

SUPREME COURT OF ARKANSAS

No. CR09-1097

JEROME MERAZ

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 11, 2010

PRO SE MOTION FOR
APPOINTMENT OF COUNSEL
[CIRCUIT COURT OF CARROLL
COUNTY, EASTERN DISTRICT, CR
2007-61, HON. GERALD K. CROW,
JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

Appellant Jerome Meraz lodged in this court an appeal of an order denying postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2009). He subsequently filed the instant motion for appointment of counsel. We hold the motion moot because we must dismiss the appeal; the record before us fails to establish jurisdiction of the trial court to consider the Rule 37.1 petition.

A judgment entered on June 16, 2008, reflects appellant's conviction on a negotiated plea of guilty to first-degree stalking, kidnapping, residential burglary, and misdemeanor theft of property, with an aggregate sentence imposed of 720 months. The petition contained in the record bears an intact file mark for June 26, 2009, and a file mark for January 19, 2009, that was marked out. The record also contains two motions to amend the petition, which are marked as filed in the circuit court on October 20, 2008, and on November 6, 2008. The



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later motion appears to assert that the original petition was timely tendered and that the circuit clerk declined to accept the petition until later.

Where a conviction was obtained on a plea of guilty, a petition for postconviction relief may be filed no later than ninety days after the entry of the judgment. Ark. R. Crim. P. 37.2(c) (2009). 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). Here, the trial court found that it could exercise jurisdiction, but that ruling is not supported by the trial court's factual findings or the record.

The file mark on the petition in this case was more than a year after the date of entry of the judgment. The motion to amend the petition raised claims that the original petition had been presented to the circuit clerk by appellant's mother on June 23, 2008, and that the clerk had marked the petition as filed, then crossed the file mark out. Appellant also indicated that the petition had been sent to the judge and received within the time for filing.¹ As the party challenging the file mark, appellant carried the burden to show by a preponderance of evidence that the filing date affixed was not correct. *See State v. Thurman*, 305 Ark. 448-A, 809 S.W.2d 821 (1991) (per curiam).

¹Appellant raised similar claims in a tendered petition for writ of mandamus presented to this court and then filed a motion for rule on clerk. *Meraz v. Crow*, 2009 Ark. 369 (unpublished per curiam). Our clerk had correctly declined to file the petition, and we were not able to reach the merits of the petition, because appellant did not present the petition with a certified record. *Id.* As we noted in that opinion, resolution of any claim that the circuit clerk had incorrectly marked the petition would lie with the circuit court.



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The order at issue does not indicate that an evidentiary hearing was held, and the court appeared to rely on the materials contained in the record in determining that jurisdiction was proper.² The decision that jurisdiction was appropriate was based upon the trial judge's failure to forward appellant's petition to the circuit court. The trial court found that the petition should have been filed, that appellant's rights were frustrated by the acts of the court, and that the trial judge should have taken steps to insure that appellant could seek postconviction relief.

Delivering the petition to the circuit judge, however, is not the equivalent of filing the petition with the circuit clerk. *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996) (per curiam). Filing the petition *with the circuit clerk* is critical to the trial court's jurisdiction to consider the merits of the petition. *Id.* (emphasis added).

Although appellant's second motion to amend included an assertion that the petition was tendered to the clerk within the required time, the trial court did not include in its order any finding to that effect, and the record before us does not contain any documentation of a timely tender. If appellant had tendered a petition in accord with our rules of procedure, but the circuit clerk marked the petition as filed on a later date through clerical error, then the petition was filed on the date tendered. See *White v. State*, 373 Ark. 415, 284 S.W.3d 64 (2008) (per curiam) (delay in filing as a result of a delay in payment of filing fees was clerical

² The court may have considered a broader record than the one before us. The circuit clerk tendered a supplemental record to this court, but appellant has not moved to supplement the record. An appellant or petitioner in this court has the burden to bring up a sufficient record upon which to grant relief. See *Daniels v. State*, 2009 Ark. 607 (per curiam). As we explain, however, there is no indication that a more complete record might contain any additional support for the court's decision.



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error); *see also Arbaugh v. A.G. Processing, Inc.*, 358 Ark. 432, 191 S.W.3d 539 (2004) (per curiam) (date of tender becomes the date of filing when filing fee was subsequently paid).

Without some evidence of a timely tender to the circuit clerk, we cannot say that the trial court's finding that the petition should have been filed is supported by the record.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *French v. State*, 2009 Ark. 443 (per curiam); *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam). It is clear that appellant could not prevail here because it is clear that the record does not support the trial court's assumption of jurisdiction in the matter, as the Rule 37.1 petition was not timely filed with the circuit clerk. If the circuit court was without subject-matter jurisdiction, this court is likewise without jurisdiction to hear the appeal. *Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179; *see also Kemp v. State*, 2009 Ark. 631. Accordingly, we dismiss the appeal and the motion is moot.

Appeal dismissed; motion moot.