

SUPREME COURT OF ARKANSAS

No. CR 09-731

RODNEY LEE MITCHAEAL
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered October 22, 2009

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
CRAWFORD COUNTY, CR 2006-166,
HON. GARY R. COTTRELL, JUDGE]

MOTION DENIED.

PER CURIAM

In 2006, a jury found petitioner Rodney Lee Mitchael guilty of rape and first-degree terroristic threatening and sentenced him to an aggregate term of 780 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Mitchael v. State*, CACR 07-98 (Ark. App. Jan. 16, 2008). On April 24, 2008, petitioner filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was denied by the trial court as untimely. The partial record before us does not indicate that a timely notice of appeal was filed in the trial court. Petitioner has now filed in this court a motion in which he seeks to proceed with an appeal of the order denying postconviction relief.

In his motion before this court, petitioner asserts that he is indigent, that he mailed his petition under Rule 37.1 on April 17, 2008, that he did not have control over the date that the petition was filed, that he has grounds for relief under Rule 37.1, and that those grounds should be considered. Petitioner does not, however, provide any reason for his failure to timely file a notice of appeal or otherwise comply with our rules of procedure for perfecting an appeal. *See* Ark. R. App. P.–Crim. 2(a). If a

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petitioner fails to timely file a notice of appeal, a belated appeal will not be allowed absent a showing by the petitioner of good cause for the failure to comply with proper procedure. Ark. R. App. P.–Crim. 2(e); *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (per curiam).

In addition, it is clear that petitioner could not be successful in any appeal of the order denying postconviction relief. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). The trial court dismissed the petition as not timely filed under Arkansas Rule of Criminal Procedure 37.2(c) and petitioner would contest that finding. Regardless as to the merits of petitioner's claims concerning that issue, the petition also failed to comply with Rule 37.1(c).

Petitioner did not verify the petition. Rule 37.1(c) provides a form of affidavit to be attached to the petition. *See Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam). Here, the petition was not notarized and no affidavit was attached. The petition included a notation that the petitioner was in isolation and that no notary was available. Under Rule 37.1(d), the circuit clerk is not to accept for filing any petition that fails to comply with the requirements of Rule 37.1(c). The trial court could not consider the issues in the petition. *Id.*; *see also Shaw v. State*, 363 Ark.156, 211 S.W.3d 506 (2005) (per curiam). Under Rule 37.1(d), the circuit court and any appellate court must dismiss a petition that is not verified as required by Rule 37.1(c). Because the trial court properly dismissed the petition for postconviction relief, we deny petitioner's motion for belated appeal.

Motion denied.