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SUPREME COURT OF ARKANSAS

No. CR09-15

CHRISTOPHER BRANNING, APPELLANT,	**Opinion Delivered** October 28, 2010
VS.	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT, NO. CR2004-244-4, HON. GORDON WEBB, JUDGE,
STATE OF ARKANSAS, APPELLEE,	REVERSED AND REMANDED; APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE MOOT.

PAUL E. DANIELSON, Associate Justice

Appellant Christopher Branning appeals from the circuit court's order dismissing his petition for postconviction relief. He alleges the following on appeal: (1) that the circuit court erred when it dismissed his petition on the grounds that he was on parole at the time of the hearing although he was incarcerated when the order was entered; (2) that the circuit court erred when it failed to provide him Rule 37 relief or hold a hearing on the hearing's originally-scheduled date of May 16, 2008, regardless of the fact that he was unable to attend that hearing; (3) that the circuit court erred when it refused to allow his father to stand in his place as his attorney-in-fact at the May 16, 2008 hearing; (4) that the circuit court erred by continuing his originally-scheduled hearing from May 16, 2008 to July 25, 2008; and (5) that

this court's decision in *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999), which was relied upon by the circuit court, is unconstitutional and an incorrect interpretation of legislative intent. We agree with Branning that the circuit court erred when it dismissed his petition on the grounds that he was on parole at the time of hearing although he was incarcerated when the order was entered. Therefore, for that reason, we reverse and remand the circuit court's order of dismissal.

Branning was convicted of second-degree stalking, two counts of first-degree terroristic threatening, and misdemeanor violation of a protection order, for which he was sentenced to concurrent terms of 120 months, 72 months, 72 months, and 259 days, respectively, in the Arkansas Department of Correction. This court affirmed the conviction and sentence. *See Branning v. State*, 371 Ark. 433, 267 S.W.3d 599 (2007).

On January 12, 2007, Branning was paroled; however, he filed a timely petition for postconviction relief on January 18, 2007. The circuit court held a hearing on Branning's petition on May 16, 2008. Branning was not able to be present at the time of the hearing as he had been arrested on two unrelated misdemeanor charges and was temporarily being held at the Arkansas Department of Community Correction for allegedly violating conditions of his parole. Therefore, the circuit court rescheduled the hearing so that Branning could be present.

The circuit court held a hearing on the petition on July 25, 2008. At that time, Branning remained on parole and was no longer being held at the Arkansas Department of

Community Correction. At the hearing, the circuit court announced that the petition would be dismissed as Branning was not in custody at the time he filed the petition, nor was he in custody at the time of the hearing on the petition. Therefore, the circuit court found, he was not eligible for the postconviction relief he sought.

The circuit court's written order denying the petition for postconviction relief was not filed until January 5, 2009. Before that order was entered, Branning's parole was revoked. Additionally, he had filed a timely notice of appeal and an amended notice of appeal. We turn now to the merits of Branning's argument on appeal.

Branning argues that the circuit court erred in dismissing his petition, as he was in custody at the time the written order was entered on January 5, 2009. The State avers that the circuit court was correct in dismissing the petition because Branning had not been in custody when his petition was filed, nor when the hearing on the petition was held.

Postconviction proceedings under Rule 37 are intended to avoid persons being unjustly imprisoned. *See Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999). "Rule 37 is a narrow remedy designed to prevent wrongful incarceration under a sentence so flawed as to be void." *Id.* at 369, 985 S.W.2d at 709 (quoting *Williams v. State*, 298 Ark. 317, 320, 766 S.W.2d 931, 933 (1989)). Rule 37.1 begins, "A petitioner in custody under sentence of a circuit court . . . ." *See* Ark. R. Crim. P. 37.1(a)(2010).

This court has previously construed "in custody" to mean physically incarcerated. *See Bohanan*, *supra*. Our precedent is clear that a person on parole is not eligible to proceed under

Rule 37. *See id*. *See also State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). The question presented in the instant case is when must a petitioner be in custody to be eligible for postconviction relief.

In *Bohanan*, this court held that the appellant's Rule 37 petition was moot because he was released from prison on parole approximately two weeks prior to the entry of the circuit court's order denying the petition and, therefore, granting the relief had no practical effect. Here, while Branning was not in custody when he filed his petition, nor at the hearing on the petition, he was in custody before the circuit court's order was filed and, therefore, relief would have had a practical effect.

