Cite as 2012 Ark. 98

SUPREME COURT OF ARKANSAS

No. CR-11-1059

Opinion Delivered March 1, 2012

MICHAEL RAY PERRY
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

APPELLANT'S PRO SE MOTION FOR APPOINTMENT OF COUNSEL [HEMPSTEAD COUNTY CIRCUIT COURT, NO. CR 2011-60, HON. DUNCAN CULPEPPER, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2011, appellant Michael Ray Perry entered a plea of guilty to aggravated residential burglary, aggravated robbery, two counts of battery in the second degree, aggravated assault, misdemeanor theft of property, and misdemeanor interference with emergency communication. An aggregate sentence of 432 months' imprisonment was imposed.

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The trial court denied the petition, and appellant has lodged an appeal in this court from the order.

Appellant now seeks by pro se motion to have counsel appointed to represent him on appeal. As it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Riddell v. State*, 2012 Ark. 11 (per

curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Tucker v. State*, 2011 Ark. 543 (per curiam); *Jones v. State*, 2011 Ark. 523 (per curiam); *Eaton v. State*, 2011 Ark. 432 (per curiam); *Grant v. State*, 2011 Ark. 309 (per curiam); *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

The allegations raised in the petition filed in the trial court were entirely conclusory in nature; that is, the claims were without factual substantiation to support them, and, thus, appellant did not establish that he was prejudiced. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Jones*, 2011 Ark. 523; *Payton v. State*, 2011 Ark. 217 (per curiam). While a fundamental claim that would render the judgment in a criminal case void can be considered under Rule 37.1 after a plea of guilty is entered, even fundamental claims must be supported by facts to demonstrate that a fundamental right was denied to a particular petitioner under the facts of his or her case. *See Holt v State*, 281 Ark. 210, 662 S.W.2d 822 (1984). Petitioner stated in his petition that it is a violation of the Double Jeopardy Clause and the Fifth, Eighth, and Fourteenth Amendments for a defendant to be convicted of an offense that is a lesser included offense of another offense of which he has been convicted. While appellant made the statements concerning constitutional provisions, he did not explain how those provisions applied to the facts of his case. A court is not required to research and develop arguments for the petitioner in a Rule 37.1 proceeding. *Jones*, 2011 Ark. 523; *Payton*, 2011 Ark. 217. The

mere statement that there are certain requirements that must be met under the Constitution in a criminal proceeding, without an effort to demonstrate that there were violations of those provisions in the facts of the petitioner's case, does not warrant relief.

Appellant contended in his petition that his attorney was ineffective in that counsel failed to move to sever the charges on the ground that all the charges arose out of the same conduct. He did not, however, offer any factual development of the claim to show that there was cause to sever the charges. Moreover, when a judgment is entered on a plea of guilty, with the exception of certain issues, cognizable claims are limited to those asserting that the petitioner's plea was not entered intelligently and voluntarily upon advice of competent counsel. *Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (per curiam). Here, appellant did not allege that he would not have entered his plea except for some error of counsel, and he did not contend that the plea was not intelligently and voluntarily entered.

Finally, appellant also asserted that the evidence against him was insufficient to sustain the judgment. Even if appellant had not entered a plea of guilty, such claims are not cognizable in a Rule 37.1 proceeding because such challenges are a direct attack on the judgment. *Jones*, 2011 Ark. 523; *Delamar v. State*, 2011 Ark. 85 (per curiam).

Appeal dismissed; motion moot.