

SUPREME COURT OF ARKANSAS

No. CR09-77

TIMOTHY WAYNE KEMP
APPELLANT,

V.

STATE OF ARKANSAS
APPELLEE,

Opinion Delivered December 17, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR-93-2903]

,
HON. MARION A. HUMPHREY,
JUDGE

DISMISSED WITHOUT PREJUDICE.

JIM GUNTER, Associate Justice

Appellant appeals the circuit court's order denying his motions for leave to file an overlength Rule 37 petition and for leave to file an amended petition. The circuit court's order also noted that the motions had been deemed denied pursuant to Ark. R. Crim P. 33.3(c). On appeal, appellant asserts that Rule 33.3(c) does not apply to Rule 37 proceedings and that his motions should have been granted. The State argues that, because this court's mandate affirming the denial of appellant's first Rule 37 petition has not been recalled, the circuit court never had jurisdiction, and the appeal should be dismissed. We agree with the State and dismiss the appeal for lack of jurisdiction.

Appellant was convicted of four counts of capital murder and sentenced to death on each count. This court affirmed his convictions and one of the death sentences, but remanded



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for resentencing on the remaining three. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996). After resentencing, this court affirmed the three new death sentences that were imposed. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). Appellant then filed a petition for postconviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure, which was denied by the circuit court; however, on appeal, this court remanded for findings of fact and conclusions of law. *Kemp v. State*, 347 Ark. 52, 60 S.W.3d 404 (2001). After an amended order was filed and the remand returned, this court affirmed the denial of postconviction relief. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002).

Appellant, represented by the Federal Public Defender's Office, then proceeded to seek federal habeas corpus relief in the United States District Court for the Eastern District of Arkansas. In his petition for a writ of habeas corpus, filed February 14, 2003, appellant alleged a series of errors that his previous attorney had failed to discover and present in his Rule 37 proceeding. On November 29, 2004, appellant filed a motion to stay and hold in abeyance the federal proceedings pending his exhaustion of state remedies. On January 12, 2005, this motion was granted.

On April 15, 2008, appellant filed in the Pulaski County Circuit Court a Rule 37 petition for postconviction relief, which was 315 pages in length; a motion for leave to file an overlength petition, as Ark. R. Crim. P. 37.1(b) limits petitions for Rule 37 relief to ten pages in length; and a memorandum of law regarding the timeliness of his petition. Also on April 15, 2008, appellant's federal public defenders filed with this court an application for



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permission to be appointed as counsel on appellant's behalf and represent him in the circuit court. On April 24, 2008, appellant filed an amended Rule 37 petition as well as a motion for leave to file an amended petition. No response to any of the motions was filed by the State.

On May 8, 2008, this court granted counsels' application for permission to be appointed as counsel on appellant's behalf. On September 30, 2008, the circuit court entered an order ruling that the motion to file an overlength petition, the memorandum of law, and the motion for leave to file an amended petition had been deemed denied under Ark. R. Crim. P. 33(c). In addition, the court specifically denied the pleadings by entry of the order. Appellant then filed a notice of appeal from this order on October 29, 2008.

On appeal, appellant asserts that Rule 33.3(c) does not apply to Rule 37 proceedings, therefore his motions could not be deemed denied, and that the circuit court erred in denying the motions. While appellant's brief discusses the merits of his arguments regarding the denial of his motions, the State raises a jurisdictional issue in its brief, and, as jurisdiction is a threshold issue, we shall consider that issue first. The State asserts that, because appellant has never requested that this court recall the mandate affirming the denial of appellant's first Rule 37 petition, the circuit court was without authority to entertain a second Rule 37 petition filed by appellant. As authority, the State cites *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006), which presented a similar fact situation to the case at bar and resulted in this court granting Lee's motion to recall our mandate and reopen his postconviction proceedings. Because a similar request for a recall of the mandate was not done in this case, the State asks that we dismiss the present appeal for lack of jurisdiction.



