

SUPREME COURT OF ARKANSAS

No. CR 11-362

JAMES ALLEN HILL
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** October 6, 2011PRO SE MOTION FOR
PHOTOCOPYING AT PUBLIC
EXPENSE [APPEAL FROM THE
JEFFERSON COUNTY CIRCUIT
COURT, CR 2006-1117, HON. JODI
RAINES DENNIS, JUDGE]APPEAL DISMISSED; MOTION
MOOT.**PER CURIAM**

Appellant James Allen Hill was convicted by a Jefferson County jury of first-degree murder and was sentenced to 360 months' incarceration. The Arkansas Court of Appeals affirmed. *Hill v. State*, 2010 Ark. App. 488. Appellant then filed in the trial court a timely petition for postconviction relief, pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The trial court did not hold a hearing on the petition, and it denied the requested relief by written order. Appellant has appealed from that order.

Now before us is appellant's motion for photocopying at public expense. We need not address the merits of appellant's motion, however, because it is clear from the record that appellant could not prevail if his appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Moore v. State*, 2011 Ark. 269 (per curiam); *Lewis v. State*, 2011 Ark. 176 (per

curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Watkins v. State*, 2010 Ark. 156 (per curiam).

In his original Rule 37.1 petition, appellant alleged four grounds for relief: (1) prosecutorial misconduct, (2) denial of due process based on the trial court's denial of appellant's motion for mistrial, (3) temporary mental incompetency, and (4) denial of a fair and impartial trial based on the trial court's allowance of evidence concerning appellant and the appellant's wife's past deviant sexual activities. None of these claims is meritorious.

Appellant's first two claims—prosecutorial misconduct and denial of due process—are not cognizable in a Rule 37.1 proceeding. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006) (holding that the issue of alleged prosecutorial misconduct is an issue that should have been raised on direct appeal, and it is not a claim that may be raised for the first time in a Rule 37.1 petition); *see also Miller v. State*, 2011 Ark. 114 (per curiam) (holding that due-process claims are not cognizable in Rule 37.1 proceedings). As such, appellant could not prevail on either claim on appeal.

As to his claim of temporary mental incapacity, appellant bases this on the fact that he was so enraged upon learning that his wife had engaged in consensual sex with the victim that appellant was incapable of forming the specific intent needed to support a first-degree-murder conviction. Appellant offered this same defense at trial, and it was rejected by the jury. On direct appeal, appellant did not argue this point. *See Hill*, 2010 Ark. App. 488. Issues raised at trial, but not argued on appeal, are considered abandoned. *State v. Grigsby*, 370 Ark. 66, 257 S.W.3d 104 (2007). Rule 37.1 does not provide a postconviction remedy when an issue could

have been raised at trial and argued on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001) (citing *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001)).

Finally, appellant's claim that he was denied a fair and impartial trial based on the trial court's allowance of evidence concerning appellant and appellant's wife's past deviant sexual activities was addressed on direct appeal. The court of appeals held that "the evidence was indeed prejudicial but, in light of appellant's defense, it was not unfairly so." *Hill*, 2010 Ark. App. 488. Therefore, the appellate court held that the trial court did not abuse its discretion by permitting this testimony to rebut appellant's state-of-mind defense. *Id.*

Rule 37.1 does not provide an opportunity for an appellant to reargue points that were settled on direct appeal. *Howard*, 367 Ark. 18, 238 S.W.3d 24; *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). Postconviction relief is not intended to permit the petitioner to again present questions that were passed upon on direct appeal; but rather, it is a narrow remedy designed to prevent incarceration under a sentence so flawed as to be void. *See Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002) (citing *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999)). Because appellant's argument involves an issue that is a direct attacks on the judgment, and because this issue has already been considered on direct appeal, his claim on this point is not cognizable under Rule 37.1. *See id.*

Inasmuch as appellant failed to raise a single claim that is cognizable under Rule 37.1, it is clear that he could not prevail on his appeal. Thus, the appeal is dismissed, and the motion for photocopying at public expense is moot.

Appeal dismissed; motion moot.