

# ARKANSAS SUPREME COURT

No. CR 07-418

JAMES EVERETT NELSON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered September 27, 2007

APPELLEE'S MOTION TO DISMISS  
APPEAL [CIRCUIT COURT OF  
WASHINGTON COUNTY, CR 2002-  
2121, HON. KIM MARTIN SMITH,  
JUDGE]

MOTION GRANTED; APPEAL  
DISMISSED.

## PER CURIAM

In 2003, a jury found appellant James Everett Nelson guilty of possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine and, in 2004, the trial court sentenced him to an aggregate sentence of 600 months' imprisonment in the Arkansas Department of Correction. Appellant appealed the judgment and the Arkansas Court of Appeals reversed. *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005). However, on review, this court affirmed the trial court. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). The mandate issued on March 7, 2006.

On February 5, 2007, appellant filed a pro se pleading in the trial court in Washington County styled "Petition to Correct Illegal Sentence." The trial court denied the petition, and appellant lodged an appeal of that order in this court. The State now brings a motion to dismiss the appeal, arguing that appellant's petition was a petition for postconviction relief under Ark. R. Crim. P. 37.1, and that we must dismiss for lack of jurisdiction. The State asserts that, because appellant's petition was a

petition under Rule 37.1, it must be verified in accordance with Rule 37.1(c) and filed within sixty days of the date the mandate issued under Ark. R. Crim. P. 37.2(c). We agree that the trial court did not have jurisdiction to grant relief upon appellant's petition, that the petition was properly dismissed for that reason, and we must dismiss the appeal on that basis.

Appellant's petition did not reference Rule 37.1, nor did it reference Ark. Code Ann. § 16-90-111 (Supp. 2005), or any other rule or statute as authority for a grant of relief. In fact, appellant did not clearly state in his petition on what basis that he sought relief. He sought correction of the sentence because he asserted that the charge of possession of pseudoephedrine was a lesser-included offense of the charge of possession of drug paraphernalia with intent to manufacture methamphetamine and his convictions on the two charges violated double jeopardy, but he did not indicate the basis under which he would request that the court correct his sentence. The circuit court did not state in its order the basis on which it denied the petition. However, it is clear that the trial court did not have authority on any possible basis to grant the petition, and we dismiss the appeal because it is therefore clear that the court lacked jurisdiction.

Although a writ of habeas corpus may be used to correct an illegal sentence, appellant did not indicate in the petition that he sought the writ. Moreover, appellant was not incarcerated in Washington County, and the circuit court did not have jurisdiction to consider a petition seeking that relief. Any petition for writ of habeas corpus to effect the release of a prisoner is properly addressed to the circuit court in the county in which the prisoner is held in custody, unless the petition is filed pursuant to Act 1780 of 2001, which provides a means to assert that the petitioner is entitled to scientific testing of evidence in his case. *Lukach v. State*, 369 Ark. 475, \_\_\_ S.W.3d \_\_\_ (2007) (per curiam). Appellant's petition plainly did not seek scientific testing so as to fall under Act 1780. As

the circuit court could not have provided relief through a writ of habeas corpus, even were it clear that appellant had sought such relief, the court would not have had jurisdiction to consider a petition to correct an illegal sentence on that basis.

We next consider whether appellant could have sought relief under section 16-90-111 or Rule 37.1, and must conclude that a petition seeking relief under the statute or the rule would not have been timely. We have held that section 16-90-111 has been superceded to the extent that it conflicts with the time limitations for postconviction relief under Rule 37.2(c). *Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999). Whether appellant sought relief under the statute or under Rule 37.1, the petition must have been filed within sixty days of the date the mandate issued on appellant's direct appeal. Appellant's petition was filed almost eleven months after that date, and was therefore not timely as either a request for relief under section 16-90-111 or under Rule 37.1.

We do not determine whether the petition should have been verified because the petition was not timely under either the statute or the rule. The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and the circuit court may not grant relief on an untimely petition. *Womack v. State*, 368 Ark. 341, \_\_\_ S.W.3d \_\_\_ (2006) (per curiam); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (per curiam). 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); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (per curiam). Here, it is clear that appellant could not prevail because the trial court did not have jurisdiction to grant the relief that he requested upon any basis that might have been available for relief. We therefore grant the State's

motion and the appeal is dismissed.

Motion granted; appeal dismissed.