

Cite as 2019 Ark. 147
SUPREME COURT OF ARKANSAS
No. CV-18-823

ALONZO WATSON

APPELLANT

V.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

APPELLEE

Opinion Delivered May 16, 2019

PRO SE APPELLANT'S MOTION FOR
EXTENSION OF BRIEF TIME
[LINCOLN COUNTY CIRCUIT
COURT, NO. 40CV-18-117]

HONORABLE JODI RAINES DENNIS,
JUDGE

APPEAL DISMISSED; MOTION
MOOT.

JOHN DAN KEMP, Chief Justice

Appellant Alonzo Watson appeals the denial of his pro se petition to proceed in forma pauperis in a habeas proceeding.¹ The circuit court denied his petition because it found the underlying petition for writ of habeas corpus did not contain a colorable cause of action. Now before us is Watson's motion for extension of time to file his brief-in-chief. Because the circuit court did not abuse its discretion in finding that Watson should not be permitted to proceed at public expense, we dismiss the appeal. An appeal from an order that denied a petition for postconviction relief, including civil postconviction remedies such as habeas proceedings, will not be permitted to go forward when it is clear that the

¹In 2012, a jury found Watson guilty of capital murder and sentenced him a habitual offender to life imprisonment without parole. We affirmed. *Watson v. State*, 2012 Ark. 430. The habeas petition, which was filed in the circuit court in Lincoln County where Watson is incarcerated, pertains to that judgment of conviction.

appellant could not prevail. *Gardner v. Kelley*, 2018 Ark. 300, at 2. Watson's motion is rendered moot by the dismissal of the appeal.

In evaluating Watson's petition to proceed in forma pauperis, the circuit court found that he had established he was indigent but that he did not raise a cognizable claim for the writ. In his habeas petition, Watson alleged the following: (1) the trial court erred in allowing the State to amend the felony information and by permitting invalid instructions to be given to the jury; (2) while the original felony information conferred jurisdiction on the trial court, the amendment of the information removed the trial court's jurisdiction; (3) there is new scientific evidence to demonstrate his actual innocence; (4) the evidence adduced at trial was not sufficient to sustain the judgment of conviction; (5) he was arrested illegally; (6) he has obtained the statement of a witness that supports his (Watson's) decision not to testify at his trial; (7) he was not afforded effective assistance of counsel at trial. Although Watson appended a number of documents to the petition, the claims in the petition, including the assertion that the trial court lacked jurisdiction in the matter, were conclusory.

I. *Standard of Review*

Our standard of review of a decision to grant or deny a petition to proceed in forma pauperis is abuse of discretion, and the circuit court's factual findings in support of its exercise of discretion will not be reversed unless clearly erroneous. *Whitney v. Guterres*, 2018 Ark. 133. An abuse of discretion occurs when the court acts arbitrarily or groundlessly. *Whitney v. State*, 2018 Ark. 138.

Rule 72 of the Arkansas Rules of Civil Procedure conditions the right to proceed in forma pauperis in civil matters on indigency and the circuit court's satisfaction that the alleged facts indicate "a colorable cause of action." Ark. R. Civ. P. 72(c) (2017). If the underlying petition clearly fails to state a colorable cause of action, there has been no abuse of discretion, and this court may affirm the denial of in forma pauperis status. *Muldrow v. Kelley*, 2018 Ark. 126, 542 S.W.3d 856. A colorable cause of action is a claim that is legitimate and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. *Penn v. Gallagher*, 2017 Ark. 283. The decision to deny Watson's request for pauper status therefore turned on whether he pleaded sufficient facts in his habeas petition to support a claim for relief within the purview of a habeas proceeding.

II. *Habeas Relief and Jurisdiction*

Under our statute, a petitioner for the writ who does not allege his or her actual innocence and proceed under Act 1780 of 2001 must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he or she is being illegally detained. Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016); *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136. The burden is on the petitioner to establish with factual support that he or she is entitled to issuance of the writ. *Breden v. Kelley*, 2018 Ark. 299, 557 S.W.3d 264 (A habeas petition fails to state a colorable cause of action if it does not state sufficient nonconclusory facts to support cognizable claims.).

III. *Watson's Claims for the Writ*

Watson's assertion of actual innocence and his allegation of newly discovered scientific evidence that would negate the finding of guilt in his case are effectively challenges to the sufficiency of the evidence that are not cognizable in habeas proceedings not brought under Act 1780. *Clay v. Kelley*, 2017 Ark. 294, 528 S.W.3d 836. Moreover, those claims were brought without factual substantiation or development from which it could be concluded that the trial court lacked jurisdiction in the case or that the judgment was illegal on its face.

With respect to the legality of Watson's arrest and his allegations of trial error, questions pertaining to whether there was some error in the investigation, arrest, or prosecution of a criminal offense are not within the purview of a habeas corpus proceeding unless the error impinges on the jurisdiction of the court to enter the judgment or the facial validity of the judgment. *Story v. State*, 2017 Ark. 358, at 4-5 (noting that the trial court's jurisdiction to try the accused does not depend on the validity of the arrest). Any challenge that Watson desired to raise to the illegality of his arrest or errors in his trial could and should have been made in the trial court. Habeas proceedings are not an opportunity to raise, or relitigate, claims that could have been addressed in the trial court and, if applicable, on direct appeal from the judgment. A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case. *Stephenson v. Kelley*, 2018 Ark. 143, 544 S.W.3d 44.

Watson's allegations of ineffective assistance of counsel are not within the scope of a habeas proceeding. *Barber v. Kelley*, 2017 Ark. 214. The allegations should have been raised in the petition under Arkansas Rule of Criminal Procedure 37.1 that he filed in the trial court in 2013.² A habeas proceeding is neither a substitute for filing a timely petition under the Rule nor an opportunity to again raise the issue of counsel's competence if it has already been addressed in a Rule 37.1 proceeding. *Id.*

Appeal dismissed; motion moot.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. The only matter properly before us at this juncture is Mr. Watson's motion for extension of time to file his brief. This is not a full appeal, only an appeal of a denial of his petition to proceed in forma pauperis. To succeed, under Rule 72 of the Arkansas Rules of Civil Procedure, Mr. Watson is only required to assert a "colorable cause of action." Mr. Watson has at least done that in his claim of actual innocence and his allegation of newly discovered scientific evidence. We necessarily must look at Mr. Watson's brief to determine if he can satisfy the pleading requirements of Act 1780. Whether he can prevail or not is well beyond the scope of a motion for extension of time to file that brief, and even beyond the scope of the appeal that he has not yet perfected because his brief has not yet been filed. The majority's

²The trial court's order denying the Rule 37.1 petition was affirmed by this court. *Watson v. State*, 2014 Ark. 203, 444 S.W.3d 835.

decision appears to be a denial of due process and Mr. Watson's right of access to the courts.

I dissent.