

**SUPREME COURT OF ARKANSAS**

No. 10-982

FREDERICK BURNLEY, JR.  
APPELLANT  
V.

LARRY NORRIS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION

APPELLEE

Opinion Delivered September 22, 2011

PRO SE APPEAL FROM THE  
JEFFERSON COUNTY CIRCUIT  
COURT, CV 2009-115, HON. JODI  
RAINES DENNIS, JUDGE

APPEAL DISMISSED.

**PER CURIAM**

Appellant Frederick Burnley, Jr., entered a plea of guilty in the Pulaski County Circuit Court on September 19, 1991, to five counts of aggravated robbery, three counts of felony theft of property, two counts of misdemeanor theft of property, two counts of kidnapping, and one count of second-degree battery. On June 13, 1995, appellant filed a motion to vacate his guilty plea and sentence in the Pulaski County Circuit Court, arguing that his life sentence violated an agreement that he made with the State to plead guilty in exchange for a sentence of fifty years in prison. On July 31, 1995, the circuit court treated the motion as a petition under Arkansas Rule of Criminal Procedure 37.1 and denied it as untimely. It also noted, as to the merits of appellant's petition, that it would not grant postconviction relief where appellant had failed to show both that his attorney had been ineffective and that, had he not had ineffective assistance of counsel, the outcome of his case would have been different. Specifically, the circuit court noted that a review of the transcript of the sentencing hearing failed to indicate any reference

by either the prosecutor or appellant's attorney to a negotiated plea agreement or any objection by appellant when his life sentence was imposed. Appellant did not appeal from the circuit court's order. However, on January 26, 2010, appellant filed a petition for writ of habeas corpus in the circuit court of the county in which he is incarcerated. That court dismissed his petition without prejudice on July 2, 2010, on the basis that appellant failed to obtain service pursuant to Arkansas Rule of Civil Procedure 4 (2010). This appeal followed.

At the onset, we note that the circuit court erred in dismissing appellant's petition for failure to obtain service in accordance with our rules of civil procedure. Rule 81(a) of the Arkansas Rules of Civil Procedure provides that the rules apply to all civil proceedings in circuit courts except those for which a statute creating the right, remedy, or proceeding at issue specifically provides a different procedure. Ark. R. Civ. P. 81(a) (2011). Here, Arkansas Code Annotated section 16-112-101 (Repl. 2006) provides that “[t]he writ of habeas corpus shall be issued, served, and tried in the manner prescribed in this chapter.” Moreover, in *McArty v. State*, 364 Ark. 517, 221 S.W.3d 332 (2006), we observed that we have never applied the rules of civil procedure to postconviction-relief proceedings. *See also Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). Accordingly, the circuit court erred in applying the rules of civil procedure to appellant's habeas petition.

Nevertheless, we have stated many times that an appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Pineda v. Norris*, 2009 Ark. 471 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per

curiam). Here, appellant failed to state a claim in his petition that was cognizable in a habeas proceeding, and his appeal must be dismissed.

The burden is on the petitioner in a habeas-corpus petition to establish 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. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner who does not allege his actual innocence<sup>1</sup> must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a “showing by affidavit or other evidence [of] probable cause to believe” that he is illegally detained. *Id.* at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006).

Appellant did not plead either a lack of jurisdiction by the trial court or that the commitment was invalid on its face. Rather, appellant based his grounds for relief upon a claim that his life sentence violates a negotiated plea agreement that he made with the State to plead guilty in exchange for a sentence of fifty years in prison for all counts. A habeas-corpus proceeding does not afford a prisoner an opportunity to retry his case and is not a substitute for direct appeal or a timely petition for postconviction relief. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam). In his most recent petition, appellant was clearly rearguing what he had previously asserted in his untimely Rule 37.1 petition. His argument was not cognizable in a habeas petition. The claim requires the kind of factual inquiry that goes well beyond the

---

<sup>1</sup>Pursuant to Arkansas Code Annotated section 16-112-103(a)(2) (Repl. 2006), a petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to -208.

# SLIP OPINION

Cite as 2011 Ark. 381

facial validity of the commitment and is therefore best left to a postconviction proceeding. *See Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005). Because appellant did not raise a cognizable claim in his petition, he cannot prevail on appeal.

Appeal dismissed.