

SUPREME COURT OF ARKANSAS

No. 10-194

ERIC C. BURGIE
Appellant

v.

LARRY NORRIS
Appellee

Opinion Delivered May 27, 2010

PRO SE MOTION TO FILE
SUPPLEMENTAL BRIEF [CIRCUIT
COURT OF JEFFERSON COUNTY,
CV 2009-1040, HON. JODI RAINES
DENNIS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2001, appellant Eric C. Burgie was found guilty by a jury of capital murder and aggravated robbery. The State waived the death penalty for capital murder, and an aggregate sentence of life imprisonment without parole was imposed. We affirmed. *Burgie v. State*, CR 02-90 (Ark. Feb. 20, 2003) (unpublished per curiam).

On October 26, 2009, appellant filed in the circuit court in the county where he was incarcerated a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006). The petition was denied, and appellant lodged an appeal here. He filed his brief-in-chief and now seeks by motion to file a supplemental brief.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal. Accordingly, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that

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the appellant could not prevail. *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

Appellant failed to state a claim in his petition that was cognizable in a habeas proceeding. The burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner who does not allege his actual innocence¹ 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 is illegally detained. *Id.* at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006).

Appellant contended that the judgment in his case was invalid because the jury found him guilty of capital murder but the judge, rather than the jury, sentenced him to life imprisonment without parole. He also argued that an “X” was placed on the judgment in the spaces designed to indicate that the jury sentenced the defendant, and that this error rendered the sentence illegal.

¹A petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). Ark. Code Ann. § 16-112-103(a)(2) (Repl. 2006).

Pursuant to Arkansas Code Annotated § 5-4-602(3)(B)(ii) (Supp. 2009), when a defendant is found guilty of capital murder and the death penalty is waived, the “trial court shall sentence the defendant to life imprisonment without parole.” Additionally, Arkansas Code Annotated § 5-4-103(b)(4) (Supp. 2009) permits a trial judge to fix punishment when the prosecution and defense agree that the court may fix punishment. At appellant’s trial, the trial court imposed the statutorily mandated sentence of life imprisonment without parole without objection from the prosecution or the defense.

Appellant offered nothing to demonstrate that the trial court lacked personal jurisdiction over him or jurisdiction over the subject matter. A court with personal and subject-matter jurisdiction over the defendant in a criminal proceeding has authority to render judgment. *Johnson v. State*, 298 Ark. 479, 769 S.W.2d 3 (1989).

With respect to appellant’s assertion that the judgment was not valid because it indicated that the jury had sentenced him, appellant failed to establish that there was more than a clerical error in the judgment. As we said in *Carter v. Norris*, 367 Ark. 360, 363, 240 S.W.3d 124, 127 (2006) (per curiam), “Clerical errors . . . do not entitle [a petitioner in a habeas proceeding] to a writ of habeas corpus.” Our case law has dealt with a number of examples of a clerical error in judgment and commitment orders. See, e.g., *McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999). Such clerical errors do not prevent enforcement of the order. *Id.* (appellant owed fine omitted from the judgment and commitment order but pronounced in open court). Clerical errors also have not prevented other legal documents

from effectuating the intended result.² As clerical errors do not speak the truth, courts have the power to enter an amended judgment and commitment order nunc pro tunc to correct an erroneous judgment. *Carter*, 367 Ark. 360, 240 S.W.3d 124; *McCuen*, 338 Ark. 631, 999 S.W.2d 682. See Ark. R. Civ. P. 60(b).

While Arkansas Rule of Civil Procedure 60(a) (2009) allows for a circuit court to modify or vacate a judgment, order, or decree within ninety days of its having been filed with the clerk, we have held that Rule 60(a) does not apply to criminal proceedings. *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000). As we said in *State v. Rowe*, 374 Ark. 19, 25, 285 S.W.3d 614, 619 (2008), we have, however, applied the theory behind Arkansas Rule of Civil Procedure 60(b) (2009) to criminal cases because Rule 60(b) embodies the common law rule of nunc pro tunc orders that is applicable in both civil and criminal cases. *Grissom*, 2009 Ark. 557; see *McCuen*, 338 Ark. 631, 999 S.W.2d 682 (interpreting former version of the rule). Pursuant to Rule 60(b), a circuit court can enter an order nunc pro tunc at any time to correct clerical errors in a judgment or order. Ark. R. Civ. P. 60(b) (2009). A circuit court's power to correct mistakes or errors is to make "the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Lord v. Mazzanti*, 339 Ark. 25, 29, 2 S.W.3d 76, 79 (1999). As stated, clerical errors do not prevent enforcement of a

²See, e.g., *Fullerton v. McCord*, 339 Ark. 45, 2 S.W.3d 775 (1999) (petition for writ of habeas corpus denied where defendant's incorrect initial in extradition document did not prevent positive identification of defendant) and *Smith v. Cauthron*, 275 Ark. 435, 631 S.W.2d 10 (1982) (petition for writ of habeas corpus denied where discrepancies in defendant's social security number and date of birth did not invalidate arrest warrant in extradition proceeding).

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judgment and commitment order. *Grissom*, 2009 Ark. 557; see *Baker v. Norris*, 369 Ark. 405, 414, 255 S.W.3d 466, 471 (2007).

Appeal dismissed; motion moot.