

SUPREME COURT OF ARKANSAS

No. CR 11-352

THURMAN RUSSELL
Petitioner

v.

HON. GORDON WEBB, CIRCUIT
JUDGE
Respondent

Opinion Delivered July 27, 2011

PRO SE PETITION FOR WRIT OF
MANDAMUS [BAXTER COUNTY
CIRCUIT COURT, CR 2005-58]

PETITION DENIED.

PER CURIAM

In 2006, petitioner Thurman Russell was found guilty by a jury of two counts of solicitation to commit capital murder and sentenced to an aggregate term of 720 months' imprisonment. The Arkansas Court of Appeals affirmed. *Russell v. State*, CACR 06-1425 (Ark. App. Dec. 10, 2008) (unpublished).

On February 19, 2009, petitioner filed in the trial court a timely verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). On March 18, 2009, he filed a motion to amend the Rule 37.1 petition, and, on June 12, 2009, petitioner filed an amended petition, which was not verified. On September 11, 2009, the court entered an order denying and dismissing the "amended petition for post-conviction relief." There was no specific mention in the order of the original Rule 37.1 petition filed February 19, 2009. Petitioner could have filed a motion asking the court to address any omitted issues that were contained in the original petition. We have specifically held that a request that the trial court modify its order to include an omitted issue is not a request for a

rehearing and does not violate Rule 37.2(d), which provides that decisions under the rule are final. *See Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *see also Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Instead, petitioner elected to take an appeal from the September 11, 2009 order. The appellee State filed a motion to dismiss the appeal, seeking dismissal of the appeal solely on the failure of petitioner to verify the amended petition, noting that the proper verification of the original petition did not cure the failure to verify the amended petition in which a new allegation was raised. The State's motion appeared to assume that only the amended petition was ruled on by the court in the September 11, 2009 order. On June 24, 2010, this court granted the motion to dismiss the appeal by Per Curiam Order.

On April 6, 2011, petitioner filed the pro se petition for writ of mandamus that is now before us. Petitioner contended in the petition that the Honorable Gordon Webb, Circuit Judge, had not acted on the original February 19, 2009 Rule 37.1 petition. In its response to the mandamus petition, the respondent Judge Webb argued that the mandamus petition was moot because the order of September 11, 2009, disposed of the original Rule 37.1 petition. In a tendered response to the response, petitioner asserted that only the amended petition was ruled on by the court in the September 11, 2009 order.

Because the order of September 11, 2009, referred to the "amended petition" only, it was not clear whether the court's order encompassed the original Rule 37.1 petition and the amendment or merely the amended petition filed June 12, 2009. For that reason, we asked

that the respondent submit an amended response to the mandamus petition specifying whether the September 11, 2009 order disposed of both the original Rule 37.1 petition, which was a properly verified petition, and the amended petition that was subject to dismissal for lack of verification. *Russell v. Webb*, 2011 Ark. 156 (per curiam). We now have the amended response.

In the amended response, the respondent avers that it was the court's view when the September 11, 2009 order was entered that the amended petition was intended to supersede the original petition and that the court was thus ruling on all of petitioner's grounds for relief under Rule 37.1 when it disposed of the amended petition. Respondent contends that this assumption was given credibility by the fact that petitioner chose to appeal from the order rather than simply filing a motion asking the court to rule on the issues in the original petition. Respondent asserts that he did not consider the original petition to still be an active matter on the court's docket after the appeal was taken. For that reason, respondent urges this court to hold the mandamus action moot, inasmuch as there was no matter on the court's docket that required a ruling.

Now that the respondent has clarified the circumstances that figure in this mandamus proceeding, we find that the respondent is correct that petitioner could have timely filed a motion for reconsideration and asked that the court rule on the issues in the original petition rather than opting to appeal from the order that was clearly limited to the amended petition. By electing to appeal the September 11, 2009 order, petitioner elected to forego the remedy

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that was available to him of filing a motion for reconsideration. A writ of mandamus is appropriate if three factors are established: (1) the duty to be compelled is ministerial and not discretionary; (2) the petitioner has shown a clear and certain right to the relief sought; and (3) the absence of any other adequate remedy. *Parker v. Crow*, 2010 Ark. 371, 368 S.W.3d 902. Here, petitioner had a remedy to achieve a ruling on the issues in the original Rule 37.1 petition and did not pursue it. He is not entitled to a writ of mandamus to afford him the opportunity to pursue that remedy now. Accordingly, the petition for writ of mandamus is denied.

Petition denied.