

SUPREME COURT OF ARKANSAS

No. CR11-621

KENNETH JOE BARROW
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 10, 2012

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT,
[NO. CR07-986]

HONORABLE DAVID LEE
REYNOLDS, JUDGE

REVERSED AND REMANDED.

JIM HANNAH, Chief Justice

Appellant, Kenneth Barrow, appeals from the circuit court’s order denying his petition for postconviction relief. On appeal, Barrow contends that the circuit court erred in dismissing the petition for lack of jurisdiction and that the circuit court’s order denying postconviction relief failed to comply with the requirements of Arkansas Rule of Criminal 37.3 (2011). In addition, Barrow argues that trial counsel was ineffective for failure to preserve a speedy-trial argument and for failure to investigate. We reverse and remand.

The Faulkner County Circuit Court found Barrow guilty of sexual indecency with a child, second-degree sexual assault, rape, and first-degree terroristic threatening and sentenced him to an aggregate term of 360 months in the Arkansas Department of Correction. Barrow appealed his convictions and sentence, and the Arkansas Court of Appeals affirmed. *See Barrow v. State*, 2010 Ark. App. 589, ___ S.W.3d ___.

On December 2, 2010, Barrow filed a timely, verified petition for postconviction

relief, and on December 6, 2010, he filed an amended petition. At a hearing on December 8, 2010, the State asserted that the amended petition should be dismissed because it failed to comply with the requirements of Rule 37.1(b).¹ Specifically, the State contended that Barrow's amended petition did not comply with the margin requirements, exceeded the ten-page limit, and failed to state in concise, nonrepetitive, factually specific language the grounds upon which it was based. Finding that the amended petition did not comply with the requirements of Rule 37.1(b), the circuit court dismissed Barrow's amended petition without prejudice and gave Barrow ten days to file a compliant petition. On December 9, 2010, Barrow filed a second amended petition.

On January 18, 2011, the circuit court held a hearing on the second amended petition. The State moved to dismiss, contending that the circuit court lacked jurisdiction to give Barrow ten days to file a compliant petition. The circuit court took the motion under advisement and then proceeded to hear the allegations contained in Barrow's petition. At the conclusion of the hearing, the circuit court found that Barrow had failed to meet his burden of proof in his claims of ineffective assistance.

In an order entered on January 28, 2011, the circuit court denied with prejudice

¹Rule 37.1(b) provides:

The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches. The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.

Barrow's petition for postconviction relief:

The representation by defense counsel is presumed to be effective. The burden is on the petitioner to show that trial counsel made an error or errors so serious that counsel was not functioning as the "counsel" guaranteed by the Constitution. *McMann v. Richardson*, 397 U.S. 333 (1970). Petitioner must demonstrate that counsel's deficient performance actually prejudiced the defense, which requires a showing that counsel's error was so serious as to deprive the petitioner of a fair trial. The burden is on the petitioner to make both showings; otherwise, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Fink v. Lockhart*, 823 F.2d 204 (8th Cir. 1987).

Testimony and proof presented by Petitioner failed to meet that burden.

Further, this court lacks jurisdiction to hear the matter due to the original motion filed [by] the Defendant. The court found that the pleadings did not comply with the strict formatting, content and page requirements of Ark. R. of Cr. P. 37.1; and, the amended motion was not filed until well after the 60 day time period provided under the rule.

Barrow filed a "Response and Objections to Order Entered and Filed on January 28, 2011," asserting that the order entered by the circuit court was incorrect and contrary to the court's bench rulings. On February 25, 2011, the circuit court entered an order overruling Barrow's objections. Barrow now brings this appeal.

Barrow contends that the circuit court erred when it dismissed his second amended petition for lack of jurisdiction. He avers that he timely filed his original petition on December 2, 2010, that the circuit court had jurisdiction to grant ten days' leave to amend the petition, and that the amended petition filed on December 9, 2010, was within the ten-day period allowed by the circuit court.

