

Cite as 2009 Ark. 235 (unpublished)

ARKANSAS SUPREME COURT

No. CR 08-773

MARK A. THOMPSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 23, 2009

PRO SE MOTION FOR WRIT OF
CERTIORARI TO EXPAND
RECORD [CIRCUIT COURT OF
PULASKI COUNTY, CR 2004-268,
HON. CHRIS PIAZZA, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2004, appellant Mark A. Thompson entered a guilty plea to first-degree domestic battering and received a sentence of 240 months' imprisonment in the Arkansas Department of Correction as a habitual offender under Arkansas Code Annotated § 5-4-501 (Repl. 2006). In 2008, appellant filed a pro se motion in the trial court seeking to correct a clerical error in the commitment order. The trial court denied the motion by order entered June 2, 2008, and appellant has lodged an appeal of that order in this court. Briefs have been submitted and appellant now brings this motion in which he seeks to supplement the record to include a transcript of the plea hearing that he has included in his brief.

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. *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam). It is clear here that appellant cannot prevail on appeal and we dismiss the appeal.



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Appellant's motion in the trial court sought to correct an alleged clerical error. A court may correct a clerical error even after a sentence is placed into execution. *See, e.g., McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999). Appellant alleged that he had entered a negotiated plea, and that, under the plea agreement, he was to be sentenced with the understanding that he would not have to serve his full term, that he would be eligible for parole after having served 25% of his sentence. Petitioner sought to have the judgment indicate that he was to be eligible for parole in accord with the alleged plea agreement.

It is well settled that a trial court is empowered to enter a nunc pro tunc order to cause the record to speak the truth, in both criminal and civil cases. *Ainsworth v. State*, 367 Ark. 353, 240 S.W.3d 105 (2006). Nunc pro tunc orders may be entered to correct a misprision of the clerk, but the trial court cannot change an earlier record to correct something that should have been done but was not. *Id.* Appellant's motion in the trial court did not seek to correct a clerical error. By appellant's own admission, the trial court failed to address parole eligibility during the plea hearing. His motion in the trial court did not allege that the judgment merely failed to reflect what was pronounced.

Moreover, determining parole eligibility is the prerogative of the Arkansas Department of Correction. *Morris v. State*, 333 Ark. 466, 970 S.W.2d 210 (1998). The trial court would not have had authority to place conditions as to parole eligibility on the sentence announced. *Id.*; *see also State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008).

Because we dismiss the appeal, appellant's motion is moot. We note that the transcript of the plea hearing as it appeared in appellant's brief would not have supported appellant's



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argument, in any case. Both the copy of the transcript included in the brief and the judgment in the record indicate that appellant's plea was entered without benefit of a plea agreement. Even though the transcript may have supported appellant's allegation that the trial court did not address parole conditions at the plea hearing, a notation concerning that type of condition on the judgment would not constitute the correction of a clerical error.

Appeal dismissed; motion moot.