

SUPREME COURT OF ARKANSAS
No. 09-1054

MELVIN SMITH, JR.
Appellant

v.

LEROY BROWNLEE, CHAIRMAN,
ARKANSAS BOARD OF PAROLE,
AND RAY HOBBS, INTERIM
DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION
Appellees

Opinion Delivered May 27, 2010

PRO SE MOTION TO ADD
ADDITIONAL INFORMATION TO
APPEAL [CIRCUIT COURT OF
JEFFERSON COUNTY, CV 2009-370,
HON. JODI RAINES DENNIS,
JUDGE]

MOTION TREATED AS MOTION
TO SUPPLEMENT RECORD AND
DENIED; APPEAL DISMISSED.

PER CURIAM

Appellant Melvin Smith, Jr., who is incarcerated in the Arkansas Department of Correction (“ADC”) serving a life sentence, filed a pro se petition in Jefferson County Circuit Court for a writ of mandamus. Appellant sought to compel the named defendants, in their official capacities as chairman of the board of parole and director of the ADC,¹ to schedule a hearing for appellant’s release. The circuit court entered an order denying the petition, and appellant lodged an appeal of the order in this court. The parties have submitted their briefs.

Appellant filed a motion to add additional information to the appeal, which we treat as a motion to supplement the record on appeal. Appellant would add a letter that appellant

¹The petition initially named Larry Norris as director of the ADC. This court granted a motion to substitute Ray Hobbs as interim director for Mr. Norris by syllabus entry dated April 29, 2010.

received from the governor's office into the record for consideration. However, there is no indication that the proposed supplemental letter was before the circuit court for its consideration. This court has long and consistently held that it cannot, in the exercise of its appellate jurisdiction, receive testimony or consider anything outside of the record below. *Hudson v. Kyle*, 365 Ark. 341, 229 S.W.3d 890 (2006); *see also Clark v. Pine Bluff Civil Serv. Comm'n*, 353 Ark. 810, 120 S.W.3d 541 (2003); *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002); *Boswell, Tucker & Brewster v. Shirron*, 324 Ark. 276, 921 S.W.2d 580 (1996); *Jacobs v. State*, 316 Ark. 96, 870 S.W.2d 740 (1994) (per curiam); *McLeod v. Mabry*, 206 Ark. 618, 177 S.W.2d 46 (1944).

We accordingly deny appellant's motion, and, in addition, we address the merits of the appeal. This court has consistently held that an appeal of the denial of postconviction relief, including appeals from the denial of extraordinary relief, will not be permitted to go forward where it is clear that the appellant could not prevail. *See Washington v. Norris*, 2010 Ark. 104 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam); *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). The relief sought by appellant in his mandamus petition was postconviction relief, in that appellant sought to obtain a hearing and release from incarceration. As it is clear that he cannot prevail, we dismiss the appeal.

In appellant's petition, he asserted that the parole board is given the power and is also required, under Arkansas Code Annotated § 16-93-206 (Supp. 2009), to make a discretionary

determination as to whether he should be paroled or transferred from the ADC. Appellant contends that he has twice been recommended by the parole board for executive clemency and that he was twice refused executive clemency by the governor. The circuit court denied the petition, finding that res judicata was applicable and that, if the court were to reach the merits of the issue, the action sought was discretionary.

Appellant asserts in his brief that res judicata is inapplicable because the claims and parties are not the same as in the previous holding cited by the circuit court, *Smith v. Huckabee*, 06-917 (Ark. Mar. 8, 2007) (unpublished per curiam). In that case, this court addressed similar issues on appellant's appeal of the denial of a petition for declaratory judgment or mandamus. Appellant also contends that the trial court erred in finding that the requested action was within the discretion of the governor.

We need not address appellant's asserted errors by the trial court because it is clear that the denial of the petition for writ of mandamus was well-founded, in any event, in that the petition did not seek the enforcement of an established right. A petitioner must show a clear and certain right to the relief sought and the absence of any other adequate remedy when requesting a writ of mandamus. *McLeod v. State*, 2010 Ark. 95 (per curiam). Here, appellant sought a hearing before the parole board to determine whether he should be transferred or paroled. Appellant failed to show an established right to such a hearing because he did not demonstrate that he was eligible for parole. Section 16-93-206(a) provides the parole board the power to determine which persons shall be placed on parole, but only as to those persons

Cite as 2010 Ark. 266

eligible for parole. Appellant is serving a sentence of life that has not been commuted to a term of years, and appellant is therefore not eligible for parole. The petition did not establish that appellant had a clear and certain right to the hearing he requested.

Motion treated as motion to supplement record and denied; appeal dismissed.