procedure—Criminal 3; and Administrative Order No. 8*, 2011 Ark. 58 (per curiam).

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On February 1, 2011, appellant filed a pro se petition to “re-initiate” the Rule 37.1 proceeding and for leave to file an amended petition. In an order entered February 11, 2011, the trial court denied the petition on the ground that it was not timely filed pursuant to Arkansas Rule Criminal Procedure 37.2(c). Rule 37.2(c) provides that, if a direct appeal is taken from a judgment of conviction and the judgment is affirmed on appeal, a Rule 37.1 petition must be filed within sixty days of the date the mandate was issued by the appellate court. As stated, appellant filed the petition to reinstate the Rule 37.1 proceeding many years after the mandate in his case had issued. Appellant has lodged an appeal in this court from the February 11, 2011 order, and he now seeks by pro se motion a copy at public expense of the transcript lodged on direct appeal of the judgment in his case.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motion is 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. *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

At the time appellant filed his Rule 37.1 petition while the appeal in his case was pending, the trial court did not have authority under the rule to hold the petition in abeyance

until the appeal was completed. The rule at that time provided that a petitioner must decide whether to pursue a direct appeal of the judgment of conviction, which would require him to delay proceeding under the rule, or forego a direct appeal and proceed under the rule with a petition filed within ninety days of the date that the judgment was entered. *See Washington v. State*, 2010 Ark. 345 (per curiam) (citing *Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981) (holding that a Rule 37.1 proceeding cannot be held while an appeal is proceeding)); *see also Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993). Having pursued a direct appeal, the burden was on the petitioner to determine if the mandate had been issued before proceeding with a Rule 37.1 petition. *See O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999) (per curiam). Under the rule at the time appellant was convicted, a petition under Rule 37.1 was required to be filed *after* the mandate was issued because, once a judgment had been appealed, the trial court did not regain jurisdiction over the case until the mandate was issued. *Johnson v. State*, 2010 Ark. 217 (per curiam); *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006) (per curiam); *Doyle v. State*, 319 Ark. 175, 890 S.W.2d 256 (1994) (per curiam); *see Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (per curiam); *see also Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993) (citing *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945)). Accordingly, the trial court in 2001 was obligated to dismiss the Rule 37.1 petition. If appellant desired to proceed under the rule, his petition should have been filed in the trial court within sixty days of the date the mandate was issued following affirmance of the judgment in his case. He did not do so, and the court in 2011 did not have jurisdiction “to reinitiate” the proceedings from 2001. Time limitations imposed in Rule 37.2(c) are

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jurisdictional in nature, and, if they are not met, a trial court lacks jurisdiction to consider a Rule 37.1 petition. *Sims v. State*, 2011 Ark. 135 (per curiam); *Trice v. State*, 2011 Ark. 74 (per curiam) (citing *Mills v. State*, 2010 Ark. 390 (per curiam)); *Gardner v. State*, 2010 Ark. 344 (per curiam); *Harris v. State*, 2010 Ark. 314 (per curiam); *Crawford v. State*, 2010 Ark. 313 (per curiam). Where the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Daniels v. Hobbs*, 2011 Ark. 249 (per curiam); *see also Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005) (citing *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995)).

Appeal dismissed; motion moot.