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SUPREME COURT OF ARKANSAS

No. 11-1165

RANDALL T. McARTY APPELLANT v. RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION APPELLEE	**Opinion Delivered** May 31, 2012 PRO SE MOTION TO FILE SUPPLEMENTAL ABSTRACT, ADDENDUM, AND BRIEF [JEFFERSON COUNTY CIRCUIT COURT, CV 11-551, HON. JODI RAINES DENNIS, JUDGE] MOTION DENIED; ORDER AFFIRMED.

PER CURIAM

Appellant, Randall T. McArty, was convicted in 1993 of first-degree murder. The judgment-and-commitment order shows that appellant was "sentenced to hard labor" in the Arkansas Department of Correction for life. This court affirmed. *McArty v. State*, 316 Ark. 35, 871 S.W.2d 346 (1994). He then timely filed a petition for postconviction relief, which was denied, and this court affirmed that order. *McArty v. State*, CR 94-1010 (Ark. Apr. 10, 1995) (unpublished per curiam). A subsequent attempt to challenge the denial of postconviction relief under Arkansas Rule of Civil Procedure 60 (2005) was also unsuccessful. *See McArty v. State*, 364 Ark. 517, 221 S.W.3d 332 (2006).

In 2011, appellant filed a petition for writ of habeas corpus in the Jefferson County Circuit Court, alleging that his sentence exceeded the statutory sentencing authority of the circuit court and was a violation of appellant's right against cruel and unusual punishment.[1] The circuit

[1]This was the second habeas-corpus petition filed by appellant in the Jefferson County Circuit Court. The first, filed in 2007, was dismissed for failure to state a claim upon which relief could be granted, and no appeal was taken from that dismissal.

court found that the petition did not raise a jurisdictional issue or establish that the sentence was illegal, and it was therefore denied under Arkansas Rule of Civil Procedure 12(b)(6) (2011) for failing to state a claim upon which relief could be granted. The circuit court further held that the petition constituted one "strike" for purposes of Arkansas Code Annotated section 16-68-607 (Repl. 2005). Appellant timely filed a notice of appeal from the circuit court's order, the record was lodged in this court, and both appellant and the appellee State filed their respective briefs.

Now before us is appellant's pro se motion to file a supplemental abstract, addendum, and brief. In the motion, appellant claims that, after receiving the State's brief, he realized that his original abstract, addendum, and brief were "insufficient to substantiate his arguments," and he has tendered supplemental materials with his motion.

Rule 4-7 of the Rules of the Arkansas Supreme Court (2011) applies to briefs filed in postconviction and civil appeals where an appellant is incarcerated and proceeding pro se, as is the situation here. Rule 4-7(d)(3) allows an appellant to file a reply brief within fifteen days from the date that the appellee's brief is filed. Appellant chose not to file such a brief. Instead, he seeks by the instant motion to insert additional paragraphs to the arguments contained in his brief-in-chief. Rule 4-7(c)(3), however, states that mere modifications of the original brief will not be accepted. Thus, the portion of appellant's motion that seeks to file the supplemental brief is denied.

Regarding the remainder of appellant's motion to supplement, he seeks to add to the abstract a quote from the memorandum filed by the State in opposition to appellant's petition

for writ of habeas corpus while it was pending in the circuit court, and he seeks to add that memorandum in full to the addendum. Where the case has not yet been submitted to this court for decision, we may grant a motion to supplement the abstract or the addendum. Ark. Sup. Ct. R. 4-7(c)(3)(B). Such decisions are solely within this court's discretion, however, and we will not grant permission where the motion attempts to supplement the abstract or addendum with material that does not otherwise comply with the requirements of our rules.

Rule 4-7(c)(1) dictates that pleadings, papers filed with the clerk, and documentary evidence should not be abstracted, but should be included in the addendum. Ark. Sup. Ct. R. 4-7(c)(1)(A). Furthermore, an addendum should contain only documents that "are material to the points to be argued in the appellant's brief." Ark. Sup. Ct. R. 4-7(c)(1)(C). Appellant does not reference the State's memorandum in the arguments contained in his brief-in-chief, and the inclusion of that memorandum is not necessary for our determination of the merits of the underlying appeal. Thus, appellant's motion to supplement the abstract and addendum is denied.

We turn next to the merits of the appeal. A circuit court's denial of habeas relief will not be reversed unless the court's findings are clearly erroneous. *Christopher v. Hobbs*, 2011 Ark. 399 (per curiam); *Smith v. State*, 2010 Ark. 137, __ S.W.3d __ (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. *Christopher*, 2011 Ark. 399 (citing *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam)). Under our statute, a petitioner who does not allege his actual

innocence must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a "showing by affidavit or other evidence [of] probable cause to believe" that he is illegally detained. *Id.*; *see also* Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006).

On appeal, appellant argues that his sentence is illegal on its face because it exceeds the statutory range of punishment.[2] He bases this claim on the fact that the judgment-and-commitment order stated that he was sentenced to "hard labor in the Arkansas Department of Correction" when Arkansas Code Annotated section 5-4-401 (Repl. 2005) states only that a conviction for first-degree murder, a Y felony, is punishable by ten to forty years, or life. Ark. Code Ann. 5-4-401(a)(1). Therefore, according to appellant, sentencing him to "hard labor" imposes a condition on his incarceration that makes his sentence illegal under *Richie v. State*, 2009 Ark. 602, __ S.W.3d __.