Pursuant to Arkansas Rule of Criminal Procedure 37.2(c)(ii), if an appeal of the judgment of conviction has been taken, a verified petition for postconviction relief must be

filed in the circuit court within sixty days of the date the mandate was issued by the circuit court. The time limitations imposed in Rule 37.2 are jurisdictional in nature, and if those requirements are not met, a circuit court lacks jurisdiction to grant postconviction relief. *E.g.*, *Williamson v. State*, 2012 Ark. 170 (per curiam). In the instant case, the court of appeals issued its mandate on October 5, 2010. The last day for Barrow to file a timely petition under Rule 37.2(c) was December 6, 2010. Barrow met the time requirement when he filed his verified petition on December 2, 2010.

Before the court acts upon a petition filed under Rule 37.2, the petition may be amended with leave of court. Ark. R. Crim. P. 37.2(e). At a hearing on December 8, 2010, the circuit court gave Barrow ten days to file an amended petition; Barrow filed an amended petition on December 9, 2010. Under the facts of this case, the circuit court had jurisdiction to hear Barrow's amended petition.

We are not persuaded by the State's contention that, pursuant to our holding in *Worthem v. State*, 347 Ark. 809, 66 S.W.3d 665 (2002) (per curiam), the circuit court correctly determined that it lacked jurisdiction to consider Barrow's second amended petition because it was filed after the sixty-day time limitation provided under Rule 37. In *Worthem*, the appellant filed a timely, *unverified* petition for postconviction relief, and the State moved for dismissal, asserting that it was not verified pursuant to Arkansas Rule of Criminal Procedure 37.1(d). The appellant then filed a second, verified petition, and the State again moved for dismissal of the petition on the ground that the second, verified petition was not filed within sixty days of the entry of judgment as required by Arkansas Rule of Criminal Procedure

37.2(c), and therefore, the circuit court did not possess jurisdiction to grant the requested relief. The circuit court dismissed the petition, finding that the first petition lacked verification and that the second petition was untimely filed. We affirmed, stating that

appellant's first petition lacked verification, and therefore, was invalid. Appellant's second petition was not filed within the sixty-day time limit of Rule 37.2(c). As such, the circuit court lacked jurisdiction to grant the relief requested. Accordingly, the circuit court did not err in dismissing appellant's Rule 37 petitions.

Worthem, 347 Ark. at 810, 66 S.W.3d at 666.

In *Worthem*, the second petition, filed after the deadline, was not sufficient to independently—that is, without reference back to an earlier timely petition—confer jurisdiction on the circuit court to consider the petitioner's claims for relief. *See Williamson*, 2012 Ark. 170, at 3–4. The jurisdictional defect of a timely, *unverified* petition cannot be cured by filing a subsequent verified petition outside the sixty-day-time limit.

In the instant case, jurisdiction was conferred on the circuit court when Barrow filed a timely, *verified* petition on December 2, 2010. *See Ark. R. Crim. P. 37.2(c)(ii)*. It appears that the State is contending that the circuit court did not have jurisdiction of the matter because a petition in compliance with Rule 37.1(b) was not filed within sixty days of the date that the court of appeals had issued the mandate. Rule 37.1(b), however, is not jurisdictional in nature. Once jurisdiction was established by Barrow's timely filing of a verified petition on December 2, 2010, the circuit court had discretion to allow Barrow to file an amended petition. *See Ark. R. Crim. P. 37.2(e)*. We hold that the circuit court erred in dismissing Barrow's petition for lack of jurisdiction.

Having concluded that the circuit court had jurisdiction of this matter, we now turn

to Barrow's contention that this case must be reversed and remanded because the circuit court's order of dismissal does not contain written findings supporting its denial of postconviction relief, as required after an evidentiary hearing. The State concedes, and we agree, that the circuit court failed to make the required findings.

Rule 37.3(c) of the Arkansas Rules of Criminal Procedure provides that after a hearing, "[t]he court shall determine the issues and make written findings of fact and conclusions of law with respect thereto." Here, after determining that it lacked jurisdiction, the circuit court recited case law stating Barrow's burden of proof and then found that "[t]estimony and proof presented by Petitioner failed to meet that burden." The circuit court's order is conclusory in nature and fails to comply with Rule 37.3. Accordingly, we remand the case with instructions for the circuit court to enter written findings of fact and conclusions of law in accordance with Rule 37.3.

Reversed and remanded.