

ARKANSAS SUPREME COURT

No. 08-469

RAECHIO SMITH
Petitioner

v.

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION
Respondent

Opinion Delivered December 4, 2008

PRO SE MOTION FOR RULE ON
CLERK [CIRCUIT COURT OF
JEFFERSON COUNTY, CV 2006-576,
HON. ROBERT H. WYATT, JR.,
JUDGE]

MOTION DENIED.

PER CURIAM

In 2006, petitioner Raechio Smith, a prisoner incarcerated in the Arkansas Department of Correction, filed a pro se petition for writ of habeas corpus in Jefferson County Circuit Court. The circuit court entered an order that dismissed the petition. In 2007, petitioner filed in this court a motion for rule on clerk that requested permission to proceed with an appeal of that order without a copy of the record. We denied that motion on the basis that this court could not assume jurisdiction without a certified record. *Smith v. State*, 07-70 (Ark. Feb. 8, 2007) (per curiam). In 2008, petitioner filed a petition for writ of mandamus, in which he contended that the Honorable Robert H. Wyatt, Jr., Circuit Judge, failed to act in a timely manner on certain motions, including his motions to proceed *in forma pauperis* on appeal, to have the record prepared at public expense, and to extend the time to lodge the record on appeal. Because the trial court entered an order disposing of these motions several days after the petition for writ of mandamus was filed, we held that the petition was moot. *Smith v. Wyatt*, 08-469 (Ark. Sept. 25, 2008) (per curiam).

During our review of the record in the matter concerning petitioner's request for a writ of

mandamus, it became evident that the circuit clerk had declined to prepare the record on appeal until petitioner paid certain fees and costs associated with the filing of the petition in circuit court. Petitioner had previously sought to file a motion for rule on clerk, but was prevented from providing a partial record that would confer jurisdiction on this court. As a result, we granted petitioner's motion to proceed *in forma pauperis* in this court and directed our clerk to accept the same record should petitioner file another motion for rule on clerk in this matter within a thirty day period from the date of our opinion. *Id.*

A petitioner has the right to appeal an adverse ruling on a petition for postconviction relief, including a petition for writ of habeas corpus. *See Leavy v. Norris*, 324 Ark. 346, 920 S.W.2d 842 (1996) (per curiam). This court has held that a circuit court may not prevent the filing of a notice of appeal of an adverse decision on a postconviction petition by implementing procedures for processing motions to proceed *in forma pauperis* that would prevent those appellants who are, or in good faith assert that they are, indigent from filing a timely notice of appeal. *White v. State*, 373 Ark. 415, ___ S.W.3d ___ (2008) (per curiam). To the extent that a right of appeal is granted, equal protection applies and procedures that would result in a violation of equal protection are prohibited. *See id.* Here, petitioner had timely filed his notice of appeal. The circuit clerk was required to provide petitioner with at least a partial transcript in order for petitioner to file a motion for rule on clerk, under the circumstances presented.

Petitioner filed this motion within the required time, and the matter is before us for consideration. We deny the motion for rule on clerk, however, as it is clear from the partial record that petitioner could not prevail on an appeal. An appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be

permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

The burden is on the petitioner in a habeas corpus petition 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. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. *Id.* at 221, 226 S.W.3d at 798-799.

In his petition for the writ, petitioner alleged that the trial court lacked jurisdiction to try him because it failed to provide a hearing or rule upon a motion to transfer to juvenile court prior to entry of his guilty plea. The applicable statute, Arkansas Code Annotated § 9-27-318 (Supp. 1997), requires a mandatory hearing on a motion to transfer.¹ But, the failure to provide a hearing under the statute is not a jurisdictional issue. *See Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991) (decision under previous law). Because, as petitioner admits, he was sixteen years old at the time of the commission of the crimes described in the charges, the circuit court had jurisdiction under section 9-27-318 (b)(1) to accept his guilty plea, and the failure to conduct a hearing on the motion to transfer did not cause the trial court to lose jurisdiction.

Petitioner did not provide grounds in his petition upon which the writ could issue. Because it is clear that petitioner could not prevail on an appeal, we deny the motion for rule on clerk.

Motion denied.

¹ Petitioner cited to a later version of the statute than that which was applicable, but the requirement of a hearing was also included in the applicable version of section 9-27-318.