

**ARKANSAS SUPREME COURT**

No. 11-1166

BILLY N. CULBERTSON

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 8, 2012

PRO SE MOTION TO FILE BELATED  
BRIEF [LEE COUNTY CIRCUIT  
COURT, CV 2011-73, HON. L.T. SIMES,  
II, JUDGE]APPEAL DISMISSED; MOTION  
MOOT.**PER CURIAM**

In 2011, appellant Billy N. Culbertson, who was incarcerated at a unit of the Arkansas Department of Correction located in Lee County, filed a pro se petition for writ of habeas corpus in the Lee County Circuit Court.<sup>1</sup> The petition pertained to three criminal judgments from the Lonoke County Circuit Court, CR 2006-92, CR 2006-528, and CR 2006-529.<sup>2</sup> Appellant stated in the petition that he had entered pleas of guilty to the charges.

Appellant argued that he was actually innocent of the offenses and that he was entitled to be released on a writ of habeas corpus on a number of grounds. The circuit court denied the petition, and appellant lodged an appeal of that order in this court. Now before us is appellant's motion to file a belated brief on appeal. We need not consider the motion, inasmuch as it is clear from the record that appellant could not prevail on appeal. An appeal of the denial of

---

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

<sup>2</sup>Appellant was also found guilty of four felony offenses in CR 2006-4216, but the docket number for those cases was not included in the heading to the habeas petition.

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. *Smith v. Hobbs*, 2012 Ark. 18 (per curiam); *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).

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. *Smith*, 2012 Ark. 18; *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; *see also Randolph v. State*, 2011 Ark. 510 (per curiam).

In addition to asserting that he was actually innocent of the offenses, appellant contended the following in his petition for writ of habeas corpus: that the prosecution withheld exculpatory information from the defense, that his guilty plea was not voluntarily and intelligently entered, that he was not competent to enter the plea, that the court did not adequately advise him of the charges against him and the possible sentences for the offenses, and that he was not afforded effective assistance of counsel when he entered the pleas.

First, a petitioner who seeks a writ of habeas corpus on the ground of actual innocence must do so in accordance with Act 1780 of 2001, which is codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). Ark. Code Ann. § 16-112-103(a) (Repl. 2006). Such petitions are filed directly in the trial court. *Heffernan v. State*, 2011 Ark. 326 (per curiam); *see also Bradford v. State*, 2011 Ark. 494 (per curiam). Accordingly, appellant was obligated to raise his claim of actual innocence in the court in the county where he entered the pleas.

As to appellant's contention that his attorney was ineffective, this court has held many times that allegations of ineffective assistance of counsel are not cognizable in a habeas proceeding. *Smith*, 2012 Ark. 18; *Rodgers v. Hobbs*, 2011 Ark. 443 (per curiam); *Willis v. Hobbs*, 2011 Ark. 312 (per curiam); *Tryon v. State*, 2011 Ark. 76 (per curiam); *Grimes v. State*, 2010 Ark. 97 (per curiam). Claims concerning counsel's effectiveness are properly raised pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). *Smith*, 2012 Ark. 18; *Rodgers*, 2011 Ark. 443; *Christopher v. Hobbs*, 2011 Ark. 399 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *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).

As to the remaining allegations, appellant's claims regarding the validity of his guilty pleas did not challenge the facial validity of the judgment, and, therefore, the allegations were not cognizable in a petition for habeas-corpus relief. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005). Although we treat allegations of void or illegal sentences as issues of subject-matter jurisdiction, the type of factual inquiry necessary for an issue that concerns the factual basis for

a plea is one that goes beyond the face of the commitment and is not the kind of inquiry to be addressed by a proceeding for the writ. *Id.* at 317, 219 S.W.3d at 125. Because appellant failed to show that the judgment of conviction was invalid on its face or that the circuit court lacked jurisdiction, the circuit court appropriately determined that the writ should not issue. *Id.*; *see also Skinner v. Hobbs*, 2011 Ark. 383 (per curiam).

Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Randolph*, 2011 Ark. 510; *Anderson v. State*, 2011 Ark. 35 (per curiam); *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes. *Randolph*, 2011 Ark. 510. Appellant 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 appellant failed to establish that the writ should issue, he could not prevail on appeal of the order denying his petition. *Douthitt v. Hobbs*, 2011 Ark. 416 (per curiam); *Dickinson v. Norris*, 2011 Ark. 413 (per curiam).

Appeal dismissed; motion moot.