

SUPREME COURT OF ARKANSAS

No. 12-308

JOHN J. SMITH

APPELLANT

V.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

APPELLEE

Opinion Delivered September 27, 2012PRO SE MOTIONS FOR
EXTENSION OF BRIEF TIME AND
FOR TRANSCRIPT, PRO SE
PETITION FOR WRIT OF
CERTIORARI [PRO SE APPEAL
FROM THE LINCOLN COUNTY
CIRCUIT COURT, LCV 11-125,
HON. JODI RAINES DENNIS,
JUDGE]APPEAL DISMISSED; MOTIONS AND
PETITION MOOT.**PER CURIAM**

Appellant John J. Smith pled guilty to a charge of aggravated robbery, pursuant to a negotiated plea agreement, and he was sentenced to 180 months' incarceration in the Arkansas Department of Correction ("ADC"). Subsequently, appellant filed in the circuit court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2009), which was denied. No appeal was taken from that denial.

On December 13, 2011, appellant filed in the county in which he is incarcerated a petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-101 to -123 (Repl. 2006). The circuit court denied appellant's petition by written order, and appellant timely filed an appeal from that denial. Now before us are appellant's pro se motions for extension of time in which to file his brief-in-chief and for a copy of the transcript of the hearing held on his habeas-corpus petition in the Lincoln County Circuit Court, along with

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his petition for writ of certiorari. We need not consider the motion, however, as it is clear that appellant could not prevail if his appeal were allowed to proceed. An appeal from an order that denied 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. *Wilencewicz v. Hobbs*, 2012 Ark. 230 (per curiam); *Fudge v. Hobbs*, 2012 Ark. 80 (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. *Fudge*, 2012 Ark. 80 (citing *Abernathy v. Norris*, 2011 Ark. 335 (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. *Craig v. Hobbs*, 2012 Ark. 218 (per curiam); *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). To meet this burden, 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. See *Culbertson v. State*, 2012 Ark. 112 (per curiam); Ark. Code Ann. § 16-112-103(a)(1).

Appellant's original petition raised two claims as bases for habeas relief. First, he asserted that his conviction is invalid because, at the time that he entered his guilty plea, appellant believed that he would serve only seventy percent of his sentence before he became eligible

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for parole, yet he was sentenced under Arkansas Code Annotated section 16-93-609 (Repl. 2005), which does not allow for parole. While appellant's petition is not entirely clear, the gravamen of his argument seems to be that he was not told, prior to entering his guilty plea, that section 16-93-609 would apply to his sentence. However, he failed to demonstrate how this allegation would make the judgment against him facially invalid or to support his claim "by affidavit or other evidence of probable cause" to believe that he is illegally detained. Ark. Code Ann. § 16-112-103(a)(1).

Even assuming that appellant's claim is true, it is clear that his argument is not cognizable in a petition for writ of habeas corpus. A habeas-corpus proceeding in state court is generally unavailable for challenging parole matters. See *Blevins v. Norris*, 291 Ark. 70, 722 S.W.2d 573 (1987). Appellant does not contend that section 16-93-609 should not have been applied to him; at most, he seems to contend that he was not informed about the statute's applicability prior to entering his plea. To the extent that appellant believes that his attorney should have informed him about the statute, such a claim would be tantamount to an allegation of ineffective assistance of counsel, and ineffective-assistance claims are not cognizable in petitions for writ of habeas corpus. See *Tarkington v. Norris*, 2012 Ark. 147 (per curiam). All claims of ineffective assistance must be brought under a timely Rule 37.1 petition, and a petition for writ of habeas corpus is not a substitute for a timely petition for postconviction relief. See *id.* (citing *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam)).

Nor was the circuit court under any duty to explain issues of parole eligibility to

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appellant prior to sentencing. *See Wells v. State*, 279 Ark. 55, 648 S.W.2d 466 (1983) (noting that requiring the court or its officers to explain parole eligibility to a defendant would be to encourage the judiciary to encroach upon the executive department of government). As neither the court nor appellant's attorney was under a duty to explain the applicability of section 16-93-609 to appellant, appellant's petition for writ of habeas corpus based on this argument fails to demonstrate that his judgment was invalid on its face or that he is otherwise illegally detained.

As his second basis for writ of habeas corpus, appellant contended that he was denied his constitutional right to counsel when the circuit court refused to appoint counsel to represent appellant for purposes of seeking postconviction relief under Rule 37.1. However, postconviction matters, such as Rule 37.1 petitions, are considered civil in nature, and there is no absolute right to appointment of counsel. *See Walton v. State*, 2012 Ark. 269 (per curiam) (citing *Noble v. State*, 2011 Ark. 200 (per curiam)). Moreover, allegations that a defendant was denied counsel are not cognizable in a petition for writ of habeas corpus. *See Tryon v. Hobbs*, 2011 Ark. 76 (per curiam). Whether counsel was appointed to represent appellant in his Rule 37.1 proceeding has no bearing on whether the trial court lacked jurisdiction over appellant, nor would failure of the circuit court to appoint Rule 37.1 counsel establish that appellant's commitment was invalid on its face. Thus, nothing in appellant's allegation would provide a basis on which a writ of habeas corpus could issue. *See Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006); Ark. Code Ann. § 16-112-103.

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Because it is clear that appellant could not prevail if his appeal were allowed to proceed, the appeal is dismissed. Appellant's motions and petition are moot.

Appeal dismissed; motions and petition moot.

John J. Smith, pro se appellant.

No response.