

SUPREME COURT OF ARKANSAS

No. 11-522

FRANK RANDOLPH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 1, 2011

APPELLANT'S PRO SE MOTION FOR
APPOINTMENT OF COUNSEL
[LINCOLN COUNTY CIRCUIT
COURT, LCV 2011-134, HON. JODI
RAINES DENNIS, JUDGE]APPEAL DISMISSED; MOTION
MOOT.**PER CURIAM**

In 1997, appellant Frank Randolph was found guilty by a jury of robbery, theft of property, and kidnapping. He was sentenced as a habitual offender to twenty-five years' imprisonment for each offense. The sentences were ordered to be served consecutively. The Arkansas Court of Appeals affirmed. *Randolph v. State*, CACR 98-948 (Ark. App. Mar. 17, 1998) (unpublished).

In 2011, appellant filed in the county in which he was incarcerated a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006). In the petition, appellant first contended that his consecutive sentences were illegal because the trial judge referred to the terror experienced by the elderly victim who had been confined, which was not a fact admitted by appellant or found by the jury. Additionally, he asserted that it was a violation of the prohibition against double jeopardy for him to be sentenced to twenty-five years' imprisonment for kidnapping on the grounds that he (1) was sentenced as

a habitual offender, (2) was sentenced under Arkansas Code Annotated section 16-93-611 (Repl. 2006) to serve seventy percent of the sentence imposed, and (3) was sentenced to serve the term consecutively to the other terms of imprisonment imposed.

The petition was denied without a hearing, and appellant lodged an appeal in this court. Now before us is appellant's motion seeking appointment of counsel to represent him on appeal.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal. Accordingly, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Smith v. Norris*, 2011 Ark. 414 (per curiam); *Burnley v. Norris*, 2011 Ark. 381 (per curiam); *Simpson v. Hobbs*, 2011 Ark. 346 (per curiam); *Smith v. Norris*, 2011 Ark. 331 (per curiam); *Chappell v. Hobbs*, 2011 Ark. 220 (per curiam); *Anderson v. State*, 2011 Ark. 35 (per curiam); *McCullough v. State*, 2010 Ark. 394 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

The burden is on the petitioner in a petition for writ of habeas corpus 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. *Burnley*, 2011 Ark. 381; *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam) (citing *Jackson v. Norris*, 2011 Ark. 49, ___ S.W.3d ___); *Moore*, 2010 Ark. 380; *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner 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. *Young*, 365 Ark. at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant’s claims were not supported by affidavit or other evidence of probable cause to establish that he was illegally detained. Such proof is required for the petitioner to establish that a writ of habeas corpus should issue. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Anderson*, 2011 Ark. 35; *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes. *Id.* Appellant raised no argument that demonstrated a jurisdictional defect in the proceeding against him. He further made no showing that the commitment in his case was invalid. Because the petition did not state a basis to warrant issuance of the writ, the circuit court did not err in denying the relief sought.

The explanation by the trial judge for the reasons that consecutive sentences were warranted under the facts of the case was a matter that could have been objected to at trial. The judge’s remarks concerning the victim did not call into question the jurisdiction of the court or the facial validity of the commitment entered.

With respect to appellant’s claims concerning the requirement that he serve seventy percent of his sentence, the claims amounted to an attack on the constitutionality of the statute, Arkansas Code Annotated section 16-93-611. Constitutional challenges to statutes that govern parole eligibility in a particular case are not cognizable in habeas-corpus proceedings. *Wingfield v. State*, 2009 Ark. 499 (per curiam); *see also McKinnon v. Norris*, 366 Ark. 404, 231 S.W.3d 725

(2006) (per curiam); *Blevins v. Norris*, 291 Ark. 70, 722 S.W.2d 573 (1987).

As to appellant's assertions that he was placed in double jeopardy, the offenses of which appellant was found guilty each required an element or elements not required of the others. Such claims do not raise a question of jurisdiction for purposes of habeas-corpus relief. *See Smith v. State*, 2011 Ark. 333 (per curiam) (citing *Johnson v. State*, 298 Ark. 479, 769 S.W.2d 3 (1989)).

Appeal dismissed; motion moot.