

SUPREME COURT OF ARKANSAS

No. CR09-1265

MICHAEL F. JACKSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 1, 2010

PRO SE MOTION FOR EXTENSION OF
TIME TO FILE BRIEF-IN-CHIEF [CIRCUIT
COURT OF MISSISSIPPI COUNTY,
CHICKASAWBA DISTRICT
[NO. CR 98-281]

HON. BARBARA HALSEY, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

Appellant Michael F. Jackson was convicted by a jury of first-degree battery on January 14, 1999. He was sentenced to 240 months' imprisonment in the Arkansas Department of Correction, and that sentence included an enhancement under Arkansas Code Annotated § 16-90-121 (1987)¹ for commission of a felony with a deadly weapon. The Arkansas Court of Appeals affirmed. *Jackson v. State*, CACR 99-325 (Ark. App. Nov. 3, 1999) (unpublished). Appellant then filed a number of petitions seeking postconviction relief in various forms, and this court dismissed each of appellant's respective appeals from the trial court's orders. See *Jackson v. State*, CR 00-1383 (Ark. Dec. 12, 2002) (unpublished per curiam) (holding that appellant's original petition under Arkansas Rule of Criminal Procedure 37.1 (2000) had not

¹Section 16-90-121 was amended in 2001, and it now enhances sentences for a "second or subsequent felony" with a firearm. Ark. Code Ann. § 16-90-121 (Repl. 2006). Appellant was sentenced under the prior version, however, which mandated an enhanced sentence for a first conviction if the crime was committed with a deadly weapon.



Cite as 2010 Ark. 157

been filed with the circuit clerk within the sixty-day deadline imposed by Arkansas Rule of Criminal Procedure 37.2(c) (2009) and was therefore untimely); *Jackson v. State*, CR 03-593 (Ark. Oct. 30, 2003) (unpublished per curiam) (holding that the grounds raised in appellant’s “petition for declaratory judgment and mandamus relief conjoined” were either cognizable under his prior Rule 37.1 petition or constituted grounds that could and should have been raised earlier); *Jackson v. State*, CR 07-179 (Ark. June 14, 2007) (unpublished per curiam) (holding that appellant was not entitled to duplication of his briefs where he failed to offer any showing of substantial merit to his appeal).

On October 13, 2008, appellant filed in the trial court a petition to correct or reduce his sentence pursuant to Arkansas Code Annotated § 16-90-111 (Repl. 2006) and application for a new trial pursuant to Arkansas Code Annotated § 16-89-130 (Repl. 2005), which he amended on April 17, 2009. The trial court denied relief in its May 15, 2009 order, finding that the petition was untimely and that all the claims within the petition had been finally adjudicated in other proceedings. Appellant filed a notice of appeal from this denial on June 19, 2009, but our clerk refused to lodge the record on appeal as the appeal was untimely. Appellant then re-filed in the trial court the same motion for correction or reduction of sentence and application for new trial, as well as the same amendment to that petition, on August 31, 2009, which the trial court denied on September 11, 2009. Appellant appealed that denial to this court on September 21, 2009. Now before us is appellant’s motion for extension of time in which to file his brief-in-chief. Because it is clear appellant cannot prevail, we dismiss the appeal, and the motion for extension of time is moot.



Cite as 2010 Ark. 157

An appeal from an order that denied a petition for postconviction relief, including civil postconviction remedies, will not be permitted to go forward where it is clear that the appellant could not prevail. See *Pierce v. State*, 2009 Ark. 606 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam). Regardless of the label placed on it by the petitioner, a petition is considered an application for relief under Rule 37.1 if the grounds asserted are cognizable under that rule. *McLeod v. State*, 2010 Ark. 95 (per curiam); *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993) (per curiam).

Here, appellant has alleged that the sentence imposed was illegal, that the evidence was insufficient to convict appellant, that trial counsel was ineffective for failing to call a witness, and that a faulty photo lineup was used by the police to identify appellant. All of these claims were either cognizable in a Rule 37.1 petition or should have been addressed at trial and on direct appeal. See, e.g., *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam) (addressing ineffective assistance of counsel claims under Rule 37.1); *Rodriguez v. State*, 2010 Ark. 78 (per curiam) (noting that claims challenging the sufficiency of the evidence are not cognizable in Rule 37.1 petitions and must be addressed on direct appeal); *Mezquita v. State*, 354 Ark. 433, 125 S.W.3d 161 (2003) (treating pretrial identification procedures as questions of due process); *Hendrix v. State*, 291 Ark. 134, 722 S.W.2d 596 (1987) (holding that illegal sentencing is a proper subject for a Rule 37.1 petition); see *Bell v. State*, 2010 Ark. 65, 390 S.W.3d 98 (per curiam) (explaining that assertions of due-process violations are allegations of



Cite as 2010 Ark. 157

trial error that could have been raised at trial or on appeal and may not be raised in Rule 37.1 proceedings).

Rule 37.2(b) provides that all grounds for postconviction relief must be raised in a petition under Rule 37.1 filed within sixty days of the date that the appellate court's mandate affirming the judgment was issued. The court of appeals mandate in the instant case was issued on November 23, 1999, and appellant's Rule 37.1 petition was accordingly due on or before January 21, 2000. Thus, his August 31, 2009 petition was filed nine years, seven months, and ten days too late. Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and, if they are not met, a trial court lacks jurisdiction to grant postconviction relief, including a petition to correct an illegal sentence on its merits. *Tillman v. State*, 2010 Ark. 103 (per curiam); *McLeod*, 2010 Ark. 95; *Lauderdale v. State*, 2009 Ark. 624 (per curiam); *Worthem v. State*, 347 Ark. 809, 66 S.W.3d 665 (2002) (per curiam).

Where a trial court lacks jurisdiction, this court does not acquire jurisdiction on appeal. See *Thomas v. State*, 345 Ark. 236, 45 S.W.3d 818 (2001). As such, it is clear that appellant could not prevail on appeal, and we dismiss his appeal accordingly. See *Pierce*, 2009 Ark. 606; *Grissom*, 2009 Ark. 557. Appellant's motion for extension of time in which to file his brief-in-chief is therefore moot.

Appeal dismissed; motion moot.