

SUPREME COURT OF ARKANSAS

No. 12-749

DANNY LEE HOOPER

PETITIONER

V.

RAY HOBBS

RESPONDENT

Opinion Delivered January 31, 2013

PRO SE MOTION FOR RULE ON
CLERK [JEFFERSON COUNTY
CIRCUIT COURT, CV 12-205, HON.
JODI RAINES DENNIS, JUDGE]

MOTION DENIED.

PER CURIAM

Petitioner Danny Lee Hooper filed in the circuit court in the county where he was incarcerated a pro se petition for writ of habeas corpus. The petition was dismissed on April 26, 2012. Petitioner filed a motion for reconsideration on May 18, 2012. The motion was denied by the court on June 26, 2012. On July 19, 2012, petitioner filed a notice of appeal. When the record-on-appeal was tendered to this court, our clerk declined to lodge the record because the motion for reconsideration was deemed denied on June 17, 2012, and the notice of appeal was not filed within thirty days of the deemed-denied date. Petitioner then filed the motion that is now before us seeking leave to proceed with the appeal.

We first note that the notice of appeal filed by petitioner was indeed timely. For that reason, the motion is treated as a motion for rule on clerk, pursuant to Arkansas Supreme Court Rule 2-2(b) (2012), to perfect the appeal. *Eubanks v. State*, 2011 Ark. 214 (per curiam); *Wilmoth v. State*, 2010 Ark. 315 (per curiam); *Tillman v. State*, 2010 Ark. 103 (per curiam); *Ester v. State*, 2009 Ark. 442 (per curiam) (citing *Mitchem v. State*, 374 Ark. 157, 386 S.W.3d 679 (2008) (per

curiam)); *Marshall v. State*, 2009 Ark. 420 (per curiam).

We find that the deemed-denied provision under Arkansas Rule of Appellate Procedure—Criminal 2(a)(3) (2012), which provides that a notice of appeal must be filed within thirty days of the entry of an order denying a posttrial motion under Arkansas Rule of Criminal Procedure 33.3 (2012), does not apply to habeas proceedings. Under Rule 33.3, a pleading is considered denied as an operation of law if not acted on within thirty days. This court will take up the issue of whether Rule 33.3 applies in a case, even though the issue was not raised by the parties, because the preliminary issue of whether a timely notice of appeal was filed is always an issue before the appellate court. See *McJames v. State*, 2010 Ark. 74. Rule 33.3, which requires a motion for new trial to be filed within thirty days after the entry of judgment, is clearly a post-trial rule intended to raise issues concerning the trial. It contemplates a written motion for post-trial relief, stating that a person convicted of either a felony or misdemeanor may file a motion for new trial or any other application for relief and requiring that a copy of any such motion shall be served on the representative of the prosecuting party. A ruling is made on the motion while the trial is fresh in the mind of the trial judge, or the court elects not to enter an order and permit the motion to be deemed-denied by operation of law.

This court has held that Rule 33.3 does not apply to proceedings under Arkansas Rule of Criminal Procedure 37.1 (2012).¹ *Young v. State*, 373 Ark. 264, 283 S.W.3d 188 (2008) (per

¹In *Robbins*, 2010 Ark. 312, this court noted that any posttrial motion made after a Rule 37.1 decision is ineffective and does not extend the time for filing the notice of appeal. *Robbins*, 2010 Ark. 312, at 2 (quoting *McJames v. State*, 2010 Ark. 74, at 4). The *Robbins* decision nevertheless acknowledged that a defendant can request a court to modify its order to include an issue that was raised in a Rule 37.1 petition but not addressed in the order. To be considered

curiam); see *Robbins v. State*, 2010 Ark. 312 (per curiam). This court has also held that the deemed-denied provision does not apply to error-coram-nobis proceedings. *McJames*, 2010 Ark. 74. While Rule 33.3 may overlap with postconviction remedies, in that it allows for a collateral attack on the judgment on the issue of trial counsel's effectiveness, e.g., *State v. Robinson*, 2011 Ark. 90, the narrow window in which the posttrial motion must be filed necessarily limits its scope.

To require a court to issue a ruling on a Rule 37.1, a coram-nobis, or a habeas-corpus petition within thirty days does not allow sufficient time for consideration of the complicated, broad issues that may be raised in a postconviction remedy. When a court considers a Rule 37.1, coram-nobis, or habeas petition, whether the petition is filed relatively soon after trial or after a judgment has been affirmed on appeal, the petition may raise issues that require a study of the record and legal research, both of which are time-consuming. It is not reasonable to expect that careful consideration of a petition for postconviction relief can quickly be accomplished by the court so that an order can be issued within thirty days. The deemed-denied provision that would deny the petition by operation-of-law after thirty days is not conducive to proper consideration of a Rule 37.1, coram-nobis, or habeas petition. For this reason alone, the deemed -denied provision undermines the purpose of the postconviction remedies. A judge should have ample time to study a petition for writ of habeas corpus and enter an appropriate, reasoned ruling

timely, an appellant's motion for a ruling on an omitted issue must be filed within thirty days of the date the order was entered. *Lovett v. State*, 2013 Ark. 8. The timely filing of such a motion extends the time for filing the notice of appeal.

contained in a written order that reflects the basis or bases for the decision.

