

SUPREME COURT OF ARKANSAS

No. CR09-1372

JIMMY SMITH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 11, 2010

PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL AND FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF [CIRCUIT COURT OF PULASKI COUNTY, CR 2006-1007, HON. WILLARD PROCTOR, JR., JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 2006, a jury found appellant Jimmy Smith guilty of first-degree murder and sentenced him, as a habitual offender, to 720 months' imprisonment. The Arkansas Court of Appeals affirmed the judgment. *Smith v. State*, CACR 07-277 (Ark. App. Feb. 6, 2008) (unpublished). Appellant filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2009), and later filed amended petitions, both as a pro se litigant and represented by counsel. The trial court denied postconviction relief, and appellant lodged an appeal in this court.

On January 21, 2010, we granted counsel's motion to be relieved, and appellant filed the instant motion for appointment of counsel. Appellant later filed another motion in which he requests an extension of time in which to file his brief. We need not consider the merits of the motions, because appellant did not timely file a petition sufficient under Rule 37.1, and



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we must dismiss the appeal. The motions are therefore moot.

Under Arkansas Rule of Criminal Procedure 37.2(c) (2009), where, as here, a defendant's judgment was appealed, a petition under Rule 37.1 must be filed within sixty days of the date of the mandate. The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and, if those requirements are not met, the circuit court lacks jurisdiction to consider an untimely petition. *Lauderdale v. State*, 2009 Ark. 624 (per curiam); *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam).

The court of appeals issued its mandate as to the direct appeal of appellant's judgment on February 6, 2008. The record before us contains a pro se petition filed on March 31, 2008; other pro se pleadings that included an over-length, amended petition filed a few minutes later on the same date; and a petition prepared by counsel and filed on April 6, 2009. The original petition filed on March 31 did not bear the appellant's signature, although it was notarized. The over-length petition contains one signature, on the last page of the petition after the certificate of service, and is notarized. There is no other signature on the over-length petition, although a signature line is indicated, both following the body of the petition and after a paragraph designated as the verification.

The amended petition filed by counsel more than a year after the mandate issued was clearly not filed within the requisite sixty-day period. The two petitions filed on March 31, 2008, were not properly verified. Rule 37.1(c) provides a form of affidavit to be attached to the petition. *Mitchael v. State*, 2009 Ark. 516 (per curiam) (citing *Bunch v. State*, 370 Ark. 113,



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257 S.W.3d 533 (2007) (per curiam)). The verifications on the pro se petitions filed here were not in the designated form. Even if the form used was otherwise sufficient, neither verification was executed by the appellant.

The fact that appellant's signature appeared on the second pro se petition after the certificate of service, particularly as there was a designated signature block following the verification, was not sufficient. The verification requirement for a postconviction-relief petition is of substantive importance to prevent perjury. *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005) (per curiam). For that purpose to be served, the petitioner must execute the verification, and if the petitioner is represented by counsel, counsel may not sign and verify the petition for him. *Boyle v. State*, 362 Ark. 248, 208 S.W.3d 134 (2005) (per curiam). In this case, appellant did not execute the verification on either pro se petition.

Under Rule 37.1(d), the circuit court and any appellate court must dismiss a petition that is not verified as required by Rule 37.1(c). *Mitchael*, 2009 Ark. 516, at 2. An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Crain v. State*, 2009 Ark. 512 (per curiam). Because it is clear that appellant cannot prevail, we dismiss the appeal. The motions for appointment of counsel and for an extension of time to file appellant's brief are consequently moot.

Appeal dismissed; motions moot.