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SUPREME COURT OF ARKANSAS

No. 09-532

HAROLD DAVY CASSELL APPELLANT V. LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION APPELLEE	**Opinion Delivered** September 8, 2011 APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT, LCV-2008-123, HON. JODI RAINES DENNIS, JUDGE AFFIRMED.

PER CURIAM

In January 1976, appellant Harold Davy Cassell was charged by felony information with capital murder in connection with the death of Springdale Police Officer John Tillman Hussey, which occurred on December 21, 1975. A jury in Washington County found appellant guilty of that offense and sentenced him to life in prison without the possibility of parole. We affirmed. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981). This court subsequently denied appellant's request to pursue an untimely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (1979). *Cassell v. State*, CR 80-110 (Ark. Mar.16, 1982) (unpublished per curiam).[1]

In 2008, appellant filed a petition for writ of habeas corpus in the circuit court of the county in which he is incarcerated, pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006). The Lincoln County Circuit Court denied the petition, and

[1] Appellant also sought but was denied habeas corpus relief in federal court. *See Cassell v. Norris*, 103 F.3d 61 (8th Cir. 1996), *cert. denied*, 522 U.S. 857 (1997); *Cassell v. Lockhart*, 886 F.2d 178 (8th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990).

appellant now seeks review of that decision. As he did below, appellant maintains on appeal that he is entitled to relief (1) because the circuit court did not have jurisdiction to try and convict him based on statutes that were not in effect at the time of the offense, (2) because the conviction was void in that it was necessary for him to be charged as an accessory under the law in effect at the time of the offense, (3) because the conviction was void as it violated the *ex post facto* provisions of the United States and Arkansas Constitutions, and (4) because he was tried on a charge that was not made against him in the information.

Under our statute, a petitioner who does not allege his actual innocence[2] must plead either the facial invalidity of the judgment or the lack of jurisdiction by the circuit court and make a "showing by affidavit or other evidence, [of] probable cause to believe" that he is illegally detained. *Young v. Norris*, 365 Ark. 219, 221, 226 S.W.3d 797, 798–99 (2006) (per curiam). In habeas proceedings, the burden is on the petitioner to establish that the circuit court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Hutcherson v. State*, 2011 Ark. 77 (per curiam). A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam).

Appellant's primary assertion is that he was convicted of capital murder as an accomplice pursuant to statutes that were not in effect at the time the offense was committed and that the application of those statutes violated the prohibition against *ex post facto* laws. Relatedly, appellant argues that he should have been indicted as an accessory under the

[2] A petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780 of 2001, codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). Ark. Code Ann. § 16-112-103(a)(2).

statutes that were in effect when the murder occurred.[3] With regard to each allegation, appellant asserts that, but does not satisfactorily explain, how these claims worked to divest the circuit court of jurisdiction. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes. *Id.* Mere trial error does not deprive a court of jurisdiction. *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam). Additionally, appellant's arguments require this court to look beyond the face of the judgment to argument of the parties, jury instructions, and verdict forms. However, in determining whether the denial of a petition for writ of habeas corpus was proper, this court must look to the invalidity on the face of the judgment, not to trial error. *Tryon v. Hobbs*, 2011 Ark. 76 (per curiam); *Key v. Norris*, 2010 Ark. 61 (per curiam). A writ of habeas corpus will not be issued to correct errors or irregularities that occurred at trial. *Meny*, 340 Ark. 418, 13 S.W.3d 143 (per curiam). The remedy in such a case is by direct appeal. *Id.* If his counsel was remiss in some manner, appellant's remedy was a timely claim of ineffective assistance of counsel raised pursuant to our postconviction rule. *Anderson v. State*, 2011 Ark. 35 (per curiam). A petition for writ of habeas corpus is not a substitute for proceeding under Rule 37.1. *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam).

As his final argument, appellant contends that he was tried on charges that were not

[3] In our 1992 per curiam denying appellant leave to seek postconviction relief, we rejected appellant's contentions that he was convicted under an *ex post facto* law, that the accomplice statutes were not in effect at the time of the murder, and that he was entitled to the defense of accessory after the fact. *Cassell v. State*, CR 80-110 (Ark. Mar. 16, 1992) (unpublished per curiam).

contained in the information. Again, looking to the face of the judgment, appellant was charged with capital murder, and he was convicted of capital murder. Moreover, a writ of habeas corpus will not lie based on a nonjurisdictional challenge to the sufficiency of an information. *Davis v. State*, 2011 Ark. 88 (per curiam).

In sum, appellant has failed to demonstrate that a writ of habeas corpus should issue. Therefore, we affirm the decision of the circuit court.

Affirmed.