

SUPREME COURT OF ARKANSAS

No. CR12-123

JOSHUA ROGER KECK

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 4, 2013

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CR07-498-1 & CR11-850-6]HONORABLE WILLIAM A. STOREY,
JUDGEAPPEAL DISMISSED.**JIM HANNAH, Chief Justice**

Appellant, Joshua Roger Keck, appeals from the Washington County Circuit Court's denial of his posttrial petition to withdraw a plea of guilty. We dismiss the appeal.

In June 2007, Keck pled guilty to sexual assault in the fourth degree. He was sentenced to a probated term of forty-eight months in the Arkansas Department of Correction and required to register as a sex offender. In February 2010, the State moved to revoke the probated sentence, contending that Keck had violated conditions of his probation, and in June 2011, the State filed a new charge against him, failure to comply with sex-offender-registration requirements, in violation of Arkansas Code Annotated section 12-12-904 (Repl. 2009).

On September 8, 2011, Keck, with his attorney, appeared before the circuit court, and pled guilty to failure to comply with sex-offender-registration requirements. He also pled guilty to violating conditions of his probated sentence. Keck requested that his sentencing

be postponed, and the circuit court set a sentencing hearing for September 26, 2011. Keck appeared at that hearing with counsel of record, Scott Parks, and a newly hired counsel, Larry Froelich, and asked for additional time before sentencing to allow him to reconsider his guilty plea. Froelich did not specifically make a motion to withdraw the guilty plea at the hearing, but instead, informed the circuit court that he had not given Keck advice on the matter and was at a loss as to what to do about seeking to withdraw the guilty plea. Parks informed the circuit court that Keck wanted to substitute Froelich as counsel. Keck then addressed the circuit court, stating, “I’m completely confused. I definitely would like to be able to look at it a little longer, figure out, talk to somebody who” The circuit court denied the requests and sentenced Keck in accordance with the plea agreement.¹

While no formal motion to withdraw the plea or substitute counsel was made to the circuit court, Parks made the following statement after the sentence was pronounced: “[J]ust so the record is clear, the motion for Mr. Froelich to be substituted was denied and the Defendant’s motion to withdraw his plea was denied,” to which the circuit court responded, “I think surely that’s clear.” The record reflects that, despite this response to Parks, the circuit court later clarified what had actually occurred at the sentencing hearing and noted that neither Keck nor Froelich had moved the court to withdraw the guilty plea; rather, they had merely asked for a continuance.

After the sentencing hearing, Keck filed a motion to substitute counsel, and that

¹Keck was sentenced to 120 months, with 36 months suspended, for violation of Arkansas Code Annotated section 12-12-904, and a 72-month suspended sentence for failing to comply with the conditions of his release.

motion was granted on October 6, 2011. On October 25, 2011, Keck, through his newly substituted counsel Froelich, filed a “Petition for Post-Trial Relief” pursuant to Arkansas Rule of Criminal Procedure 33.3. This petition included the first specific motion made by Keck requesting that he be allowed to withdraw his guilty plea. In his motion, Keck asserted that he should have been allowed to withdraw his plea of guilty because the plea was not voluntary and because he had discovered a new defense to the charges. He also contended that the circuit court abused its discretion in denying his requests for a continuance and substitution of counsel. Keck requested a hearing on the issue of whether he should have been allowed to withdraw his plea under the terms of Rule 26.1. In addition, Keck filed a separate motion requesting a hearing on his posttrial petition.

On November 4, 2011, the circuit court held a hearing on the posttrial petition, which was denied and dismissed. On appeal, Keck contends that the circuit court erred (1) by refusing to grant his request for a continuance before sentencing him, (2) by denying his request to substitute counsel before sentencing him, (3) by refusing to conduct a hearing on his request to withdraw his plea before sentencing him, (4) by excluding testimony as hearsay during the posttrial petition hearing, (5) by refusing to allow him to withdraw his guilty plea where substantial evidence demonstrated that his plea had not been knowingly made, (6) by refusing to allow him to withdraw his guilty plea where substantial evidence demonstrated that he had a viable defense to the charge to which he had pled guilty, and (7) by ruling that guilt or innocence is not relevant to a claim of manifest injustice under Arkansas Rule of Criminal Procedure 26.1(a).

Keck's first three points on appeal, which challenge the circuit court's sentencing-hearing rulings, amount to an appeal of a guilty plea. Generally, there is no right to appeal a guilty plea, except (1) for a conditional plea of guilty premised on an appeal of the denial of a suppression motion pursuant to Arkansas Rule of Criminal Procedure 24.3, (2) when there is a challenge to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself, or (3) when the appeal is an appeal of a posttrial motion challenging the validity and legality of the sentence itself. *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005) (per curiam). We cannot entertain the issues raised in Keck's first three points on appeal because they do not fall within any of the exceptions to the general prohibition of appealing a guilty plea. See *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004).

We now turn to Keck's remaining points on appeal—challenges to the circuit court's rulings from the posttrial-petition hearing in which he argued that he should be permitted to withdraw his guilty plea. When the defendant is in custody, a motion to withdraw a plea filed after the entry of judgment will be treated as a postconviction motion under Rule 37. E.g., *Mims v. State*, 360 Ark. 96, 199 S.W.3d 681 (2004). Even though Keck styled his motion as one filed pursuant to Rule 33.3, it constituted a petition for postconviction relief under Rule 37.1. See *Mazurek v. State*, CR07-1002 (Ark. Nov. 13, 2008) (per curiam) (noting that the fact that appellant cited Rule 33.3 in his petition did not convert the petition into a posttrial motion for relief).

A motion to withdraw a guilty plea filed after an appellant has been sentenced must comply with the verification requirement of Rule 37.1(c). E.g., *Webb v. State*, 365 Ark. 22,

223 S.W.3d 769 (2006). Rule 37.1(c) requires that the petition be accompanied by an affidavit that is sworn before a notary or other officer authorized to administer oaths; in substantially the form noted in that provision; and attesting that the petitioner has read the petition and that the facts stated in the petition are true, correct, and complete to the best of his knowledge and belief. *E.g.*, *Martin v. State*, 2012 Ark. 312 (per curiam). Rule 37.1(d) requires that the circuit clerk reject a petition that does not conform to the rule and that the circuit court or any appellate court must dismiss a petition that fails to comply with Rule 37.1(c). *Id.*

Keck contends that his petition is sufficient because it substantially complied with the verification requirement of Rule 37.1(c). We disagree. Along with his petition, Keck submitted affidavits from his family members and himself containing statements in support of his contention that he did not knowingly enter a guilty plea. In his affidavit, Keck verified that the statements in his *affidavit* were true and correct. He did not, however, verify that the statements in his *petition for postconviction relief* were true and correct. Because Keck's petition was not verified as required by Rule 37.1(c), we must dismiss the appeal. *See* Ark. R. Crim. P. 37.1(d).

Appeal dismissed.

Larry R. Froelich, for appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.