

SUPREME COURT OF ARKANSAS

No. 12-179

LARRY WAYNE STEPHENS
APPELLANT

V.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

APPELLEE

Opinion Delivered September 13, 2012

PRO SE MOTION TO FILE A
SUPPLEMENTAL BRIEF [JEFFERSON
COUNTY CIRCUIT COURT, CV 11-
694, HON. JODI RAINES DENNIS,
JUDGE]

MOTION DENIED; APPEAL
DISMISSED.

PER CURIAM

Appellant Larry Wayne Stephens is a prisoner in the Arkansas Department of Correction (“ADC”). He filed a petition in the Jefferson County Circuit Court that sought a declaratory judgment, contending that the ADC had erroneously applied Act 1805 of 2001, codified at Arkansas Code Annotated section 16-93-609 (Supp. 2006), so as to make appellant ineligible for parole. The petition additionally sought a writ of mandamus directing the ADC to correct the parole calculation. The circuit court denied the petition, and appellant lodged this appeal. After filing his brief, appellant filed a motion to file a supplemental brief. We deny the motion, and we dismiss the appeal.

Appellant seeks to supplement his brief in order to address an argument that the application of Act 1805 to his case was discriminatory, or that the ADC did not consistently apply the Act. The appellee, Director of the ADC, Ray Hobbs, in a brief prepared by the Attorney General’s office, has correctly noted that the argument was not presented below. In his petition below, appellant presented two arguments based on due-process violations and ex-

post-facto-clause violations. The only due-process arguments presented to the circuit court concerned appellant's claims that the sentencing court had not intended that the Act should apply, that the jury was not advised that the Act would apply, and that appellant had not been timely advised during trial that the Act applied to him. While appellant, in a tendered reply brief, would contend that his arguments concerning discriminatory application of the Act are not new and that the proposed arguments merely better develop his existing arguments, the proposed arguments were simply never presented to the circuit court in any manner.

This court has held that where appellants sought declaratory relief on a matter concerning the ADC's interpretation and application of a statute to determine the appellants' parole eligibility, the matter was one for postconviction relief. *Rowe v. Hobbs*, 2012 Ark. 244, 410 S.W.3d 40. It is therefore appropriate that we deny the motion and address the merits of the appeal, dismissing the appeal because it is clear that appellant cannot prevail. *See Smith v. Brownlee*, 2010 Ark. 266 (per curiam). This court has consistently held that an appeal of the denial of postconviction relief, including appeals from the denial of extraordinary relief, will not be permitted to go forward where it is clear that the appellant could not prevail. *Id.*

As noted, there were two arguments that were made by appellant on appeal and presented to the circuit court. The first argument sets out appellant's due-process claims concerning whether the Act should apply when the jury, court, and appellant were unaware of the Act and did not intend for the Act to apply to the judgment. The second argument is a claim of an ex post facto violation because appellant had committed the previous crime used to trigger

application of the Act prior to the statute's enactment.¹ Both arguments are unavailing.

Parole eligibility falls clearly within the domain of the executive branch and specifically the ADC, as fixed by statute. *Johnson v. State*, 2012 Ark. 212. This court has considered similar arguments concerning whether there must be a judicial determination of application of the Act and whether the Act violated the ex post facto clause where the previous offense that triggered application of the Act had occurred prior to the statute's enactment, and we rejected those arguments. *See Aguilar v. Lester*, 2011 Ark. 329 (per curiam). As was the case in *Aguilar*, the ADC is not required to first obtain a judicial determination concerning the existence of a previous felony conviction in order to determine application of the statute; those offenses are set out specifically in the statute with reference to listed offenses. *See* Ark. Code Ann. § 16-93-609(b)(2). Also as in *Aguilar*, the application of the Act does not violate the ex post facto clause because the statute was applied to appellant's current offenses committed in 2004, not to any prior offense used in making a determination of application of the Act.

We have examined the issues raised by appellant sufficiently through the review required to dispose of his motion. Because he clearly cannot prevail on the arguments raised in his brief, we dismiss the appeal.

Motion denied; appeal dismissed.

BROWN, J., not participating.

¹The respondent addresses a perceived third issue involving conflict between the court and the prosecutor. That portion of appellant's argument, however, was directed at his due-process claim that the court was unaware of the Act and did not intend for it to apply to appellant's sentence. It did not appear as a separate argument that need be further addressed.