

SUPREME COURT OF ARKANSAS

No. CR 10-836

DAVID L. PIERCE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 7, 2011

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE REPLY BRIEF
[MILLER COUNTRY CIRCUIT
COURT, CR 2007-553, HON. KIRK
D. JOHNSON, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

Appellant David L. Pierce lodged an appeal in this court from the Miller County Circuit Court's denial of a petition to vacate that appellant filed in relation to a 2008 judgment reflecting his conviction on a guilty plea to the charge of aggravated robbery and his sentence of 240 months' imprisonment. Appellant has filed a motion for extension of time to file a reply brief. We need not consider the merits of that motion, however, because it is clear that appellant cannot prevail on appeal. *See Morgan v. State*, 2010 Ark. 540 (per curiam).

Appellant relied upon Arkansas Rule of Civil Procedure 60 (2010) and a federal rule of procedure as the basis for his challenge to the judgment against him. The theory behind Rule 60 has been applied in criminal cases only where a court corrects a judgment nunc pro tunc. *Id.* Appellant, however, did not seek to correct some clerical error, but rather directly and collaterally challenged the judgment against him.

The trial court treated the petition, which was filed over a year after the judgment was entered, as an untimely petition for relief under Arkansas Rule of Criminal Procedure 37.1 (2010) that was filed outside of the mandatory ninety-day period under Arkansas Rule of Criminal Procedure 37.3. Regardless of the label placed on a motion, a motion that seeks postconviction relief is governed by the provisions of our postconviction rule. *Musgrove v. State*, 2010 Ark. 458 (per curiam). This court has consistently held that Rule 60 does not provide an avenue for postconviction relief. *Morgan*, 2010 Ark. 540.

Appellant has previously sought unsuccessfully to receive relief from the judgment against him relying upon Rule 60 and Federal Rule of Civil Procedure 60 in a petition for writ of error coram nobis. See *Pierce v. State*, 2009 Ark. 606 (per curiam). In his latest petition, appellant had, as in the earlier petition, failed to demonstrate that the federal rule applied to his postconviction claims. As appellant stated no basis for any claim in his petition to vacate, it is clear that he cannot prevail, and the appeal is dismissed. The motion for extension of time is therefore moot.

Appeal dismissed; motion moot.