

SUPREME COURT OF ARKANSAS

No. 10-1084

PHILIP EUGENE PARMLEY APPELLANT	Opinion Delivered February 17, 2011
V.	PRO SE MOTION FOR EXTENSION OF TIME [JEFFERSON COUNTY CIRCUIT COURT, CV 2010-486]
RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION	HON. JODI RAINES DENNIS, JUDGE
APPELLEE	<u>APPEAL DISMISSED; MOTION MOOT.</u>

PER CURIAM

Appellant Philip Eugene Parmley, who is also known as Phillip Eugene Parmley, is an inmate incarcerated in the Arkansas Department of Correction. In 2010, appellant filed a petition for writ of habeas corpus in the county in which he is incarcerated, and the circuit court dismissed the petition. Appellant has lodged an appeal of that order in this court and has now filed a motion in which he seeks an extension of time in which to file his brief. We dismiss the appeal, and the motion is accordingly moot.

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 the appellant could not prevail. *Hill v. Norris*, 2010 Ark. 287 (per curiam). In this case, it is clear that appellant cannot prevail on appeal.

A jury in Garland County Circuit Court found appellant guilty of possession of drug paraphernalia with intent to manufacture methamphetamine and sentenced him to 480

months' imprisonment. The Arkansas Court of Appeals affirmed. *Parmley v. State*, CACR 04-692 (Ark. App. Mar. 2, 2005) (unpublished). In 2007, appellant filed a petition for writ of habeas corpus, alleging the trial court lacked jurisdiction to try the case because the crime had not been committed in Garland County. After remand to the circuit court for findings of fact, this court affirmed the denial of the writ. *Parmley v. Norris*, 07-813 (Ark. Feb. 12, 2009) (unpublished per curiam).

Appellant subsequently filed the petition which is the subject of this appeal, alleging once again that the crime was not committed in Garland County. The petition asserted that on remand the circuit court had erroneously determined that the crime was ongoing from the time that appellant entered a gated community in Garland County and continued into Hot Spring County, still within the same gated community, where appellant was then arrested.

The trial court found that the law-of-the-case doctrine was applicable and dismissed the petition on that basis. In order for the law-of-the-case doctrine to apply in a habeas proceeding where jurisdiction is at issue, the merits of the claim must previously have been addressed and the jurisdictional claim must have been adjudicated. *Mosley v. Norris*, 2010 Ark. 501 (per curiam) (citing *Cloird v. State*, 252 Ark. 190, 99 S.W.3d 419 (2003)). To the extent that appellant merely reargues his previous challenge, that because the location of his arrest was not in Garland County, the crime did not occur in Garland County, the claim has been addressed.

The petition also contained allegations that the information stated that the crime was committed in Hot Spring County. To that extent, appellant raised some claims that were

not subject to prior adjudication. Those claims, however, are clearly without merit.

It is true that claims of a defective information that raise a jurisdictional issue, such as those that raise a claim of an illegal sentence, are cognizable in a habeas proceeding. See *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003); see also *Russell v. Norris*, 2009 Ark. 472 (per curiam) (challenge to information must allege an illegal sentence and not one illegally imposed). In spite of appellant's allegation to the contrary, the information contained in the record as an attachment to the petition to support appellant's claim does allege that the crime was committed in Garland County, and the information also indicates that it was filed in Garland County Circuit Court. The charging instrument clearly did allege that the crime occurred in the county where appellant was convicted.

Appellant appeared to contend that the alleged facts stated in support of the information and later shown at trial were not sufficient to establish that the crime was committed in Garland County, mirroring his previous claim that the crime occurred in the county where he was arrested. Claims concerning this type of defect of the information, however, are not generally the type of challenge appropriate to a proceeding for writ of habeas corpus. See *Moore v. Hobbs*, 2010 Ark. 380 (per curiam) (a claim that amendment of the information was invalid is not cognizable in a habeas proceeding); *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997) (per curiam) (non-jurisdictional claims concerning a defective information may be waived); see also *Anderson v. Norris*, 370 Ark. 110, 257 S.W.3d 540 (per curiam); *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990). A nonjurisdictional challenge to the sufficiency of an information must be raised prior to trial to be preserved for appellate review. *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001).

Appellant complained that the State failed to adequately demonstrate that the crime occurred in Garland County. The State, however, is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue. *Evans v. State*, 2010 Ark. 234 (per curiam) (citing *Mackey v. Lockhart*, 307 Ark. 321, 323, 819 S.W.2d 702, 704 (1991)). Because the information clearly alleged that the crime was committed in Garland County, the sufficiency of the supporting facts was a challenge that could have been resolved at trial or on appeal. A habeas corpus proceeding does not afford a convicted defendant an opportunity to retry his case, and it is not a substitute for direct appeal. *Marshall v. State*, 2010 Ark. 500 (per curiam).

Appellant asserted in his petition that the writ should be granted because the State failed to show that he did not acquire possession of the drug paraphernalia somewhere in Hot Spring County after he entered the gated community in Garland County and before he was arrested in Hot Spring County. To the contrary, the burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise there is no basis for a finding that a writ of habeas corpus should issue. *Moore v. Hobbs*, 2010 Ark. 380 (per curiam). Appellant was required to make a showing, by affidavit or other evidence, of probable cause to believe that he is illegally detained. *See id.* Because appellant failed to make the required demonstration, his petition did not merit relief, and the trial court did not err to dismiss the petition without granting relief.

Appeal dismissed; motion moot.