

Cite as 2010 Ark. 234
SUPREME COURT OF ARKANSAS
No. CV-09-613

TIMOTHY GENE EVANS		Opinion Delivered: May 13, 2010
	APPELLANT	PRO SE MOTION FOR LEAVE TO FILE BELATED REPLY BRIEF [CIRCUIT COURT OF IZARD COUNTY, CV 2008-158, HON. JOHN ADAM HARKEY, JUDGE]
V.		
STATE OF ARKANSAS		
	APPELLEE	<u>APPEAL DISMISSED; MOTION MOOT.</u>

PER CURIAM

Appellant, Timothy Gene Evans, was found guilty of rape by a jury in Carroll County, Arkansas, for which he was sentenced to forty years' imprisonment in the Arkansas Department of Correction. We affirmed. *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996). Appellant subsequently filed in the circuit court in the county in which he was incarcerated a petition for writ of habeas corpus, pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006), alleging that the court where appellant was originally convicted lacked "geographic" jurisdiction, which entitled appellant to a hearing on the petition or dismissal of his conviction. The trial court denied appellant's petition on March 18, 2009, without holding an evidentiary hearing, and appellant timely filed an appeal from the trial court's order. Now before us is appellant's motion for leave to file a

belated reply brief.¹ Because appellant could not prevail on his petition, we dismiss the appeal, and the motion is accordingly moot.

An appeal of the denial of postconviction relief, including an appeal from an order denying a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Grissom v. State*, 2009 Ark. 557 (per curiam). Therefore, the sole question presented is whether appellant has established 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. See *Grissom*, 2009 Ark. 557; *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). To meet this burden, appellant must plead either the facial invalidity or the lack of jurisdiction and make a “showing by affidavit or other evidence [of] probable cause to believe” that he is illegally detained. *Young*, 369 Ark. at 221, 226 S.W.3d at 798–99.

As an initial matter, we note that the felony information charging appellant was filed in Carroll County, and it alleged that the crime had occurred within Carroll County in the area of the Enon Bridge.² The abstracted testimony proffered with appellant’s petition shows that, at the close of the State’s case-in-chief, appellant’s trial counsel moved

¹Appellant timely filed his brief and abstract on July 21, 2009, and the State filed its appellee’s brief on August 19, 2009. Appellant’s reply brief was received on September 4, 2009, which was outside the fifteen-day deadline imposed by Arkansas Supreme Court Rule 4-3(d) (2009), and our clerk correctly refused to file it for that reason.

²The Enon Bridge is on Highway 311 in northwest Carroll County, and we note that Highway 311 does not cross into Boone County, Arkansas.

for a directed verdict based on the State's failure to establish with absolute certainty where the rape occurred. The State then presented rebuttal testimony from Officer J.R. Ashlock of the Carroll County Sheriff's Department, who stated that, in his opinion, the crime clearly occurred within Carroll County. Trial counsel then asked the officer to draw a circle on a state map of the area where the crime occurred, which Officer Ashlock did. Regarding this circle and the map generally, the trial court stated that "[a]lthough the circle that [Officer Ashlock] has drawn here is within what's been designated as Carroll County, we really don't have any foundation for the accuracy of this map so far as county lines are concerned." No other evidence was presented by trial counsel that would establish that the crime occurred outside of Carroll County, and the trial court denied appellant's motion for directed verdict.

Appellant's petition for writ of habeas corpus was based solely on his assertion that the court in which he was convicted lacked "geographic" jurisdiction under Arkansas Code Annotated section 16-88-105(b) (Repl. 2005) because the State never "established as a fact certain" that the crime occurred in Carroll County. Appellant further alleged that the crime might possibly have occurred in Boone County,³ which Carroll County borders, and

³Appellant's petition also alleged that the crime might possibly have occurred in Missouri, which both Boone and Carroll County border. The abstracted questioning and testimony of the investigating officer by appellant's trial counsel, however, illustrate that the only issue was whether the State had established that the crime took place in Carroll County, Arkansas. No reference to Missouri was made by any party, nor has appellant proffered any evidence that would support probable cause to believe the crime might have happened in Missouri. Ark. Code Ann. § 16-112-103. As such, this court will not address the possibility that the crime might have happened in Missouri.

he asserted that “irrefutable evidence that Carroll County failed to establish jurisdiction can be shown at an evidentiary hearing.” However, there is no affidavit attached to the petition that would support these claims, nor does appellant proffer “other evidence” in support thereof. He merely asserts the existence of some unspecified “irrefutable evidence.” Moreover, the abstracted testimony shows that at no time during his questioning of Officer Ashlock or in his oral motion for directed verdict did trial counsel even mention Boone County. He only asserted that the officer could not “tell this jury with any definite certainty that this point [on the map] is within Carroll County.”

Appellant’s contention that it was “only presumed” that the crime occurred in Carroll County, and that the State was required to irrefutably prove the location of the crime in order to establish jurisdiction is without merit. The State is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue. *Mackey v. Lockhart*, 307 Ark. 321, 323, 819 S.W.2d 702, 704 (1991) (quoting Ark. Code Ann. § 5-1-111(b) (1987)). Appellant failed to proffer any such evidence. Assuming arguendo that appellant is correct that it was “only presumed” that the Carroll County Circuit Court had jurisdiction, he is nevertheless incorrect in his assertion that this presumption was improper. We have consistently held that it is presumed that an offense charged was committed within the jurisdiction of the court where the charge was filed, unless the evidence affirmatively shows otherwise. *See, e.g., State v. Osborn*, 345 Ark. 196, 200, 45 S.W.3d 373, 375 (2001) (citing *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972)).

In appellant's brief-in-chief, the sum total of the evidence he provided was "an abstract of his trial transcript that supports his ground that the state failed to establish local jurisdiction to try him." This abstract consisted only of the aforementioned testimony of Officer Ashlock, which in no way rebutted the idea that the crime occurred in Carroll County. The remainder of appellant's argument consisted of his assertion that the State was required to prove territorial jurisdiction and citations to various decisions by this court, some of which were inapposite to appellant's claim and none of which was persuasive. A mere assertion that the trial court lacked jurisdiction is insufficient grounds for a writ of habeas corpus to issue; such claims must be substantiated to warrant relief. See *Washington v. Norris*, 2010 Ark. 104 (per curiam).

Nor is there any merit to appellant's claim that, at the very least, he was entitled to an evidentiary hearing on his petition. A hearing is not required on a habeas corpus petition, even where the petition alleges an otherwise cognizable ground, when probable cause for issuance of the writ is not shown by affidavit or other evidence. See *Mackey*, 307 Ark. at 322-24, 819 S.W.2d at 704. Inasmuch as appellant failed to rebut "by affidavit or other evidence" the statutory presumption that venue and jurisdiction were properly laid in Carroll County, he was not entitled to an evidentiary hearing, and the trial court accordingly did not err in denying appellant's petition without a hearing.

Due to his failure to establish by affidavit or other evidence probable cause to believe that he is being illegally detained, it is clear that appellant could not prevail if his

appeal were allowed to proceed. His appeal is therefore dismissed, and his motion to file a belated reply brief is moot.

Appeal dismissed; motion moot.

No briefs filed.