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SUPREME COURT OF ARKANSAS

No. 11-1255

	Opinion Delivered January 31, 2013
ERIC LAVELL MURRY APPELLANT V. RAY HOBBS AND WILLIAM STRAUGHN APPELLEES	PRO SE MOTIONS TO AMEND ARGUMENT IN APPELLANT'S BRIEF [JEFFERSON COUNTY CIRCUIT COURT, CV 11-626, HON. JODI RAINES DENNIS, JUDGE] APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

On November 7, 2005, appellant Eric Lavell Murry entered a plea of guilty to charges of theft by receiving, being a felon in possession of a firearm, and possession with intent to deliver a controlled substance, for which he received a ten-year suspended sentence on each count and was ordered to pay $500 in court costs. A petition for revocation of suspended sentence was filed in 2009, alleging that appellant had failed to pay court costs; had failed to notify the sheriff of appellant's current address and employment; and had been charged with burglary, theft, and first-degree criminal mischief. Following a revocation hearing, the Crittenden County Circuit Court revoked appellant's suspended imposition of sentence and sentenced him to 360 months' incarceration in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Murry v. State*, 2010 Ark. App. 782.

In 2011, appellant, who is incarcerated in the custody of the Arkansas Department of Correction by virtue of the 2005 conviction, filed in the circuit court in the county where he is

incarcerated a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006) in which he challenged the judgment. The petition was denied, and appellant lodged an appeal here.

Appellant now seeks by pro se motions leave to amend his brief. We need not address the merits of the motions because it is clear from the record that appellant could not prevail on appeal. Accordingly, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *McHaney v. Hobbs*, 2012 Ark. 361(per curiam); *Bliss v. Hobbs*, 2012 Ark. 315 (per curiam); *McCullough v. State*, 2010 Ark. 394 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Hutcherson v. State*, 2010 Ark. 368 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

Appellant failed to demonstrate in his petition that the writ was warranted. The burden is on the petitioner in a petition for writ of habeas corpus 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. *Culberson v. State*, 2012 Ark. 112 (per curiam); *Moore*, 2010 Ark. 380; *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[1] must plead either the facial

[1]A petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). Ark. Code Ann. § 16-112-103(a)(2) (Repl. 2006).

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. *Young*, 365 Ark. at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant contended in his petition that the trial court lacked jurisdiction in his case because the felony information charging him with aggravated robbery was defective in that a deputy prosecutor, rather than the prosecuting attorney, signed and filed it, and there had been no grand-jury proceeding to validate the charge. In *State v. Eason & Fletcher*, 200 Ark. 112, 143 S.W.2d 22 (1940), this court held that an information filed in the name of a deputy was *voidable*, rather than void. We said

> There is a presumption that a deputy prosecuting attorney acts under the direction of his superior. Until the authority is questioned and there is a failure of the prosecuting attorney to affirm, the information, being voidable only, is sufficient to bring the defendant before the court, and in consequence such court acquires jurisdiction.

In *Eason & Fletcher*, this court further held that an information must be challenged in the trial court before it can be declared void. We found that neither Eason nor Fletcher, at any stage in the proceedings, objected to the form of the information. Consequently, we held that a "presumption of verity" attached to the information throughout the trial, and we reversed the judgment with directions to dismiss the writs of habeas corpus.

Since our decision in *Eason & Fletcher*, we have consistently held that the proper time to object to the form or sufficiency of an indictment or information is prior to trial. *See Davis v. State*, 2011 Ark. 88 (per curiam); *see also Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962); Ark. Code Ann. § 16-85-705 (1987). We have declined to review the sufficiency of an information on appeal when there was no proper

objection in the court below. *Prince*, 304 Ark. 692, 805 S.W.2d 46. If we considered the issue to be jurisdictional, we could have overlooked the failure to object and reversed the conviction, if necessary, on our own motion. *See Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). Accordingly, appellant here did not establish that the trial court lacked jurisdiction by virtue of a defective information.

Appellant also contended in his petition that the State did not have jurisdiction over him because the pending criminal charge mentioned in the revocation petition was not prosecuted. It appears that appellant's claim was, at least in part, a challenge to the sufficiency of the evidence to revoke the suspended sentence. If so, the claim did not implicate the validity of the judgment-and-commitment order or the jurisdiction of the court. *See Bliss*, 2012 Ark. 315. If considered as a constitutional or statutory argument, a defendant need not be convicted of an offense during the period of suspension to violate the terms of the suspended imposition of sentence. Because the original judgment, imposing the suspended sentence, was still in effect, the trial court retained jurisdiction to hear the revocation. *See Mosley v. Norris*, 2010 Ark. 501, ___ S.W.3d ___ (per curiam).

Appeal dismissed; motions moot.

Eric Lavell Murry, pro se appellant.

No response.