

Cite as 2009 Ark. 512

SUPREME COURT OF ARKANSAS

No. CR 09-450 & CR 09-607

TROY D. CRAIN
Petitioner/Appellant

v.

STATE OF ARKANSAS
Respondent/Appellee

Opinion Delivered October 22, 2009

PRO SE MOTIONS FOR RULE ON CLERK AND FOR APPOINTMENT OF COUNSEL IN CR 09-450; AND PRO SE MOTION TO FILE BELATED BRIEF IN CR 09-607 [CIRCUIT COURT OF ARKANSAS COUNTY, NORTHERN DISTRICT, CR 2008-151, HON. DAVID G. HENRY, JUDGE]

MOTIONS FOR RULE ON CLERK AND APPOINTMENT OF COUNSEL IN CR 09-450 MOOT; APPEAL IN CR 09-607 DISMISSED AND MOTION TO FILE BELATED BRIEF IN CR 09-607 MOOT.

PER CURIAM

In 2008, Troy D. Crain entered a plea of *nolo contendere* to delivery of rock cocaine and was sentenced to 138 months' imprisonment. The trial court sentenced Crain on January 5, 2009, and the judgment and commitment order was entered on January 15, 2009.

Subsequently, on January 27, 2009, Crain filed in the trial court a pro se motion to withdraw the plea pursuant to Arkansas Rule of Criminal Procedure 26.1, and to dismiss the charge filed against him. In an order entered on February 4, 2009, the trial court found that the Rule 26.1 motion was untimely as it was filed after the judgment had been entered. Ark. R. Crim. P. 26.1(a). The court treated the motion as a petition seeking postconviction relief pursuant to Arkansas Rule of Criminal Procedure

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37.1. See *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006). In the same order, the trial court dismissed the Rule 37.1 petition as the court found that petition was not verified as required under Rule 37.1(c).

Crain filed a notice of appeal in the trial court on March 10, 2009. Thereafter, on March 30, 2009, Crain initially tendered the record on appeal to this court, but our clerk declined to lodge it because the tendered record did not contain a notice of appeal. Crain filed pro se motions for rule on clerk and for appointment of counsel filed in case number CR 09-450, on April 29, 2009. In the motion for rule on clerk, Crain seeks leave to proceed with an appeal of the trial court's order that dismissed his Rule 37.1 petition to withdraw the guilty plea.

After filing the motion for rule on clerk in CR 09-450, Crain tendered a second appeal record in the same proceeding that did contain a timely notice of appeal. That record was lodged here and assigned case number CR 09-607. As an appeal has been lodged from the trial court's order, Crain's pending motion for rule on clerk in CR 09-450 is moot. The pending motion for appointment of counsel in CR 09-450 is moot because we dismiss Crain's appeal in CR 09-607.

In his appeal, Crain tendered briefs to this court that failed to comply with Arkansas Supreme Court Rule 4-7. The briefs were returned to him for correction. Crain failed to timely file a corrected brief, and has now filed a pro se motion to file a belated, and corrected, brief. However, we need not consider Crain's grounds to file a belated brief because it is clear from the record that the Rule 37.1 petition failed to comply with verification requirements. An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

Criminal Procedure Rule 37.1(d) requires that a Rule 37.1 petition be verified. *Nelson v. State*, 363 Ark. 306, 213 S.W.3d 645 (2005) (per curiam). The verification requirement for a petition is of

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substantive importance to prevent perjury. *Webb*, 365 Ark. at 24, 223 S.W.3d at 798. Because the Rule 37.1 petition was not verified as required by Rule 37.1(d), dismissal of the petition by the trial court was appropriate.¹

Motions for rule on clerk and appointment of counsel moot in CR 09-450; appeal dismissed in CR 09-607 and motion to file belated brief in CR 09-607 moot.

¹We note that the record contains a second Rule 37.1 petition filed in the trial court by Crain on May 11, 2009, which was verified. The trial court dismissed the second, verified petition as being untimely filed under Arkansas Rule of Criminal Procedure 37.2(c). That matter is not before us.