

Cite as 2018 Ark. 300
SUPREME COURT OF ARKANSAS
No. CV-18-141

WALLACE A. GARDNER
APPELLANT

V.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION
APPELLEE

Opinion Delivered October 18, 2018

PRO SE MOTIONS FOR
APPOINTMENT OF COUNSEL, FOR
EXTENSION OF TIME TO CORRECT
BRIEF, TO ORDER CIRCUIT CLERK
TO FURNISH DOCUMENTS, AND
FOR STATUS
[LINCOLN COUNTY CIRCUIT
COURT, NO. 40CV-17-129]

HONORABLE JODI RAINES DENNIS,
JUDGE

APPEAL DISMISSED; MOTIONS
MOOT.

ROBIN F. WYNNE, Associate Justice

This court previously considered three motions¹ that appellant Wallace A. Gardner filed in his appeal of an order denying him pauper status so that he could proceed with a petition for writ of habeas corpus to challenge his criminal convictions for capital murder and aggravated robbery.² We remanded for an order more fully addressing Gardner's in forma pauperis petition and providing the findings of fact as required by Arkansas Rule of

¹ The motions sought appointment of counsel, an extension of time in which to file a corrected brief, and copies of documents from the record on appeal.

² This court affirmed Gardner's convictions for capital murder and aggravated robbery in *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006).

Civil Procedure 72 (2017). *Gardner v. Kelley*, 2018 Ark. 212, 549 S.W.3d 349. In that opinion, we reserved any decision on the motions until the supplemental record was returned. *Id.* After return of the supplemental record, Gardner filed a new motion in which he again asserts his need for documents from the circuit clerk. The new order is now before us, and it is clear from the record that the circuit court correctly found that Gardner failed to set out a colorable cause of action in his proposed habeas petition. Because Gardner cannot prevail on appeal, we dismiss the appeal, and all the motions Gardner has filed are moot.

The order contained in the supplemental record reflects that the circuit court found that Gardner was indigent, but that he failed to present a colorable cause of action in the underlying habeas petition he would pursue. The order lists the three bases for relief that Gardner proposed in the petition: (1) the State failed to meet its burden of proof beyond a reasonable doubt; (2) the trial judge committed error and abused his discretion; and (3) both Gardner's trial attorney and his appellate counsel were ineffective. The circuit court found that these facts Gardner alleged failed to support a claim cognizable in habeas proceedings.

An appeal from an order that denied a petition for postconviction relief, including civil postconviction remedies, will not be permitted to go forward when it is clear that the appellant could not prevail. *Whitney v. Guterres*, 2018 Ark. 133. Our standard of review of a decision to grant or deny a petition to proceed in forma pauperis is abuse of discretion, and the circuit court's factual findings in support of its exercise of discretion will not be

reversed unless clearly erroneous. *Id.* An abuse of discretion occurs when the court acts arbitrarily or groundlessly. *Whitney v. State*, 2018 Ark. 138.

When there are obvious defects in the underlying petition, this court may dispose of an appeal from the denial of in forma pauperis proceedings. *Wood v. State*, 2017 Ark. 290. If the underlying petition clearly fails to state a colorable cause of action, there has been no abuse of discretion, and this court may summarily affirm the denial of in forma pauperis status. *Muldrow v. Kelley*, 2018 Ark. 126, 542 S.W.3d 856. A colorable cause of action is a claim that is legitimate and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. *Penn v. Gallagher*, 2017 Ark. 283.

A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacks jurisdiction over the cause. Under our statute, a petitioner for the writ who does not allege his or her actual innocence and proceed under Act 1780 of 2001 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 or she is being illegally detained. *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136 (citing Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016)). Gardner did not invoke Act 1780, and he filed his petition in the circuit court of the county where he is incarcerated rather than in the trial court. See *Dunahue v. Kelley*, 2018 Ark. 4, at 2, 534 S.W.3d 140, 141 (Any petition for writ of habeas corpus to effect the release of a prisoner is properly addressed to the circuit court in which the prisoner is held in custody,

unless the petition is filed pursuant to Act 1780.); *see also* Ark. Code Ann. § 16-112-201 (Repl. 2016) (providing that petitions under Act 1780 are brought in the court in which the petitioner's convictions were entered).

Gardner listed only two bases in his habeas petition to support his allegations that the trial court lacked jurisdiction and that he was being held under an invalid conviction. He alleged that the State had failed to prove all elements of the crimes beyond a reasonable doubt and that there was trial error, which this court failed to consider on appeal as a result of ineffective assistance of trial counsel and his appellate counsel. Although those issues were interwoven in the petition, the circuit court correctly identified the three claims Gardner raised for relief. The court also correctly found that the facts Gardner alleged did not support habeas relief.

Although Gardner couched his claims as asserting a lack of jurisdiction, the bases that supported the claims were allegations that the evidence was not sufficient to support the verdict, that there was trial error, and that his trial counsel and appellate counsel were ineffective. Gardner has unsuccessfully raised similar claims in habeas proceedings before. *Gardner v. Hobbs*, 2014 Ark. 346, 439 S.W.3d 663 (per curiam). Those claims are no more viable now than they were previously.

A habeas proceeding does not afford a prisoner an opportunity to retry his or her case, and it is not a substitute for direct appeal or postconviction relief. *Garrison*, 2018 Ark. 8, 534 S.W.3d 136. Habeas proceedings are not a means to challenge the sufficiency of the evidence to sustain a judgment. *Johnson v. State*, 2018 Ark. 42, 538 S.W.3d 819.

While claims that raise a jurisdictional issue—such as those that raise a claim of an illegal sentence—are cognizable in a habeas proceeding, claims such as Gardner’s, which could have been raised in the trial court or on direct appeal and settled there, are not.³ *Id.* Proceedings for the writ are not intended to require an extensive review of the record of the trial proceedings as Gardner desires, and the circuit court’s inquiry into the validity of the judgment is limited to the face of the commitment order. *Gonder v. Kelley*, 2017 Ark. 239.

If there were errors at trial, those issues could, and should, have been raised at trial and on the record on direct appeal and are thus not within the purview of the remedy because the writ will not be issued to correct errors or irregularities that occurred at trial. *Stephenson v. Kelley*, 2018 Ark. 143, 544 S.W.3d 44. Ineffective-assistance-of-counsel claims are not cognizable in habeas proceedings. *McConaughy v. Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992).

Under this court’s rules of civil procedure, allegations in a pleading must state facts and not mere conclusions in order to entitle the pleader to relief. *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, at 6, 436 S.W.3d 445, 449 (citing Ark. R. Civ. P. 8(a) (2013)). The determination of a colorable claim is made from an evaluation of the petitioner’s non-conclusory factual allegations, and Gardner did not state facts to

³ We note that Gardner filed a petition for rehearing of the decision on direct appeal in which he could have raised any issues concerning alleged factual mistakes in the decision.

sufficiently support his conclusory allegations of a jurisdictional defect. Because Gardner's petition clearly failed to state a colorable cause of action, there has been no abuse of discretion in the denial of his petition to proceed in forma pauperis.

Appeal dismissed; motions moot.