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In reply, appellant argues that a recall of our mandate is not required for the circuit court to have jurisdiction over his second Rule 37 petition. First, he asserts that our grant of his counsel's request to be appointed counsel on his behalf to represent him in the circuit court validates the circuit court's authority to hear the petition. He also argues that once this court has issued its mandate at the conclusion of an appeal, jurisdiction "naturally" reverts back to the circuit court. And finally, he argues that due to a change in the language of Rule 37.2 in 1990, petitioners are no longer required to seek this court's permission before pursuing a second Rule 37 proceeding. Appellant argues that it is more practical for circuit courts to consider the propriety of second Rule 37 petitions, since that determination will often turn on factual issues that require the presentation of evidence.

Despite appellant's arguments to the contrary, we agree with the State that appellant was required to ask this court to recall our mandate and allow him to pursue a second Rule 37 petition. This court has consistently upheld the rule that a petitioner is limited to one petition for postconviction relief unless the first petition was specifically denied without prejudice to allow the filing of a second petition. *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997). In *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003), we explained that we will recall a mandate only under "extraordinary circumstances." *Id.* at 564, 114 S.W.3d at 222. In deciding to recall the mandate in *Robbins*, we explained that our decision was based on three factors: (1) the presence of a defect in the appellate process; (2) a dismissal of proceedings in federal court because of unexhausted state court claims; (3) the enhanced



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scrutiny that is required in death cases. *Id.* It is only when these unique circumstances are present that this court will recall our mandate and reopen postconviction proceedings. *Id.* In addition, this court established in *Hill v. State*, 363 Ark. 480, 215 S.W.3d 589 (2005), that counsel appointed to represent indigent capital defendants in connection with unexhausted state remedies after the mandate has issued, such as the federal public defenders in the instant case, must be appointed by this court as required by Ark. R. Crim. P. 37.5.

Thus, our case law makes clear that two requirements must be met before this court will reopen postconviction proceedings after the denial of a Rule 37 petition has been affirmed by this court and the mandate has issued: (1) counsel for the appellant must obtain permission to be appointed by this court, and (2) appellant must demonstrate to this court extraordinary circumstances that warrant a reopening of postconviction proceedings. Appellant has unquestionably fulfilled one requirement, by his counsel obtaining permission from this court to represent him in circuit court proceedings, but we disagree with appellant's assertion that this grant of permission to proceed as counsel on his behalf is equivalent to a recall of our mandate. We reiterate that the recall of a mandate is a separate and distinct action that will be allowed only under exceptional circumstances, and without a recall of our mandate, the circuit court has no authority to entertain a second Rule 37 petition.

Briefly addressing appellant's additional arguments that a recall of our mandate is not required, we find these arguments equally unavailing. The cases that appellant cites for the proposition that jurisdiction "naturally" reverts to the circuit court are distinguishable; in



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short, they all involve situations where (1) the circuit court acquires jurisdiction to hear post-conviction proceedings following our mandate of a direct appeal; or (2) the circuit court has jurisdiction to take further action specifically pursuant to a remand order in our mandate. The few cases cited to support his proposition that the change in Rule 37.2 allows second petitions without leave are also unconvincing; appellant merely cites to several orders of this court granting permission for an attorney to proceed on behalf of a particular petitioner. And, despite any changes to our rules of criminal procedure, our holding in *Robbins* made clear that an appellant must ask this court to recall our mandate before postconviction proceedings can be reopened.

In sum, to allow petitioners to file multiple Rule 37 petitions without leave of this court would fly squarely in the face of Rule 37.2(b), which provides:

All grounds for relief available to the petitioner under this rule must be raised in his or her original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or in any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence, may not be the basis for a subsequent petition. All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule.

Ark. R. Crim. P. 37.2(b) (2009). We therefore hold that a petitioner must ask this court to recall its mandate and reopen postconviction proceedings before a second Rule 37 petition can be brought in circuit court. Because this has not been done in the present case, the circuit court was without jurisdiction to entertain a second Rule 37 petition, and this court is



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likewise without jurisdiction to hear an appeal from any decision of the circuit court in the matter. We therefore dismiss the appeal without prejudice.

Dismissed without prejudice.

IMBER, J., not participating.

Jennifer Horan, Federal Public Defender, by: *Scott Braden* and *Julie Brain*, Ass't Federal Public Defenders, for appellant.

Dustin McDaniel, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen., for appellee.