

**SUPREME COURT OF ARKANSAS**

No. CR 11-300

ERIC LAVELL MURRY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** September 8, 2011

PRO SE MOTION FOR EXTENSION OF BRIEF TIME [CRITTENDEN COUNTY CIRCUIT COURT, CR 2005-615, HON. RALPH E. WILSON, JR., JUDGE]

APPEAL DISMISSED; MOTION MOOT.

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**PER CURIAM**

On November 7, 2005, appellant Eric Lavell Murry pled guilty to charges of theft by receiving, being a felon in possession of a firearm, and possession with intent to deliver a controlled substance, for which he received a ten-year suspended sentence on each count and was ordered to pay \$500 in court costs. A petition for revocation of suspended sentence was filed on July 31, 2009, alleging that appellant had failed to pay court costs; had failed to notify the sheriff of appellant's current address and employment; and had been charged with burglary, theft, and first-degree criminal mischief. Following a revocation hearing, the Crittenden County Circuit Court revoked appellant's suspended imposition of sentence and sentenced him to 360 months' incarceration in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Murry v. State*, 2010 Ark. App. 782.

Appellant subsequently filed in the trial court a timely petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011) on December 20, 2010. *See Johnson v. State*, 339 Ark. 487, 5 S.W.3d 477 (1999) (per curiam) (holding that a Rule 37.1 petition regarding claims associated with the revocation of suspended sentences are timely



when filed less than sixty days after the court of appeals affirmed that revocation). He also filed motions for the recusal of both Circuit Judge Ralph E. Wilson, Jr., as well as Deputy Prosecuting Attorney Lindsey Fairley and for a change of venue. The trial court denied all of appellant's motions and denied relief on the Rule 37.1 petition, finding that the petition was over-length and that, even if it were not dismissed for failure to conform to our rules, the petition would still not warrant relief inasmuch as it raised issues that were conclusory or that had been previously decided against appellant in a different proceeding. Appellant timely filed an appeal of the trial court's order.

Now before us is appellant's motion for an extension of time in which to file his brief. Because it is clear that appellant could not prevail if his appeal were allowed to go forward, we dismiss the appeal, and appellant's pending motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. See *Sims v. State*, 2011 Ark. 135 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam); *Grissom v. State*, 2009 Ark. 559 (per curiam).

Appellant's petition for postconviction relief was twelve pages long, though he wrote at the top of page 4, "Petitioner Has A 9 Page Brief." This statement appears to suggest that only pages 4 through 12 of the petition constitute appellant's "brief," and, therefore, his petition was not over-length. Such an argument ignores the plain language of Rule 37.1(b), which states that a petition under this rule, "whether handwritten or typed, shall be clearly legible [and] shall not exceed ten pages of thirty lines per page and fifteen words per line." That rule clearly encompasses the entire petition, not merely the "brief" section that appellant



labeled. We have previously held that exhibits that are attached to a petition are counted against the ten-page limitation. *See Washington v. State*, 308 Ark. 322, 823 S.W.2d 900 (1992). It logically follows, then, that the first three pages of the petition, which include important information such as the case number and names of the parties, would count as pages of the petition.

While there is no constitutional right to a postconviction proceeding, when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. *Davis v. State*, 2010 Ark. 366 (per curiam) (citing *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam)); *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 247 S.W.3d 851 (2007). Due process does not require courts to provide an unlimited opportunity to present postconviction claims. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910; *see Maulding v. State*, 299 Ark. 570, 776 S.W.2d 339 (1989) (per curiam). This court has held that certain procedural requirements or other limitations on postconviction relief do not violate the right to due process. *See, e.g., Davis*, 2010 Ark. 366 (circuit court did not err in dismissing over-length petition); *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988) (per curiam) (requiring a petition for postconviction relief to meet certain threshold requirements is fundamentally fair). We have held that the rule limiting petitions to ten pages is an entirely reasonable restriction on petitioners seeking postconviction relief. *See Davis*, 2010 Ark. 366; *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

A petitioner under Rule 37.1 may demonstrate that he cannot adequately present his



Cite as 2011 Ark. 343

claims to the court in only ten pages and may request to file a petition longer than ten pages, but he may file the over-length petition only with the permission of the trial court. *See Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000). If an appellant does not receive permission to file an over-length petition, he is obliged to proceed in accordance with our rules. *See Davis*, 2010 Ark. 366. If he chooses not to do so, he must bear the consequences of his decision to submit an over-length amended petition. *Id.* Rule 37.1(b) clearly allows for a trial court to dismiss an over-length petition, stating, “The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.”

The circuit court did not err in dismissing a petition that failed to adhere to the page limit dictated by Rule 37.1(b).<sup>1</sup> Thus, it is clear that appellant could not prevail if his appeal were allowed to proceed. His appeal is accordingly dismissed, and the motion for extension of brief time is moot.

Appeal dismissed; motion moot.

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<sup>1</sup> We note that appellant’s original Rule 37.1 petition also does not appear to have been properly verified as required by Rule 37.1(c). That alone would have made the petition subject to dismissal. *See Croft v. State*, 2010 Ark. 83 (per curiam).