

SUPREME COURT OF ARKANSAS

No. 11-1185

KEDRICK T. DARROUGH
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered January 31, 2013

PRO SE MOTION TO SUPPLEMENT
ADDENDUM [LEE COUNTY CIRCUIT
COURT, CV 11-126, HON. RICHARD L.
PROCTOR, JUDGE]MOTION DENIED; APPEAL
AFFIRMED.**PER CURIAM**

Appellant Kedrick T. Darrough is an inmate incarcerated in the Arkansas Department of Correction. His incarceration stems, in part, from a judgment that was affirmed by the Arkansas Court of Appeals and that imposed an aggregate sentence of 1080 months' imprisonment for possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. *See Darrough v. State*, CACR 07-223 (Ark. App. Oct. 27, 2007) (unpublished). In the circuit court of the county where he was, and continues to be, imprisoned, appellant filed a pro se petition for writ of habeas corpus that challenged that judgment. The circuit court denied the petition, and appellant lodged this appeal of the order.

After the briefs were filed in this case, appellant filed a motion to supplement the addendum and tendered the material with which he wished to supplement his addendum. We deny the motion to supplement the addendum because the materials at issue were not included in the record before the circuit court. This court has long and consistently held that it cannot, in the exercise of its appellate jurisdiction, receive testimony or consider anything outside of the

record below. *Lowe v. State*, 2012 Ark. 185, ___ S.W.3d ___ (per curiam); *Smith v. Brownlee*, 2010 Ark. 266 (per curiam); *McLeod v. Mabry*, 206 Ark. 618, 177 S.W.2d 46 (1944).

Turning to the merits of the appeal, we note that a circuit court's denial of habeas relief will not be reversed unless the court's findings are clearly erroneous. *McArty v. Hobbs*, 2012 Ark. 257 (per curiam). In this case, we agree with the circuit court's determination that appellant's conclusory allegations were not sufficient to merit relief, and the court's findings to support denial of the writ were not clearly erroneous.

The burden is on the petitioner in proceedings for a writ of habeas corpus to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Culbertson v. State*, 2012 Ark. 112 (per curiam). Under our statute, a petitioner who does not allege his actual innocence and proceed under Act 1780 of 2001 Acts of Arkansas must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he is illegally detained. *See id.*; Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006). Appellant's petition did not demonstrate the requisite probable cause necessary to support issuance of the writ as to the only potentially cognizable claim in the petition.

The petition set forth two bases for the writ: that appellant's sentence was illegal, because it was improperly enhanced using an out-of-state conviction; and that counsel was ineffective for failing to challenge the imposition of the enhancement.¹ Claims of ineffective assistance of

¹Appellant references the Eighth Amendment in his brief on appeal. No claims concerning a violation of the amendment were, however, included in the petition filed in the

counsel are not cognizable in habeas proceedings. *Culbertson*, 2012 Ark. 112; *see also Smith v. Hobbs*, 2012 Ark. 360 (per curiam); *Tarkington v. Norris*, 2012 Ark. 147 (per curiam) (a habeas corpus proceeding does not afford a prisoner an opportunity to retry his case and does not encompass claims that were or should have been raised on appeal or in a timely postconviction proceeding).

The State urges that appellant's claim of an illegal sentence should also be deemed outside the purview of proceedings for the writ, because the claim is one that requires extensive factual inquiry, citing *Culbertson* in support. Yet, there is a distinction between the type of inquiry at issue in *Culbertson* and the issue in this case.

In *Culbertson*, the allegation of a void sentence was based on the validity of a guilty plea and the sufficiency of the factual basis for that plea. The inquiry in that case would have required an extensive review of the record in the proceedings in another court, and the commitment order did not, on its face, reflect an illegal sentence. Here, the allegation was that the commitment was invalid because it noted *on its face* that it was enhanced by a prior conviction, and that the prior conviction that had been used for that purpose was not one permitted by the statute noted on the commitment order. In addition, the factual basis for the claim here may be established by the presentation of a limited number of documents from the trial court record of the proceedings and should entail only a limited review of those documents. The claim made in *Culbertson*, unlike the one here, would have required more than minimal factual inquiry and was the sort that should be confined to direct appeal or postconviction proceedings under Arkansas Rule of Criminal Procedure 37.1 (2012). *See Friend v. Norris*, 364

circuit court.

Ark. 315, 219 S.W.3d 123 (per curiam). Appellant's claim, to this extent, was a cognizable one.

Appellant based his claim that an out-of-state conviction could not be used to enhance his sentence under Arkansas Code Annotated section 5-64-408 (Repl. 1997) on a decision by the court of appeals in *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990). We need not examine whether there may be a legal basis to support the claim, however, because appellant failed to provide probable cause in his petition to the circuit court, and he presented only conclusory allegations that the conviction used to enhance his sentence was an out-of-state conviction.² As already noted, the factual basis for habeas proceedings is by its nature limited, and a petitioner is required to provide some evidence in support of his claims to demonstrate probable cause that he is illegally detained. Appellant made a bare statement concerning the conviction used to enhance his sentence, but provided nothing to demonstrate which conviction was actually used to enhance his sentence.

We cannot say that the circuit court was clearly erroneous in finding that appellant failed to make the requisite showing under the statute. It was not then error to deny the petition, and we affirm the order denying relief.

Motion denied; appeal affirmed.

Kedrick T. Darrough, pro se appellant.

No response.

²The State asserts that the *Sossamon* decision is inapplicable because appellant's convictions were not for simple possession under Arkansas Code Annotated section 5-64-401(c) (Supp. 2003), but rather for possession with intent to deliver under section 5-64-401(a).