

**SUPREME COURT OF ARKANSAS**

No. 10-559

RODNEY L. MITCHAE  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered**      October 7, 2010

PRO SE MOTION FOR EXTENSION  
OF TIME TO LODGE APPELLANT'S  
BRIEF [CIRCUIT COURT OF LEE  
COUNTY, CV 2010-6, HON. OLLY  
NEAL, JUDGE]

APPEAL DISMISSED; MOTION  
MOOT.

**PER CURIAM**

In 2006, a jury found appellant Rodney L. Mitchael guilty of rape and first-degree terroristic threatening and sentenced him to an aggregate term of 780 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Mitchael v. State*, CACR 07-98 (Ark. App. Jan. 16, 2008) (unpublished). Appellant later filed an unverified petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010) that the trial court dismissed as untimely. This court dismissed appellant's motion for belated appeal. *Mitchael v. State*, CR 09-731 (Ark. Oct. 22, 2009) (unpublished).

Appellant has now lodged an appeal in this court of an order in Lee County Circuit Court that denied a pro se petition for a writ of habeas corpus. He has filed a motion for an extension of time in which to file his brief. We dismiss the appeal, and the motion is therefore moot.

Although the order appealed references a petition for writ of habeas corpus, the only pleading contained in the record, that is, the one that is listed in the table of contents as the petition for writ of habeas corpus, is devoid of any reference to a writ of habeas corpus and makes no request for the writ. The burden is on the party asserting error to bring up a sufficient record upon which to grant relief. *Meraz v. State*, 2010 Ark. 121 (per curiam); *Daniels v. State*, 2009 Ark. 607 (per curiam).

On the day the record was filed in this court, appellant tendered a file-marked copy of a petition for habeas relief that was filed in the circuit court. That petition contained the same allegations as the pleading in the record inserted into a form document that does include a prayer requesting habeas relief.<sup>1</sup> One of our staff attorneys advised appellant of the need to file a motion to supplement the record, should he desire to have included in the record the copy of the petition that he had tendered. As stated, the record does not contain a copy of a petition for writ of habeas corpus, and, more than three months later, appellant has not filed a motion to supplement the record with the tendered habeas petition. Without a record sufficient to show error, this court has no choice but to affirm the denial of the petition. *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005).

An appeal from an order that denied a petition for a postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that

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<sup>1</sup> The pleading in the record also included a number of attachments that were not a part of the pleading that was tendered to this court.

Cite as 2010 Ark. 379

the appellant could not prevail. *Hill v. Norris*, 2010 Ark. 287 (per curiam). Because the record is deficient, it is clear that appellant cannot prevail. We therefore dismiss the appeal, and appellant's motion for an extension of time to file his brief is moot.<sup>2</sup>

Appeal dismissed; motion moot.

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<sup>2</sup> We note that appellant's signature on the motion does not appear to be genuine. As the motion is moot, we need not address whether the motion was subject to dismissal on that basis.