

## SUPREME COURT OF ARKANSAS

No. 11-729

CHARLES RODGERS  
APPELLANT

V.

RAY HOBBS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION

APPELLEE

Opinion Delivered October 13, 2011

APPELLANT'S PRO SE MOTION  
FOR EXTENSION OF TIME TO FILE  
BRIEF [LINCOLN COUNTY  
CIRCUIT COURT, LCV 2011-47,  
HON. JODI RAINES DENNIS,  
JUDGE]APPEAL DISMISSED; MOTION  
MOOT.

## PER CURIAM

In 2003, appellant Charles Rodgers was found guilty by a jury of rape and sentenced as a habitual offender to life imprisonment. We affirmed. *Rodgers v. State*, 360 Ark. 24, 199 S.W.3d 625 (2004).

Subsequently, appellant timely filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1(2005). The petition was denied, and this court granted appellant leave to proceed with a belated appeal of the order. *Rodgers v. State*, CR 05-1112 (Ark. Nov. 3, 2005) (unpublished per curiam). One of the allegations raised by appellant in the Rule 37.1 petition was that trial counsel had been ineffective in failing to move for dismissal of the rape charge based on a speedy-trial violation. On appeal, however, appellant argued that counsel was ineffective for failing to raise the speedy-trial issue on direct appeal or in a petition for writ of prohibition. As the issue

argued on appeal was different from that raised below and not addressed by court in the order, we declined to reach it. *Rodgers v. State*, CR 05-1112 (Ark. Jan. 11, 2007) (unpublished per curiam).

In 2011, appellant filed in the circuit court in the county in which he was incarcerated a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006) seeking his release. He contended in the petition that the writ should issue on the grounds that he was not afforded a speedy trial.

The petition was denied, and appellant lodged an appeal in this court. Now before us is appellant's motion seeking an extension of time to file his brief-in-chief. 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 motion is 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. *Willis v. Hobbs*, 2011 Ark. 312 (per curiam); *Chappell v. Hobbs*, 2011 Ark. 220 (per curiam); *Anderson v. State*, 2011 Ark. 35 (per curiam); *McCullough v. State*, 2010 Ark. 394 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (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. *Willis*, 2011 Ark. 312; *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam) (citing *Jackson v. Norris*, 2011 Ark. 49, \_\_\_ S.W.3d \_\_\_); *Moore*, 2010 Ark. 380; *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner 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. *Young*, 365 Ark. at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant did not demonstrate that the court in his case lacked jurisdiction or that the commitment entered was illegal on its face. If there was a speedy-trial issue to be raised, it could have been settled in the trial court and on the record on direct appeal. The right to a speedy trial may be waived, and the issue is not cognizable in a habeas proceeding. *Willis*, 2011 Ark. 312; *Daniels*, 2011 Ark. 192; *Davis v. State*, 2011 Ark. 6 (per curiam) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)); see also *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998).

To the degree that appellant’s speedy-trial claim could have been construed as an allegation that he was not afforded effective assistance of counsel in the trial court, a claim of ineffective assistance of counsel is not cognizable in a habeas proceeding. *Willis*, 2011 Ark. 312; *Tryon v. State*, 2011 Ark. 76 (per curiam); *Grimes v. State*, 2010 Ark. 97 (per curiam). Allegations concerning counsel’s effectiveness are properly raised pursuant to Arkansas Rule of Criminal Procedure 37.1. *Moore*, 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. See

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*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).

Appeal dismissed; motion moot.