

Orval BURKHART *v.* STATE of Arkansas

CR 81-9

611 S.W. 2d 500

Supreme Court of Arkansas  
Opinion delivered February 9, 1981

1. CRIMINAL PROCEDURE - POSTCONVICTION RELIEF - INCUSTODY REQUIREMENT. - The scope of the remedy for proceedings under Rule 37, A. R. Crim. P., Ark. Stat. Ann., Vol. 4A (Repl. 1977) is confined to a prisoner, in custody under sentence of a circuit court, thus, a petitioner, who was not in custody at the time of filing his petition, is entitled to no relief.
2. CRIMINAL PROCEDURE - POSTCONVICTION RELIEF - NO SUBSTITUTE FOR APPEAL. - Rule 37, A. R. Crim. P., Ark. Stat. Ann., Vol. 4A (Repl. 1977) is not a substitute for appeal.

Appeal from Polk Circuit Court, *Gayle Ford*, Judge; affirmed.

*John W. Walker*, for appellant.

*Steve Clark*, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. This appeal is from a judgment denying relief under Rule 37, Ark. Rules of Crim. Proc., on the ground that the petitioner was not in custody at the time the petition was filed.

In a jury trial on April 26, 1978, appellant, Orval Burkhart, was convicted of first degree assault and his punishment was fixed at \$375.00, from which there was no appeal.

The "Scope of the Remedy" for proceedings under Rule 37 is confined to "a prisoner, in custody under sentence of a circuit court . . ." The petitioner in this case was not in custody at the time of filing his petition and, therefore, was entitled to no relief. See *Hartsell v. State*, 254 Ark. 687, 495 S.W. 2d 523 (1973).

Rule 37 is not a substitute for appeal. *Clark v. State*, 255 Ark. 13, 498 S.W. 2d 657 (1973).

Affirmed.

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