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SUPREME COURT OF ARKANSAS

No. CR 08-911

	Opinion Delivered May 27, 2010
JIMMY ED LEE Appellant	PRO SE APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, CR 2005-3, HON. JIM HUDSON, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

In 2006, appellant Jimmy Ed Lee entered a plea of guilty to possession of drug paraphernalia with intent to manufacture a controlled substance. He was placed on probation for a term of five years and fined $2900. In 2007, the State filed a petition to revoke probation, alleging appellant's failure to comply with the written conditions of probation. The petition was granted, and appellant was sentenced to a term of 240 months' imprisonment and ordered to pay the original fine and costs. The Arkansas Court of Appeals affirmed the revocation order. *Lee v. State*, CACR 07-684 (Ark. App. Dec. 5, 2007) (unpublished).

On January 28, 2008, appellant filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009) that was denied without

a hearing.[1] Appellant brings this appeal from the order. We find no error and affirm.

In his petition, appellant alleged error on the part of the trial court and ineffective assistance of counsel in the original guilty plea proceeding. With respect to those claims, the Rule 37.1 petition was not timely filed. Any allegation pursuant to the rule that appellant desired to raise was required to be raised in a petition filed within ninety days of the date that the original judgment was entered in 2006 in accordance with Arkansas Rule of Criminal Procedure 37.2(c).

Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and a circuit court cannot grant relief on claims not timely raised in accordance with the rule. *Lauderdale v. State*, 2009 Ark. 624 (per curiam) (citing *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989)).

As to the assertions raised by appellant with regard to the revocation proceeding and the appeal from the revocation order, the claims were timely and could be addressed by the trial court. But, even though the claims were timely raised, the court could grant relief only on those allegations that concerned whether appellant was afforded effective assistance of counsel in the revocation proceeding and subsequent appeal. The claims of trial error, even those of constitutional dimension, should have been raised in the revocation proceeding and on appeal from the order. *See Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Our postconviction rule does not permit a direct attack on a judgment or substitute

[1]Appellant filed a motion to amend his Rule 37.1 petition. While there is no order in the record granting the motion, the court in its order stated that it was considering the motion as an amended petition.

for an appeal. *Hill v. State*, 2010 Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). The sole exception lies in claims raised in a timely petition that are sufficient to void the judgment and render it a nullity. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 198.

Appellant raised one allegation in his petition that, if proven, would render the judgment entered on revocation void. He argued that the sentence of 240 months' imprisonment and the fine imposed when probation was revoked constituted a violation of the provisions against double jeopardy. A sentence in violation of double jeopardy is void. *See Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008); *see also Hunes v. State*, 2010 Ark. 70 (per curiam). Appellant's claim, however, was without merit.

A probation revocation, like a parole revocation, is not a stage of a criminal prosecution; accordingly, a revocation proceeding in itself does not place a convicted defendant in double jeopardy. *See Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). Once appellant failed to comply with the conditions of his probation, the trial court was authorized, pursuant to Arkansas Code Annotated § 5-4-309(g)(1)(A) (Repl. 2006), to impose any sentence that may have originally been imposed for the offense of which he was found guilty. *Cox v. State*, 365 Ark. 358, 229 S.W.3d 883 (2006) (citing *Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999)).

Appellant notes on appeal that the written conditions of probation that he received when he was placed on probation inaccurately noted that he was subject to "three-to-ten

years" imprisonment if probation were revoked. He argues that he was deprived of due process of law by the error and that his attorney at the revocation hearing was ineffective for failing to object to the lengthier sentence imposed and failing to press the court to sentence him for a lesser included offense. As set out below, because there would have been no merit to such an objection, counsel was not ineffective. Counsel cannot be said to be remiss for failing to make an argument that could not prevail. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam) (citing *Anderson v. State*, 2009 Ark. 493)).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (citing *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam)). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair proceeding. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

Appellant contends that the reference to a possible sentence of three-to-ten years was

one of the conditions of probation, and the trial judge therefore made a critical error in exceeding that sentence when probation was indeed revoked. He alleges essentially that the form listing the conditions was a binding agreement between him and the trial judge that the court in the revocation proceeding was bound to honor. He faults counsel for failing to object to the sentence on that ground. Appellant does not allege that any of the conditions listed were incorrectly stated or did not comply with Arkansas Code Annotated § 5-4-303.

Contrary to appellant's claim, the "three-to-ten years" notation on the form that listed the conditions of probation did not in itself constitute a "condition" that he was required to abide by while on probation. Moreover, the form was not an agreement that the later court was required to abide by. Sentencing is entirely a matter of statute. *Cross v. State*, 2009 Ark. 597, 357 S.W.3d 895. The original judgment set out that appellant had entered a plea of guilty to a Class B felony. The sentencing range for a Class B felony is five to twenty years' imprisonment. Ark. Code Ann. § 5-4-401(a)(3). The court upon revocation of probation was free to impose any sentence that could have been imposed at the time appellant was placed on probation. Ark. Code Ann. § 5-4-309(f)(l)(A); *Cox v. State*, 365 Ark. 358, 229 S.W.3d 883 (2006).

Finally, appellant asserts that his attorney was ineffective in that she failed to object to hearsay testimony admitted into evidence at the revocation proceeding. The argument was not raised in the Rule 37.1 petition or in an amendment to it. All grounds for relief pursuant to Rule 37.1 must be asserted in the original or an amended petition. Ark. R. Crim. P.

37.2(e); *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam)). We do not consider issues that are raised for the first time on appeal. *Jamett,* 2010 Ark. 28, 358 S.W.3d 874.

The court did not clearly err in finding that appellant's Rule 37.1 petition failed to establish a ground for relief under the rule. Accordingly, the order is affirmed.

Affirmed.