While petitioner Hooper's notice of appeal was timely, his motion to proceed with the appeal must, nevertheless, be denied on the ground that the habeas petition was clearly without merit. This court has repeatedly held that an appeal in a habeas proceeding should not be permitted to proceed where it is clear from the record that a petitioner could not prevail on appeal. *Fuller v. State*, 2012 Ark. 376 (per curiam); *Williams v. Norris*, 2012 Ark. 30 (per curiam); *Russell v. Howell*, 2011 Ark. 456 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

In the petition for writ of habeas corpus, petitioner alleged that the police department violated his rights, he was illegally arrested, his due-process rights were violated, his right not to incriminate himself was violated by the taking of DNA in a search of his body cavities, he was placed under duress by either having to cooperate with the police without a lawyer present or have his parole revoked, crucial information was withheld from the judge and jury, and he was not afforded effective assistance of counsel. The claims were not grounds for the writ.

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. *Abermathy 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-corporus 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.

The allegations raised by petitioner did not call into question the trial court’s jurisdiction or the facial validity of the judgment-and-commitment order. Any claim of actual innocence, including claims that the evidence was insufficient to sustain the judgment of conviction, were issues that did not question the jurisdiction of the court or the facial validity of the judgment-and-commitment order. *Christopher v. Hobbs*, 2011 Ark. 469 (per curiam).

Likewise, the assertions of trial error and due-process claims did not implicate the facial validity of the judgment or the jurisdiction of the trial court. *Bliss v. Hobbs*, 2012 Ark. 315 (per curiam); *see also McHaney v. Hobbs*, 2012 Ark. 361 (per curiam) (due-process allegations are not cognizable in a habeas proceeding); *Craig v. Hobbs*, 2012 Ark. 218 (per curiam) (sufficiency of the evidence and admissibility of evidence not cognizable in a habeas proceeding); *Rodgers v. Hobbs*, 2011 Ark. 443 (per curiam) (speedy-trial issue is not cognizable in a habeas proceeding); *Clem v. Hobbs*, 2011 Ark. 311 (per curiam) (a claim of conflict of interest was not properly raised in a habeas proceeding); *Tryon v. Hobbs*, 2011 Ark. 76 (per curiam) (due process and prosecutorial misconduct are matters of trial error not cognizable in a habeas proceeding). The claims were challenges to petitioner’s conviction, and the claims were not ones that might deprive a court of jurisdiction.

Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Bliss*, 2012 Ark. 315; *Culbertson v. State*, 2012 Ark. 112 (per curiam). A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal

statutes. *Id.* Mere trial error does not deprive a court of jurisdiction. *Culbertson*, 2012 Ark. 112; *Tryon*, 2011 Ark. 76. A habeas-corpus proceeding does not afford a prisoner an opportunity to retry his case, and it is not a substitute for direct appeal or postconviction relief. *Meny v. Norris*, 340 Ark. 418, 420, 13 S.W.3d 143, 144 (2000) (per curiam). Petitioner's allegations could have been raised in the trial court, on direct appeal, or in his Rule 37.1 proceeding. A habeas-corpus proceeding does not afford a prisoner a means to revisit the merits of matters that could have been addressed, and settled, in the trial court, on appeal, or in a postconviction proceeding. *See Douthitt v. Hobbs*, 2011 Ark. 416 (per curiam); *see also Bliss*, 2012 Ark. 315; *Van v. Hobbs*, 2011 Ark. 287 (per curiam).

With respect to appellant's contention that he was denied effective assistance of counsel at trial, this court has consistently held that allegations of ineffective assistance of counsel are not cognizable in a habeas proceeding. *McHaney*, 2012 Ark. 361; *Robinson v. State*, 2012 Ark. 356 (per curiam); *Smith v. Hobbs*, 2012 Ark. 360 (per curiam); *Hill v. State*, 2012 Ark. 309 (per curiam); *McConaughy v. Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992).

Because appellant failed to state cognizable claims, he did not meet his burden of demonstrating a basis for a writ of habeas corpus to issue. *McArty v. Hobbs*, 2012 Ark. 257 (per curiam); *Rodgers*, 2011 Ark. 443; *Henderson v. White*, 2011 Ark. 361 (per curiam). Appellant could not, therefore, prevail on appeal of the order denying his petition. *Douthitt*, 2011 Ark. 416;

Motion denied.

Danny Lee Hooper, pro se petitioner.

No response.