

SUPREME COURT OF ARKANSAS

No. CR12-984

ROBERT COLEMAN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 11, 2013

APPELLEE'S MOTION TO DISMISS
APPEAL AND APPELLANT'S
MOTION TO FILE A BELATED BRIEF
[ARKANSAS COUNTY CIRCUIT
COURT, NORTHERN DISTRICT, CR
08-216, CR 08-217, HON. DAVID G.
HENRY, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

In 2009, appellant Robert Coleman entered a plea of guilty in the Arkansas County Circuit Court, Northern District, to sexual assault in the second degree in CR 08-216 and to two counts of rape in CR 08-217. Amended judgments in the two cases were entered on December 14, 2009, and a second amended judgment was entered in CR 08-216 on January 28, 2010. Appellant was sentenced in the two cases to an aggregate term of 240 months' imprisonment.

On August 16, 2010, appellant filed in the trial court in the two cases a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied on the ground that it was not a timely petition under the rule. Appellant appealed from the order, and this court dismissed the appeal as it was clear from the face of the record that the Rule 37.1 petition was not timely filed. *Coleman v. State*, 2010 Ark. 490 (per

curiam).

On August 9, 2012, appellant filed in the trial court a motion to withdraw the guilty plea in the cases pursuant to Arkansas Rule of Criminal Procedure 26.1 (2012). The motion was denied, and appellant lodged an appeal from the order in this court. The appellee State now asks that the appeal be dismissed for appellant's failure to submit a timely brief. The appellant has filed a motion to file a belated brief.

As the Rule 26.1 motion was not timely filed, the appeal is dismissed. The appellee's and the appellant's motions are moot. We have consistently held that a postconviction appeal will not be permitted to go forward where it is clear that the appellant could not prevail. *Gardner v. State*, 2010 Ark. 344 (per curiam); *Harris v. State*, 2010 Ark. 314 (per curiam).

Rule 26.1 provides that a guilty plea may not be withdrawn under the rule after entry of judgment. Ark. R. Crim. P. 26.1(a); see *Winnett v. State*, 2012 Ark. 358 (per curiam). Where an appellant desires to challenge a plea after entry of judgment, his remedy is a timely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, and the trial court may treat a motion to withdraw a guilty plea filed after entry of judgment as a Rule 37.1 petition. *Winnett*, 2012 Ark. 358; *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

Even if the circuit court had treated appellant's petition as one for relief under Rule 37.1, however, the petition, as with the Rule 37.1 petition filed by appellant in 2010, was not timely filed. Arkansas Rule of Criminal Procedure 37.2, as in effect both at the time of appellant's conviction and currently, provides that a petition claiming relief under Rule 37.1 must be filed no later than ninety days after the entry of judgment if the conviction was

obtained on a plea of guilty. Ark. R. Crim. P. 37.2(c) (2007 & 2012). Appellant's petition was filed almost three years after the judgment had been entered.

The time limitations imposed in Rule 37.2 are jurisdictional in nature, and, if those requirements are not met, a trial court lacks jurisdiction to grant postconviction relief. *Tucker v. State*, 2012 Ark. 216 (per curiam). Where the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Gilliland v. State*, 2011 Ark. 480 (per curiam). It is clear that an appellant cannot prevail where this court does not have jurisdiction for the appeal.

Appeal dismissed; motions moot.

Robert Coleman, pro se appellant.

No response.