

SUPREME COURT OF ARKANSAS

No. 10-1111

THEODORE ANDERSON
Appellant

v.

STATE OF ARKANSAS and
RAY HOBBS
Appellees

Opinion Delivered February 3, 2011

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [LINCOLN COUNTY
CIRCUIT COURT, LCV 2010-62, HON.
JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2005, appellant Theodore Anderson was found guilty in a trial to the bench of residential burglary, domestic battering, and rape. An aggregate sentence of 240 months' imprisonment was imposed. Appellant appealed the judgment for rape, and the Arkansas Court of Appeals affirmed. *Anderson v. State*, CACR 07-900 (Ark. App. Feb. 20, 2008) (unpublished). In its decision, the court of appeals noted that appellant in his testimony at trial admitted that he and the victim had fought and that he had hit her, but he contended that the anal sexual intercourse that was the basis of the rape charge was voluntary.

In 2008, appellant filed in the trial court a pro se petition for writ of habeas corpus pursuant to Act 1780 of the 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). In the petition, appellant asserted that he was

actually innocent of rape and sought DNA testing of semen referenced in a laboratory report that was introduced into evidence at trial. As stated, appellant's defense at trial had been that he was actually innocent of rape because the sexual intercourse with the victim was consensual. The trial court denied the petition. We affirmed on appeal, noting that section 16-112-202(6) requires that a person who files a motion seeking scientific testing under the act must identify a theory of defense that utilizes the results of the testing, that the theory must establish the petitioner's actual innocence, and that the theory must be consistent with any affirmative defense presented at trial. *Anderson v. State*, 2009 Ark. 428 (per curiam). Appellant had conceded at trial that intercourse occurred, and, if it was his claim in the petition that some other man had engaged in intercourse with the victim, that claim was clearly inconsistent with his defense at trial. Accordingly, appellant had not stated a sufficient basis for a claim under the act.

On June 4, 2010, appellant, who is incarcerated in the custody of the Arkansas Department of Correction in Lincoln County filed in the circuit court in that county, a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006). The petition was denied, and appellant lodged an appeal here.

Appellant now seeks by pro se motion an extension of time to file his brief-in-chief. We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal. Accordingly, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief, including a petition

for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. Hobbs*, 2010 Ark. 459 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Hutcherson v. State*, 2010 Ark. 368 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

Appellant failed to state a claim in his petition that was cognizable in a habeas corpus proceeding. The burden is on the petitioner in a habeas corpus petition 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. *Johnson*, 2010 Ark. 459; *Moore*, 2010 Ark. 380; *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam).

Appellant again claimed actual innocence as grounds for the writ, but a petitioner alleging actual innocence must proceed in accordance with Act 1780. To prevail under the statute appellant invoked, a petitioner 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. *Young*, 365 Ark. at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant alleged in the petition for writ of habeas corpus that the trial judge was elected to serve as a juvenile judge and did not have authority to preside at his trial; he was not afforded a speedy trial; he was not afforded effective assistance of counsel at trial; errors

were made at trial by the trial judge; there was misconduct on the part of the prosecutor; racial prejudice played a role in his conviction; and the evidence was insufficient to sustain the judgment. These claims were not sufficient to establish that the judgment was invalid on its face or that the trial court lacked jurisdiction in the matter.

A habeas corpus proceeding does not provide a petitioner with an opportunity to retry his case or challenge the effectiveness of counsel. *Jefferson v. State*, 2010 Ark. 202 (per curiam). A claim of ineffective assistance of counsel is not cognizable in a habeas corpus proceeding. *Grimes v. State*, 2010 Ark. 97 (per curiam). Even if a petitioner can establish that there was an error at trial, mere trial error would not take away the court's personal or subject-matter jurisdiction. See *Moore*, 2010 Ark. 380. If there was trial error, appellant's remedy lay in a timely objection in the trial court. See *Johnson*, 2010 Ark. 459. If counsel was remiss in some manner, appellant's remedy was a timely claim of ineffective assistance of counsel raised pursuant to our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2010). *Moore*, 2010 Ark. 380; *Hill*, 2010 Ark. 287.

A court with personal and subject-matter jurisdiction over the defendant in a criminal proceeding has authority to render judgment. *Moore*, 2010 Ark. 380; *Hutcherson*, 2010 Ark. 368; *Johnson v. State*, 298 Ark. 479, 769 S.W.2d 3 (1989). While appellant strove to bring the court's jurisdiction into question by asserting that the trial judge was elected as a juvenile judge, he offered nothing to demonstrate that the judge was not a duly qualified circuit judge. Jurisdiction is the authority of the court to hear and determine the subject matter. *Baker v.*

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Norris, 369 Ark. 405, 255 S.W.3d 466 (2007). Appellant raised no challenge that called into question the court's authority.

Appeal dismissed; motion moot.