Sentencing in Arkansas is entirely a matter of statute, and this court defers to the legislature in all matters related to sentencing. *Jackson v. Norris*, 2011 Ark. 49, __ S.W.3d __; *see Glaze v. State*, 2011 Ark. 364, __ S.W.3d __. Where the law does not authorize the particular sentence pronounced by a trial court, the sentence is unauthorized and illegal; however, if a sentence is within the limits set by the legislature, it is legal. *See Jackson*, 2011 Ark. 49, __ S.W.3d __ (citing *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006)). We have held that, unless there is a statutory provision allowing otherwise, a circuit court has no authority to attach conditions

[2] We note that the habeas petition that appellant filed in the circuit court couched his argument in terms of cruel and unusual punishment rather than as a facially illegal sentence. However, an appellant may challenge an illegal sentence for the first time on appeal, even if he did not raise the argument below. *Richie v. State*, 2009 Ark. 602, __ S.W.3d __.

to sentences of incarceration. *Richie*, 2009 Ark. 602, __ S.W.3d __.

The question, then, is whether the statement that appellant was sentenced to "hard labor" imposed a condition on that sentence. We hold that it did not.

Originally, anyone convicted of first-degree murder in Arkansas was sentenced to death. *See* Rev. Ark. Stat. Div. III, art. 1 § 7 (1836). In 1915, the Arkansas Legislature passed Act 187, which provided, "That the jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State Penitention [sic] at hard labor." *See* Digest Ark. Stat. Ch. 44, § 3206 (Crawford 1921); *see also* Ark. Stat. Ann. §§ 41-901 to -902 (1947). Rather than creating a new type of incarceration for such cases, however, the inclusion of "at hard labor" in the 1915 statute was little more than a reflection of the policy of the State of Arkansas. As this court noted over thirty years prior to the passage of Act 187, "It is the settled policy of the State that those who, for crimes committed, are sentenced to the penitentiary, shall be confined at hard labor." *Ward v. Little Rock*, 41 Ark. 526 (1883).

The purpose behind this policy is to avoid having prisoners "maintained in idleness, because that would entail a heavy burden upon the tax-payers, without any corresponding benefit to the criminals themselves." *Id.* Indeed, we have noted that hard labor is assumed as part of a valid sentence to imprisonment in the Arkansas Department of Correction. *See Shoop v. State*, 209 Ark. 642, 192 S.W.2d 122 (1946). This assumption can be seen throughout decades of criminal jurisprudence of this state, even in cases where the statutory punishment for the offense made no reference to "hard labor." *See, e.g.*, *State v. Stapleton*, 345 Ark. 500, 51 S.W.3d

862 (2001) (life imprisonment at hard labor for aggravated robbery); *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983) (three years' imprisonment at hard labor for burglary); *Rowe v. State*, 243 Ark. 375, 419 S.W.2d 806 (1967) (cumulative sentence of twenty-eight years' imprisonment at hard labor for robbery and burglary); *Climer v. State*, 184 Ark. 97, 41 S.W.2d 768 (1931) (one year's imprisonment at hard labor for selling liquor); *Byrd v. State*, 69 Ark. 537, 64 S.W. 270 (1901) (seven years' imprisonment at hard labor for voluntary manslaughter); *Polk v. State*, 40 Ark. 482 (1883) (one year's imprisonment at hard labor for seduction); *Sanford v. State*, 11 Ark. 328 (1850) (two years' imprisonment at hard labor for larceny).

It remains the settled policy of this state that prisoners who are committed to the Arkansas Department of Correction are confined at hard labor.[3] *See Stapleton*, 345 Ark. 500, 51 S.W.3d 862; *see also Bramucci v. State*, 76 Ark. App. 8, 62 S.W.3d 10 (2001) (ten years' imprisonment at hard labor for possession of a controlled substance). Thus, the "hard labor" language on appellant's judgment-and-commitment order did not impose an illegal condition on his incarceration; it merely reflected the continuing policy of the state of Arkansas. Because appellant has not demonstrated that the circuit court lacked the authority to impose the sentence, he failed to establish that a writ of habeas corpus should issue, and the circuit court was not clearly erroneous in denying his petition for the writ.

Appellant's second point on appeal is that the circuit court erred when it determined that

[3]The Department's website explains that "all inmates work, unless there is a severe security or medical concern" and that "failure to work will result in disciplinary action." *Friends & Family Guide* 27, http://adc.arkansas.gov/resources/Documents/Friends_and_Family_Guide.pdf

appellant's habeas petition was a civil action that constituted one "strike" for purposes of Arkansas Code Annotated section 16-68-607. Appellant points to a different statute, which states that, "For purposes of this section, 'civil action' shall not include a petition for a writ of habeas corpus." Arkansas Code Annotated § 16-106-202(b). The statute, by its own language, makes perfectly clear that section 16-106-202 has no application to section 16-68-607. Moreover, because the circuit court correctly found that appellant's petition for writ of habeas corpus failed to state a claim upon which relief could be granted, section 16-68-607 did apply, and appellant's petition did constitute a "strike" for purposes of that section. The circuit court's decision was not erroneous on this point.

Motion denied; order affirmed.