

Cite as 2018 Ark. 331
SUPREME COURT OF ARKANSAS
No. CV-18-289

DENVER W. MITCHELL
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered: November 15, 2018

PRO SE APPEAL FROM THE LEE
COUNTY CIRCUIT COURT
[NO. 39CV-18-23]

HONORABLE RICHARD L. PROCTOR,
JUDGE

AFFIRMED; MOTION MOOT.

RHONDA K. WOOD, Associate Justice

Appellant Denver W. Mitchell appeals the denial of his pro se petition for a writ of habeas corpus. Mitchell filed his brief and, at the same time, filed a motion for appointment of counsel. Because the circuit court's denial was not clearly erroneous, we affirm, which renders Mitchell's motion for appointment of counsel moot.

Mitchell was convicted of first-degree felony murder pursuant to Arkansas Code Annotated section 5-10-102(a)(1) (1987). Mitchell appealed and this court affirmed. *Mitchell v. State*, 314 Ark. 343, 862 S.W.2d 254 (1993). Mitchell subsequently filed a petition for a writ of habeas corpus that was denied. *Mitchell v. Kelley*, 2016 Ark. 326 (per curiam). Mitchell filed his second pro se petition for a writ of habeas corpus that was denied and he now appeals.

A petitioner for writ of habeas corpus, who does not allege his or her actual innocence and proceed under Act 1780, must plead either the judgment is facially invalid or that the trial court lacked jurisdiction. *Williams v. Kelley*, 2017 Ark. 200, 521 S.W.3d 104. A circuit court's decision on a petition for writ of habeas corpus will be upheld unless it is clearly erroneous. *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136. A decision is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.*

Mitchell contends that he is entitled to habeas relief because the original information provided that the state was charging him with capital felony murder with robbery as the underlying felony, but he alleges he was convicted of first-degree felony murder with theft as the underlying felony. According to Mitchell, he was convicted of a crime, theft, for which he had not been charged. Mitchell attached the trial transcript that shows the trial court instructed the jury that first-degree murder required a finding that the murder was committed in the course and furtherance of the "crimes of robbery or theft." The jury returned a verdict convicting Mitchell of first-degree felony, however it is not in the record whether this was based on robbery or theft.

Regardless, even if substantiated, claims of a defective information are not generally cognizable in habeas proceedings but are treated as trial error. *Williams v. Kelley*, 2017 Ark. 200, 3, 521 S.W.3d 104, 106; *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503. Mitchell did not invoke Act 1780, and he failed to make the requisite showing for the writ to issue.

When a petitioner in a habeas proceeding fails to establish that his claims implicated the jurisdiction of the trial court or rendered the judgment-and-commitment order invalid on its face, the petitioner has not stated a basis for the writ to issue. See *Clay v. Kelley*, 2017 Ark. 294, 528 S.W.3d 836. Assertions of trial error and due-process claims do not implicate the facial validity of the judgment or the jurisdiction of the trial court. *Williams*, 2017 Ark. 200, 521 S.W.3d 104. A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case, and a writ of habeas corpus will not be issued to correct errors or irregularities that occurred at trial. *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). Mitchell's ultimate argument is that the trial court should not have included theft, in addition to robbery, as one of the underlying felonies in the jury instructions since theft was not alleged in the information. He thus contends that his conviction is invalid. This is a claim of trial error that does not impact the court's subject-matter jurisdiction. *Birchett v. State*, 303 Ark. 220, 221-22, 795 S.W.2d 53, 54 (1990). Mitchell's claim also would not render his sentence facially invalid.

Because Mitchell failed to allege a basis for the circuit court to grant the writ, we affirm the circuit court.

Affirmed; motion moot.

Denver W. Mitchell, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Kent Holt*, Ass't Att'y Gen., for appellee.