

Cite as 2010 Ark. 217

SUPREME COURT OF ARKANSAS

No. CR 10-309

WILBERT L. JOHNSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 6, 2010

PRO SE MOTIONS FOR COPY OF
TRANSCRIPT AND FOR
EXTENSION OF TIME TO FILE
BRIEF AND FOR APPOINTMENT
OF COUNSEL [CIRCUIT COURT
OF PULASKI COUNTY, CR 2007-
3648, HON. BARRY SIMS, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

In 2008, appellant Wilbert L. Johnson was found guilty by a jury of breaking or entering, theft of property, and misdemeanor fleeing. An aggregate sentence of 180 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Johnson v. State*, 2009 Ark. App. 201 (unpublished). The mandate following affirmance of the judgment was issued April 7, 2009.

On April 3, 2009, four days before the mandate was issued, appellant filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). A hearing was held on the petition and relief was denied. Appellant lodged an appeal here and now seeks by two motions a copy of the transcript lodged on appeal, an extension of time to file the appellant's brief, and appointment of counsel.

We do not address the merits of the motions because it is clear from the record that appellant could not prevail on appeal because the Rule 37.1 petition was not timely filed. Accordingly, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

A petition under Rule 37.1 must be filed *after* the mandate is issued because, once a judgment has been appealed, the trial court does not regain jurisdiction over the case until the mandate is issued. *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006) (per curiam); *Doyle v. State*, 319 Ark. 175, 890 S.W.2d 256 (1994) (per curiam); see *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993) (citing *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945)).

The court must have jurisdiction over the Rule 37.1 petition before it can consider anything other than the timeliness of the petition. *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996) (per curiam). Once it is determined that jurisdiction does not exist, the disposition of the Rule 37.1 petition must be made on that basis. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). Because the trial court lacked jurisdiction at the time appellant filed his petition, the circuit court was limited to dismissing the petition.

Arkansas Rule of Criminal Procedure 37.2(a) provides, “If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings

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under this rule shall be entertained by the circuit court while the appeal is pending.” For this reason, the burden is on the postconviction petitioner to determine when the mandate was issued before proceeding with a Rule 37.1 petition. See *O’Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999) (per curiam).

Appeal dismissed; motions moot.