

# ARKANSAS SUPREME COURT

No. 08-404

NARVELL JOHNSON  
Petitioner

v.

DUSTIN MCDANIEL, ATTORNEY  
GENERAL  
Respondent

Opinion Delivered May 15, 2008

PRO SE MOTION FOR RULE ON  
CLERK [CIRCUIT COURT OF  
PULASKI COUNTY, CV 2007-6939,  
HON. JAMES M. MOODY, JUDGE]

MOTION FOR RULE ON CLERK  
TREATED AS MOTION FOR  
BELATED APPEAL AND DENIED.

## PER CURIAM

Now before us is petitioner Narvell Johnson's pro se motion for rule on clerk seeking to proceed with the appeal of the trial court's order denying his petition for declaratory judgment. We treat the motion for rule on clerk as a motion for belated appeal pursuant to Ark. R. App. P.–Crim. 2(e) because the notice of appeal was untimely filed in the trial court. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). We need not consider petitioner's reasons for failing to perfect the appeal as petitioner could not prevail on appeal. An appeal from an order that denied a postconviction civil remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *See Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

In 2007, petitioner, who is also known as Narvell Johnson, III, filed a petition for declaratory judgment seeking a court's determination that the aggravated robbery statute, under which he was convicted, was unconstitutional.<sup>1</sup> Petitioner claimed in the declaratory judgment complaint that the

<sup>1</sup>In 2004, petitioner was found guilty by a jury of aggravated robbery and other crimes in two separate criminal matters. In Pulaski County Circuit Court Case Number CR 2003-3293, petitioner was found guilty of aggravated robbery and misdemeanor theft of property, and in Case Number CR 2003-3342, petitioner was found guilty of aggravated robbery, fleeing and theft of property. The Arkansas

statute was unconstitutional because it was not a complete statute and violated Ark. Const. art. 5, § 23. More specifically, petitioner complained that the aggravated robbery statute referenced the robbery statute in order to define certain criminal conduct and thereby created confusion and uncertainty.

We find that appellant's declaratory judgment action was properly dismissed. In *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), we outlined four prerequisites that must be present in order for a declaratory judgment to be issued.<sup>2</sup> On appeal, the question as to whether there was a complete absence of a justiciable issue shall be reviewed de novo on the record of the trial court. *Id.* As presented, petitioner cited no legal foundation for his claim and thus did not demonstrate that a justiciable controversy existed. He misconstrued the language, purpose and application of Ark. Const. art. 5, § 23., which concerns the revival, amendment or extension of statutes. The provision however does not prohibit the legislative drafting technique of making a cross-reference to other statutes governing related matters. *See Austin v. Manning*, 217 Ark. 538, 231 S.W.2d 101 (1950).

In *Austin*, the proposed legislation in question referenced the 13th Amendment of the Arkansas Constitution. We described the cross-reference in that case to be permissible and effective, and the use of a cross-reference in statutes generally to be common and uniformly upheld. 217 Ark. at 541, 231 S.W.2d at 103. This type of permitted cross-reference is contained in the aggravated robbery statute, as well as numerous other criminal statutes. Petitioner here failed to Court of Appeals affirmed both convictions. *Johnson v. State*, CACR 04-1352 (Ark. App. Aug. 31, 2005); *Johnson v. State*, CACR 05-82 (Ark. App. Oct. 5, 2005). Here, petitioner references criminal convictions from 2004, which appears to be a reference to both criminal convictions.

<sup>2</sup>The four prerequisites are: (1) there must exist a justiciable controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legally protectable interest in the controversy; (4) the issue involved in the controversy must be ripe for judicial determination.

establish the existence of a justiciable controversy or a legal basis for his claim.

Also, it is apparent that the actual purpose for bringing the declaratory judgment action was an attempt to fashion a means to overturn appellant's criminal convictions, as he reserved right to obtain "supplementary relief" in relation to his convictions in the event that the statute was held to be unconstitutional. A declaratory judgment action is not a substitute for ordinary causes of action, and is intended to supplement, rather than supersede, those causes of action. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005); *Martin v. Equitable Life Assur. Soc. of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). Moreover, such an action is not a proper means of trying a case or various issues involved in it on a piecemeal basis. *Boyett v. Boyett*, 269 Ark. 36, 598 S.W.2d 86 (1980).

Motion for rule on clerk treated as motion for belated appeal and denied.