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SUPREME COURT OF ARKANSAS

No. CR 12-239

	Opinion Delivered January 17, 2013
XAVIER REDUS APPELLANT	PRO SE MOTION TO FILE BELATED BRIEF [PULASKI COUNTY CIRCUIT COURT, 60CR 05-856, HON. CHRISTOPHER CHARLES PIAZZA, JUDGE]
V.	
STATE OF ARKANSAS APPELLEE	
	APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2005, appellant Xavier Redus entered a negotiated plea of guilty to eight counts of aggravated robbery and eight counts of theft of property, for which a cumulative sentence of 336 months' incarceration in the Arkansas Department of Correction was imposed. Over three years later, appellant filed in the circuit court a motion to vacate the judgment against him pursuant to Arkansas Rule of Civil Procedure 60 (2008), which was denied. We dismissed his appeal of that denial. *See Redus v. State*, CR 08-1397 (Ark. Feb. 26, 2009) (unpublished per curiam).

On October 18, 2011, more than six years from the date of appellant's guilty plea, he filed in the circuit court a petition to correct an illegal sentence pursuant to Arkansas Code Annotated section 16-90-111 (Repl. 2006). The circuit court denied the petition by written order, and appellant timely filed a notice of appeal from that order. The record was lodged with our clerk, and appellant's brief-in-chief was due in this court by April 30, 2012. Appellant did not tender a brief by that date.

Now before us is appellant's motion to file a belated brief in this appeal. However, because it is clear that appellant could not prevail if his appeal were allowed to proceed, we dismiss the appeal, and his motion to filed a belated brief is accordingly 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. *Thacker v. State*, 2012 Ark. 205 (per curiam); *Little v. State*, 2012 Ark. 194 (per curiam); *Perry v. State*, 2012 Ark. 98 (per curiam); *Riddell v. State*, 2012 Ark. 11 (per curiam).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, __ S.W.3d __ (per curiam)). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Watkins v. State*, 2010 Ark. 156, __ S.W.3d __ (per curiam); *Polivka v. State*, 2010 Ark. 152, __ S.W.3d __.

Appellant contended in his petition that his sentence was illegal because it exceeded the presumptive sentences for the crimes of which he was convicted; that the court misapplied the habitual-offender statute; that the sentence was in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); that the sentence was in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); that the sentence was imposed without appellant's receiving effective assistance of counsel; and that appellant is actually innocent of the crimes. However, Arkansas Rule of Criminal Procedure 37.2(b) provides that all grounds for postconviction relief that are cognizable in a

petition under Rule 37.1, including claims that a sentence is illegal or illegally imposed, must be raised in a Rule 37.1 petition. *See Talley v. State*, 2012 Ark. 314 (per curiam) (citing *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (per curiam)). Arkansas Code Annotated section 16-90-111, which permits the trial court to correct a sentence imposed in an illegal manner within ninety days after the sentence is imposed and to correct an illegal sentence at any time, is in conflict with the time limits imposed by Rule 37.2, which requires that a petition claiming relief under this rule must be filed in the trial court within ninety days of the date of entry of judgment when a defendant pleads guilty. *Id.* (citing *Morgan v. State*, 2012 Ark. 227 (per curiam)).

We have consistently held that Arkansas Code Annotated section 16-90-111 has been superseded to the extent that it conflicts with the time limitations for postconviction relief under Rule 37.1. *Morgan*, 2012 Ark. 227; *Velcoff v. State*, 2011 Ark. 267 (per curiam); *Wilburn v. State*, 2011 Ark. 237 (per curiam); *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam); *DeLoach v. State*, 2010 Ark. 79 (per curiam). Thus, under Rule 37.1, appellant's claims that his sentence was imposed in violation of the United States Constitution and laws of the United States or of this state, claims of ineffective assistance of counsel, and any other claims collaterally attacking his sentence should have been raised in a petition filed in the trial court within ninety days of the date that the judgment was entered on a plea of guilty in accordance with Rule 37.2(c). *See Talley*, 2012 Ark. 314 (citing *Biddle v. State*, 2011 Ark. 358 (per curiam)). Appellant's petition was filed more than six years after the date that the judgment was entered. The time limits in Rule 37.2 are jurisdictional in nature, and, if they

are not met, a circuit court lacks jurisdiction to grant postconviction relief. *See Wright v. State*, 2011 Ark. 356 (per curiam); *Miller v. State*, 2011 Ark. 344 (per curiam); *McLeod v. State*, 2010 Ark. 95 (per curiam); *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005). Where a circuit court lacks jurisdiction, this court also lacks jurisdiction on appeal. *See Martin v. State*, 2012 Ark. 312 (per curiam); *Williamson v. State*, 2012 Ark. 170 (per curiam).

We note that appellant's petition to correct his sentence initially claimed that his sentence exceeded "mandatory minimum and maximum" sentences in violation of the sentencing statute in effect at the time. However, the remainder of appellant's petition made clear that he was only challenging the application of the habitual-offender enhancement to his sentence and the circuit court's departure from the presumptive sentences for appellant's crimes. For the reasons outlined above, the habitual-offender issue was not timely. Additionally, in circumstances similar to this, where an appellant who sought a writ of habeas corpus waived his right to a jury trial and accepted a negotiated plea to the sentence, we do not consider the presumptive sentence or look beyond the permitted statutory range of punishment in determining whether the sentence in the judgment was valid. *Lumley v. State*, 2011 Ark. 265 (per curiam) (citing *Anderson v. Norris*, 370 Ark. 110, 257 S.W.3d 540 (2007) (per curiam)).

Appellant pled guilty to eight counts of aggravated robbery, a Y felony. *See* Ark. Code Ann. § 5-12-103 (Repl. 2005). He was sentenced as a habitual offender on each count to 336 months' imprisonment, with all sentences to run consecutively. The statutory range for a

habitual offender on each count was ten years to life. *See* Ark. Code Ann. § 5-4-501(b)(2)(A). He also pled guilty to eight counts of theft of property, which is an A misdemeanor under Arkansas Code Annotated section 5-36-103(b)(4), for which he received 12 months' imprisonment. The sentence for an A misdemeanor may not exceed one year. *See* Ark. Code Ann. § 5-4-401(b)(1). The sentences for his misdemeanors were merged with the sentences for aggravated robbery, as required by Arkansas Code Annotated section 5-4-403(c). Thus, appellant's sentence was clearly within the prescribed statutory range.

Based on the foregoing, it is clear that appellant could not prevail if his appeal were allowed to proceed. Therefore, we dismiss the appeal, and his motion to file a belated brief is moot.

Appeal dismissed; motion moot.

Xavier Redus, pro se appellant.

No response.