In *Herred*, the appellant had filed his petition three days before he began serving his sentence. While the State argued that the circuit court lacked jurisdiction to grant Rule 37 relief because Herred was not in custody when he filed his petition, we held that, because he was in custody when the circuit court ultimately disposed of his motion, the court had jurisdiction to consider it. *See Herred*, *supra*. Again, here, Branning was not in custody when he filed his petition or when the court held the hearing on July 25, 2008. However, he was in custody at the time the circuit court's final order was entered on January 5, 2009.

The State argues that because Branning was not in custody at the July hearing, he was not in custody at the time that the court considered the merits of his petition. However, the language this court used in *Herred* was that the circuit court there had jurisdiction of the appellant's petition because that appellant was in custody when the court "ultimately disposed

of his motion." 332 Ark. at 251, 964 S.W.2d at 397. While the circuit court in the instant case verbally announced its findings at the July hearing, a written order was not entered until January 5, 2009. This court has specifically held that an oral order is not effective until entered of record. *See Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005). Therefore, the circuit court did not ultimately dispose of Branning's petition until July 5, 2009, at which time Branning was in custody.

For this reason, we hold that the circuit court erred in denying Branning's petition for postconviction relief. Because we conclude that Branning's first point for reversal has merit, we need not address his remaining allegations of error.

Reversed and remanded; Appellant's motion to take judicial notice moot.

CORBIN and WILLS, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I respectfully dissent. While I understand why the majority reaches its conclusion, I disagree with this court's continued reliance on *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998), because I believe that case to be an anomaly in our postconviction law that should be overruled.[1]

Arkansas Rule of Criminal Procedure 37.1 provides postconviction relief for constitutional violations and other collateral attacks upon a conviction, including ineffective

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[1] While I joined the majority in *Herred*, upon further consideration, I now conclude that this was in error. I now agree with Justice Glaze in his concurrence that the matter should have been dismissed for lack of jurisdiction.

assistance of counsel. The rule is accessible to a "petitioner in custody under sentence of a circuit court." Ark. R. Crim. P. 37.1(a) (2010). This court has held that "in custody" for purposes of Rule 37.1 is limited to physical incarceration. *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999). There, this court held that a "petitioner seeking Rule 37 postconviction relief must be incarcerated in order for the rule's remedies to be available to the petitioner." *Id*. at 369, 985 S.W.2d at 709. Further, we have noted that being in custody is a "prerequisite for Rule 37 relief." *Coplen v. State*, 298 Ark. 272, 273, 766 S.W.2d 612, 612 (1989). In *Burkhart v. State*, 271 Ark. 859, 611 S.W.2d 500 (1981), this court held that the appellant was not entitled to Rule 37 relief where he was not in custody at the time he filed his petition.

Despite the plain wording of Rule 37.1 and this court's case law on the "in custody" issue, this court in *Herred*, 332 Ark. 241, 964 S.W.2d 391, rejected an argument by the State that the circuit court lacked jurisdiction of a Rule 37 petition where the appellant was not in custody at the time he filed his petition. There, this court recognized that our case law required a person to be in custody but concluded, nonetheless, that because the appellant was in custody when the trial court ultimately disposed of his motion, the circuit court had jurisdiction.

The problem with our decision in *Herred* is that it ignores the fact that if there is no jurisdiction at the time of the filing of the petition, because the petitioner is not in custody, then the circuit court cannot somehow later acquire jurisdiction. *Herred* in no way explains how a jurisdictional defect can be cured after the filing of the petition, it just concludes that the court ultimately had jurisdiction, which I think is in error.

Here, Appellant was not in custody at the time he filed his motion, nor was he in custody at the time the circuit court held a hearing on the petition and ruled from the bench that he was dismissing the petition because Appellant was not in custody. It was only some five months later when the circuit court entered its written order that Appellant was back in custody. Thus, Appellant was not in custody at the time of filing or at the time the court considered the petition, and the circuit court correctly dismissed Appellant's petition for lack of jurisdiction.

WILLS, J., joins in this dissent.