

Cite as 2018 Ark. 44
SUPREME COURT OF ARKANSAS
No. CR-17-923

PAUL LATHAM

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered February 15, 2018

PRO SE MOTION FOR RULE ON
CLERK AND BELATED APPEAL
[MILLER COUNTY CIRCUIT COURT,
NO. 46CR-92-308]

MOTION TREATED AS A MOTION
FOR BELATED APPEAL AND DENIED.

RHONDA K. WOOD, Associate Justice

In 2016, Paul Latham filed in the trial court a pro se petition to correct an illegal sentence under Arkansas Code Annotated section 16-90-111 (Repl. 2017).¹ The trial court denied the petition on June 28, 2017. In its order, the trial court addressed the petition as one for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2017) and under Arkansas Code Annotated section 16-90-111, and denied it. Latham did not timely file a notice of appeal. Now before us is Latham's pro se motion for rule on clerk and for belated appeal. As the notice of appeal was untimely, we treat the motion as a motion for belated appeal. *See McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

¹Latham named the director of the Arkansas Department of Correction as a party to the action, but claims under section 16-90-111 or Rule 37.1 are properly filed against the State. As the petition was filed on the trial court's criminal docket and acted on as an action challenging the judgment imposed by the State, Latham's error in naming the director as a party created no harm.

We need not consider Latham's reasons for not filing a timely notice of appeal because it is clear from the record that Latham's petition was wholly without merit. An appeal from an order that denied a petition for postconviction relief, including a petition filed under either section 16-90-111 or under Rule 37.1, will not be permitted to go forward when it is clear that there would be no merit to the appeal. *Gardner v. State*, 2017 Ark. 230; *see also Justus v. State*, 2012 Ark. 91. Accordingly, Latham's motion to proceed with an appeal is denied.

Latham was found guilty by a jury in the Miller County Circuit Court of rape. He was sentenced as a habitual offender who had been adjudged guilty of four or more prior felonies to seventy-five years' imprisonment. We affirmed. *Latham v. State*, 318 Ark. 19, 883 S.W.2d 461 (1994). Latham's sole claim for relief in the petition was the allegation that the seventy-five-year sentence imposed on him was illegal because it exceeded the maximum penalty for rape committed by a defendant who had been adjudged guilty of four or more prior felonies. Latham did not contend that he was not a habitual offender. He argued that a forty-year sentence should have been imposed because the statute governing sentencing for rape provided that the sentence could be forty years or life, and because the jury did not recommend a sentence of life, the only sentence that could be legally imposed was a forty-year sentence.

I. *Section 16-90-111*

There is a provision in section 16-90-111 that allows the trial court to correct an illegal sentence at any time because a claim that a sentence is illegal presents an issue of subject-matter jurisdiction. *Green v. State*, 2016 Ark. 386, 502 S.W.3d 524. While the

time limitations on filing a petition under section 16-90-111 on the ground that the sentence was imposed in an illegal manner were superseded by Arkansas Rule of Criminal Procedure 37.2(c) (2017), the portion of section 16-90-111 that provides a means to challenge a sentence at any time on the ground that the sentence is illegal on its face remains in effect. *Gardner*, 2017 Ark. 230.

A sentence is illegal on its face when it exceeds the statutory maximum for the offense for which the defendant was convicted. *Green*, 2016 Ark. 386, 502 S.W.3d 524. The petitioner seeking relief under section 16-90-111 carries the burden to demonstrate that his or her sentence was illegal. As stated above, Latham was entitled to relief under section 16-90-111 only if he established that the judgment in his case was illegal on its face.

At the time that Latham was convicted of rape, a Class Y felony, the applicable statute provided that the sentencing range for a Class Y felony for a defendant convicted of a felony after June 30, 1983, and who had been found guilty for four or more felonies was not less than forty years nor more than life imprisonment. Ark. Code Ann. § 5-4-501(b)(1) (1987). A sentence between forty years and life under the statute is not an illegal sentence. *See Claiborne v. State*, 319 Ark. 537, 893 S.W.2d 324 (1995). We have held that a sentence of 300 years' imprisonment for rape was not illegal under section 5-4-501(b)(1) when the defendant had been convicted of four or more prior felonies. *Franklin v. State*, 308 Ark. 539, 825 S.W.2d 263 (1992) (holding that the trial court properly instructed the jury that a person convicted of rape as a habitual offender with four or more prior felony convictions could be sentenced to a term of not less than forty

years nor more than life and that the 300-year sentence imposed on the defendant was legal even though the term exceeded the ordinary lifespan of a human being). Latham did not establish that the sentence imposed on him when he was convicted of rape in 1993 was an illegal sentence. Therefore, the denial of his claim for relief under section 16-90-111 was not error. *See Green*, 2016 Ark. 386, 502 S.W.3d 524.

II. *Rule 37.1*

There was also no error in denying the relief sought under Rule 37.1. This court has held that a petition for postconviction relief attacking a judgment, regardless of the label placed on it by the petitioner, can be considered pursuant to Rule 37.1. *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007). If considered under the Rule, Latham's petition was not timely filed. Rule 37.2(c) provides that a petition under the Rule is untimely if not filed within sixty days of issuance of the appellate court's mandate affirming the judgment of conviction. The mandate in Latham's direct appeal was issued on October 7, 1994, but his petition to correct the sentence imposed was not filed until approximately twenty-two years later in 2016. The time limitations imposed in Rule 37.2(c) are mandatory, and the trial court may not grant relief on an untimely petition. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). As Latham did not file his petition to correct the sentences imposed on him within the time limit set by the Rule, he was not entitled to relief under the Rule. Motion treated as a motion for belated appeal and denied.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. Mr. Latham failed to timely file a notice of appeal. It is axiomatic that a timely filed notice of appeal is required to give this court appellate jurisdiction. *Worsham v. Day*, 2017 Ark. 192, 519 S.W.3d 699; *Lindsey v. Green*, 2010 Ark. 118, 369 S.W.3d 1; *McJames v. State*, 2010 Ark. 74. Accordingly, Mr. Latham's motion for belated appeal *must* be considered before we have *jurisdiction* to consider the merits of this appeal. At this point, whether or not his appeal has merit cannot be part of this court's deliberation. The merits of Mr. Latham's case cannot be considered by this court until we acquire appellate jurisdiction.

I respectfully dissent.