

**ARKANSAS SUPREME COURT**

No. 11-1148

CLARENCE ASHBY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 2, 2012

PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL, FOR COPY OF TRIAL TRANSCRIPT AT PUBLIC EXPENSE, FOR APPELLATE COURT TO ADDRESS ARKANSAS DEPARTMENT OF CORRECTION POLICY CONCERNING ACCESS TO LIBRARY, TO ADDRESS PROBLEM IN THE SUPREME COURT, AND TO DELAY APPEAL [LEE COUNTY CIRCUIT COURT, CV 2011-119, HON. RICHARD PROCTOR, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

**PER CURIAM**

In 1994, appellant Clarence Ashby was found guilty of rape, for which a sentence of thirty years' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Ashby v. State*, CACR 94-1016 (Ark. App. Sept. 6, 1995) (unpublished).

On September 16, 2011, appellant filed a pro se petition for writ of habeas corpus in the Lee County Circuit Court, which is located in the county where he was incarcerated.<sup>1</sup> The circuit court denied the petition, and appellant lodged an appeal of that order in this court. Appellant now seeks appointment of counsel, a copy of the transcript of his trial, to have this court address his complaints concerning the policy of the Arkansas Department of Correction on access to

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<sup>1</sup>As of the date of this opinion, appellant remains incarcerated in Lee County.

the library at the prison where he is housed, to address his desire for a copy of the transcript of his trial, and to delay the appeal so that he may collect further information for his brief.

We need not consider the motions, inasmuch as it is clear from the record that appellant could not prevail on 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. *Willis v. Hobbs*, 2011 Ark. 509 (per curiam); *Russell v. Howell*, 2011 Ark. 456 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam). Here, the petition filed by appellant failed to state a ground on which the writ could issue.

A writ of habeas corpus is only proper when a judgment of conviction is invalid on its face or when a circuit court lacked jurisdiction over the cause. *Willis*, 2011 Ark. 509; *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam); *Abernathy v. Norris*, 2011 Ark. 335 (per curiam); *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). 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” that he is illegally detained. *Id.* at 221, 226 S.W.3d at 798–99.

Appellant raised the following grounds for the writ: appellant, who was seventeen at the time of the offense, was denied due process by not being tried in juvenile court; there was no

DNA evidence to establish appellant's identity as the offender; witness statements were unreliable and inadmissible; appellant was not afforded effective assistance of counsel at trial.

With respect to appellant's claim that he was entitled to be tried in juvenile court, appellant did not demonstrate that the circuit court was without jurisdiction in the case. In 1994, when the crime of rape, a felony, was committed by appellant, who was approximately seventeen and one-half years of age, Arkansas Code Annotated section 9-27-318(c)(1) (Repl. 1993) provided that a person at least sixteen years of age who engaged in conduct that constituted a felony if committed by an adult could be tried in circuit court. The circuit court, therefore, had jurisdiction over the matter.

As to appellant's grounds for relief pertaining to the sufficiency of the evidence against him and the admissibility of certain evidence, such issues were not grounds for a writ of habeas corpus. The sufficiency of the evidence and the admissibility of evidence are matters to be addressed at trial and on the record on direct appeal. Such challenges are not cognizable in a habeas proceeding. *Morgan v. State*, 2011 Ark. 403 (per curiam); *Clem v. Hobbs*, 2011 Ark. 311 (per curiam); *Daniels*, 2011 Ark. 192.

Likewise, allegations of ineffective assistance of counsel are not cognizable in a habeas proceeding. *Rodgers v. State*, 2011 Ark. 443 (per curiam); *Dickinson v. Norris*, 2011 Ark. 413 (per curiam); *Willis v. State*, 2011 Ark. 312; *Tryon v. State*, 2011 Ark. 76 (per curiam); *Grimes v. State*, 2010 Ark. 97 (per curiam). Claims concerning counsel's effectiveness are properly raised in a timely petition pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). *Rodgers*, 2011 Ark. 443; *Christopher v. Hobbs*, 2011 Ark. 399 (per curiam); *Moore v. State*, 2010 Ark. 380; *Hill v. Norris*,

2010 Ark. 287 (per curiam). A petition for writ of habeas corpus is not a substitute for proceeding under Rule 37.1. *Rodgers*, 2011 Ark. 443; *Tryon*, 2011 Ark. 76; *see also Johnson v. Hobbs*, 2010 Ark. 459 (per curiam); *Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005).

None of appellant's claims in his petition raised a question of jurisdiction or that the commitment was invalid on its face. All of appellant's claims could have been raised at trial and on the record on direct appeal or in a proceeding under Rule 37.1. A habeas-corpus proceeding does not afford a prisoner an opportunity to retry his case, and, as stated, it is not a substitute for pursuing postconviction relief. *Douthitt v. Hobbs*, 2011 Ark. 416 (per curiam); *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam).

Because appellant failed to state cognizable claims, he did not meet his burden of demonstrating a basis for a writ of habeas corpus to issue. *Rodgers*, 2011 Ark. 443; *Henderson v. White*, 2011 Ark. 361 (per curiam). As a result, the appeal is subject to dismissal.

Appeal dismissed; motions moot.