

SUPREME COURT OF ARKANSAS

No. 11-737

ISSAC RUSSELL

APPELLANT

V.

KAY HOWELL AND STATE OF
ARKANSAS

APPELLEES

Opinion Delivered October 27, 2011

APPELLANT’S PRO SE MOTION TO
DISMISS APPEAL WITHOUT
PREJUDICE [JEFFERSON COUNTY
CIRCUIT COURT, CV 2011-245, HON.
JODI RAINES DENNIS, JUDGE]

MOTION DENIED; APPEAL
DISMISSED.

PER CURIAM

Appellant Issac Russell, an inmate in the custody of the Arkansas Department of Correction in Jefferson County, filed in the Jefferson County Circuit Court a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006). He contended in the petition that he should be released from custody because his arrest was invalid. The petition was denied, and appellant lodged an appeal in this court. Now before us is appellant’s motion seeking to dismiss the appeal without prejudice because he filed the notice of appeal before the court had acted on his motion for reconsideration.

We deny the motion and dismiss the appeal because it is clear from the record that appellant could not prevail on appeal in that the grounds for the writ were not cognizable in a habeas proceeding. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Chappell v. Hobbs*, 2011 Ark. 220 (per curiam); *Anderson*



Cite as 2011 Ark. 456

v. State, 2011 Ark. 35 (per curiam); *McCullough v. State*, 2010 Ark. 394 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

Moreover, appellant twice before filed a petition for writ of habeas corpus challenging the judgment-and-commitment order in his criminal case on the grounds that the arrest in the case was somehow flawed. When the issue was first raised to this court in 2007 on appeal from an order that denied a petition for writ of habeas corpus, we noted that the claims attacking the arrest warrant and resulting felony Information were the type of factual claims that should be addressed at trial or on the record on direct appeal. *Russell v. State*, CR 07-601 (Ark. Nov. 1, 2007) (unpublished per curiam).

Appellant next lodged an appeal in this court in 2009 in which he again asserted that his arrest was invalid. While the grounds for the writ varied in the two petitions, we said on appeal that the law-of-the-case doctrine prevented an issue raised in a prior appellate proceeding from being raised in a subsequent appellate proceeding, unless the evidence materially varied between the two. We concluded that the issues raised were similar such that the law-of-the-case doctrine precluded the issues from being raised again, and we further noted that the issue was not cognizable as grounds for the writ even if raised for the first time. *Russell v. Norris*, 2009 Ark. 349 (unpublished per curiam).

Now before us is appellant's third appeal in which the habeas petition was predicated on claims of an invalid arrest. From a reading of the petition, it is evident that the law-of-the-case doctrine prevented appellant from raising the allegation again in a habeas proceeding. The



burden is on the petitioner in a petition for writ of habeas corpus to establish that the trial 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. *Abernathy v. Norris*, 2011 Ark. 335 (per curiam); *Cassell v. Norris*, 2011 Ark. 330 (per curiam); *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam) (citing *Jackson v. Norris*, 2011 Ark. 49, 378 S.W.3d 103); *Moore*, 2010 Ark. 380 (per curiam); *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a “showing by affidavit or other evidence [of] probable cause to believe” that he is illegally detained. *Young*, 365 Ark. at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant’s contentions of error in the arrest did not demonstrate that the trial court lacked jurisdiction or that the commitment entered was facially invalid. Such challenges are not grounds for relief in a habeas proceeding, and appellant was not entitled to reargue his claim of an invalid arrest in yet another habeas proceeding. *See Daniels*, 2011 Ark. 192.

Motion denied; appeal dismissed.