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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-18-182

LANCE HARJO

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 3, 2018

APPEAL FROM THE POLK COUNTY
CIRCUIT COURT
[NO. 57CR-16-3]

HONORABLE JERRY RYAN,
JUDGE

DISMISSED

LARRY D. VAUGHT, Judge

Lance Harjo appeals from an order of the Polk County Circuit Court denying his Arkansas Rule of Criminal Procedure 37.1 petition for postconviction relief. He makes multiple arguments on appeal in support of his claim that his trial counsel was ineffective, and he also argues that the State's vindictive and disproportionate charges resulted in excessive sentences, constituting cruel and unusual punishment. Because we lack jurisdiction, we dismiss the appeal.

After a trial, a Polk County Circuit Court jury convicted Harjo of trafficking methamphetamine, possession of drug paraphernalia, simultaneous possession of drugs and firearms, maintaining a drug premises, illegal use of a communication device, possession of a defaced firearm, and possession of marijuana with intent to deliver. The circuit court imposed an aggregate sentence of 1,632 months pursuant to the jury's recommendations.

This court, on May 24, 2017, affirmed Harjo's convictions and sentences on direct appeal. *Harjo v. State*, 2017 Ark. App. 337, 522 S.W.3d 839.

Harjo filed a timely Rule 37 postconviction petition raising the following claims: (1) trial counsel was ineffective for failing to call witnesses, (2) trial counsel was ineffective for failing to file a motion to suppress the testimony of the members of bomb squads, (3) trial counsel was ineffective for failing to challenge the legality of the search of his residence, (4) trial counsel was ineffective for failing to inquire about a plea offer, and (5) his sentences were "grossly disproportionate" and constituted cruel and unusual punishment in violation of the Eighth Amendment. In an order entered on August 29, 2017, the circuit court denied Harjo's petition without conducting an evidentiary hearing, finding that Harjo's claims were without merit.

On September 7 and 28, 2017, Harjo filed motions for reconsideration and to amend his Rule 37 petition reasserting each of his prior points and including one additional point that was not raised in his original Rule 37 petition—that his trial counsel was ineffective because he failed to object when the State changed the basis of the illegal-use-of-a-communication-device charge from a telephone, as alleged in the information, to a surveillance-camera system. The circuit court denied the motions for reconsideration in an order filed on November 15, 2017. On November 27, 2017, Harjo filed a notice of appeal from the November 15, 2017 order.

On appeal, Harjo claims the circuit court erred by denying his Rule 37 petition because (1) trial counsel was ineffective for failing to call witnesses, (2) trial counsel was ineffective for failing to file a motion to suppress testimony about explosive devices found at

Harjo's residence, (3) trial counsel was ineffective for failing to challenge the legality of the search of his residence, (4) trial counsel was ineffective for failing to inquire about a plea offer, (5) trial counsel was ineffective for failing to challenge the validity of the information as to the charge of illegal use of a communication device, and (6) his sentences were "grossly disproportionate" and constituted cruel and unusual punishment in violation of the Eighth Amendment. Though not briefed by the parties, we must first address the preliminary issue of whether Harjo's notice of appeal was timely filed. Whether an appellant has filed an effective notice of appeal is always an issue before the appellate court, and absent an effective notice of appeal, this court lacks jurisdiction to consider the appeal and must dismiss it. *McJames v. State*, 2010 Ark. 74, at 3.

Arkansas Rule of Appellate Procedure—Criminal 2(a)(4) (2017) requires that a notice of appeal be filed in the circuit court within thirty days of the date of entry of an order denying a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37. *Green v. State*, 2015 Ark. 198, at 3 (per curiam). The order denying Harjo's original Rule 37 petition was filed on August 29, 2017, but his notice of appeal was not filed until ninety days later on November 29, 2017, which is untimely.

Harjo's filing of two motions for reconsideration did not extend the time for filing his notice of appeal. Arkansas Rule of Criminal Procedure 37.2(d) states that the decision of the court in any proceeding under this rule shall be final when the judgment is rendered and that no petition for rehearing will be considered. *Porchia v. State*, 2016 Ark. 403, at 2, 503 S.W.3d 70, 71 (per curiam) (citing Ark. R. Crim. P. 37.2(d)); *McJames*, 2010 Ark. 74, at 4 (stating that

a posttrial motion made after a Rule 37 decision is ineffective and does not extend the time for filing the notice of appeal).

While Rule 37.2(d) generally prohibits motions for reconsideration or rehearing in postconviction cases, our supreme court has nonetheless acknowledged a narrow exception to this rule. A Rule 37 appellant may file a valid, timely motion requesting that the circuit court modify its order to include a ruling on an omitted or unresolved issue that was raised in the Rule 37 petition without violating the prohibition in Rule 37.2(d). *Lovett v. State*, 2013 Ark. 8, at 3 (citing *Lewis v. State*, 2012 Ark. 355 (per curiam); *Garcia v. Arnold*, 2012 Ark. 253 (per curiam)). The rationale behind this exception is due to the requirement that a Rule 37 appellant must obtain a ruling on any omitted issues if they are to be reviewed on appeal. *Id.* at 3–4 (citing *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910).

To be considered timely, an appellant’s posttrial motion requesting a ruling on an omitted issue must be filed within the thirty-day time limit for filing the notice of appeal after the order denying the Rule 37.1 petition has been entered. *Lovett*, 2013 Ark. 8, at 4 (citing *Watkins*, *supra*). When an appellant has made such a valid and timely request for a ruling on an omitted issue, the time for filing the notice of appeal is extended in a manner similar to the extension allowed for filing a notice of appeal after a posttrial motion. *Id.* at 4 (citing *Lewis*, *supra*; Ark. R. App. P.–Crim. 2(b) (2012)); *see also Green*, 2015 Ark. 198, at 4.

In the instant case, Harjo did not file a timely notice of appeal from the August 29, 2017 order denying his original Rule 37 petition. His notice of appeal was filed ninety days after the order was entered. He did, however, file his first and second motions for reconsideration and to amend within this thirty-day limit. Importantly, these posttrial

motions did not extend the time for filing a notice of appeal because they did not request modification of the circuit court's order to address unresolved or omitted issues raised in the Rule 37 petition. Instead, Harjo's motions for reconsideration reargued points in his original Rule 37 petition and added an issue that was not raised in the Rule 37 petition. Because the motions for reconsideration were not valid requests for a ruling on an omitted issue, Harjo's time for filing the notice of appeal was not extended. Accordingly, we hold that Harjo's November 27, 2017 notice of appeal, filed outside the thirty-day period set forth in Arkansas Rule of Appellate Procedure—Criminal 2(a)(4), is untimely, that we lack jurisdiction, and that we must dismiss the appeal.

Dismissed.

GLOVER and HIXSON, JJ., agree.

Lance Harjo, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Brooke Jackson Gasaway*, Ass't Att'y Gen., for appellee.