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SUPREME COURT OF ARKANSAS
No. CR-18-412

CALVIN E. JACKSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 18, 2018

PRO SE MOTION FOR EXTENSION
OF TIME [CRAIGHEAD COUNTY
CIRCUIT COURT, WESTERN
DISTRICT; NO. 16JCR-13-725]

APPEAL DISMISSED; MOTION MOOT.

JOHN DAN KEMP, Chief Justice

Before us now is appellant Calvin E. Jackson's pro se motion in which he requests an extension of time in which to file his brief. Because it is clear that Jackson cannot prevail on appeal, we dismiss the appeal, and the motion is moot.

Jackson's appeal is from an order dismissing his petition to correct a sentence imposed in an illegal manner under Arkansas Code Annotated section 16-90-111 (Repl. 2016). In his petition filed in the trial court on December 5, 2017, Jackson alleged that a 2013 judgment imposing a sentence of 228 months' imprisonment and an additional 120 months' suspended imposition of sentence on a negotiated plea of guilty to a charge of first-degree murder was an illegal application of two acts. Jackson alleged the judgment was unconstitutional, in that it reflected that he was sentenced pursuant to Arkansas Code Annotated section 16-93-609 (Repl. 2016), and that his sentence should be modified to eliminate the restriction on parole eligibility in section 16-93-609.

Section 16-93-609 provides that a person who commits first-degree murder after March 24, 1983, is not eligible for parole if that person has previously been found or pleaded guilty to first-degree murder, rape, or aggravated robbery. Ark. Code Ann. § 16-93-609(a). Jackson committed the murder in 2013, and he admitted that he had a 2005 conviction for aggravated robbery. Nevertheless, he alleged that the two convictions did not qualify to bring his sentence under the definition established by the legislature for a violent felony offense under section 16-93-609(b), arguing that the establishing act had failed to amend necessary statutes. The trial court found that the sentence imposed was within the statutory range and not illegal, that Jackson's petition was untimely, and that a determination of parole eligibility was within the exclusive domain of the executive branch of government.

An appeal from an order that denied a petition for postconviction relief, including a petition under section 16-90-111, will not be permitted to go forward when it is clear that there is no merit to the appeal. *Fischer v. State*, 2017 Ark. 338, 532 S.W.3d 40. The trial court's decision to deny relief under section 16-90-111 will not be overturned unless that decision is clearly erroneous. *Bell v. State*, 2017 Ark. 231, 522 S.W.3d 788. Here, it is apparent that the denial of relief was not clearly erroneous.

The time limitations on filing a petition under section 16-90-111(a)(b)(1) alleging that the sentence was imposed in an illegal manner were superseded by Arkansas Rule of Criminal Procedure 37.2(c). *Swift v. State*, 2018 Ark. 74, 540 S.W.3d 288. Rule 37.2 mandates that a petition seeking relief under the Rule must be brought within ninety days

of the date of entry of judgment when the conviction was obtained on a plea of guilty. Ark. R. Crim. P. 37.2(c) (2014). Jackson sought modification of his sentence, and he alleged that the sentence had been imposed in an illegal manner. The 2017 petition under section 16-90-111 was filed more than four years after the judgment that Jackson challenged had been entered, and the trial court therefore correctly found that the petition was untimely under section 16-90-111(a)(b)(1).

Despite the time limitations imposed on claims of an illegally imposed sentence, 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. *Swift*, 2018 Ark. 74, 540 S.W.3d 288. Jackson's claims, to the extent that the allegations could be interpreted as a claim that the sentence was illegal on its face, are meritless.

A sentence is illegal on its face when it exceeds the statutory maximum for the offense for which the defendant was convicted, and when the petitioner does not contend that his sentences exceeded the statutory maximum, the sentence imposed is not illegal. *Bell*, 2017 Ark. 231, 522 S.W.3d 788. Jackson raised no claim that the sentence exceeded the statutory range. Instead, Jackson alleged that section 16-93-609 should not be applicable to his conviction under the circumstances. When a petitioner alleges that the executive branch has misapplied a statute, or a portion of a statute, in calculating whether the petitioner is eligible for parole, the claim is not a ground for relief under section 16-90-111 because the Arkansas Department of Correction's determination concerning parole

eligibility does not call into question the legality of the original judgment in the case. See *Green v. State*, 2017 Ark. 361, 533 S.W.3d 81.

When, as here, the timing is such that the trial court has authority to grant relief under section 16-90-111 only if the petitioner shows that the sentence is illegal on its face, then the trial court's decision to deny relief is not clearly erroneous if the petitioner did not meet his burden of demonstrating in his petition that the sentence imposed on him in the challenged judgment was illegal. *Fischer*, 2017 Ark. 338, 532 S.W.3d 40. Jackson did not meet that burden, and he therefore cannot prevail on appeal.

Appeal dismissed; motion moot.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, Dissenting. Until the briefing is complete, all that this court has pending before it is Mr. Jackson's motion for an extension of time to file his brief. Because he has not yet filed his brief, his appeal is not perfected, and we do not have jurisdiction to decide his appeal on the merits.

I respectfully dissent.