

Cite as 2011 Ark. 287

SUPREME COURT OF ARKANSAS

No. 11-414

LAMONT VAN
Appellant

v.

RAY HOBBS
Appellee**Opinion Delivered** June 23, 2011APPELLANT'S PRO SE MOTION
FOR EXTENSION OF TIME TO FILE
BRIEF [LINCOLN COUNTY
CIRCUIT COURT, LCV 2010-133,
HON. JODI RAINES DENNIS,
JUDGE]APPEAL DISMISSED; MOTION
MOOT.**PER CURIAM**

In 1996, Lamont Van was found guilty by a jury in the Pulaski County Circuit Court of capital murder and sentenced to life imprisonment without parole. We affirmed. *Van v. State*, CR 96-1144 (Ark. Oct. 29, 1998) (unpublished per curiam).

In 2010, appellant filed in the county in which he was incarcerated a petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006). In the petition, appellant argued that the trial court lacked jurisdiction in his case. He contended also that he was not put on notice that the information in his case was amended prior to trial, that he was actually innocent of the offense of which he was convicted, that there was error at trial in the admission of evidence, and that he was not afforded effective assistance of counsel. The petition was denied, and appellant lodged an appeal in this court. Now before us is appellant's motion for extension of time to file his brief-in-chief.

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We need not address the merits of the motion 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. *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. *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’s contention that the trial court lacked jurisdiction in his case was not substantiated with facts to establish a lack of jurisdiction. Jurisdiction is the power of the court

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to hear and determine the subject matter in controversy. *Anderson*, 2011 Ark. 35; *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. *Id.* Mere trial error does not deprive a court of jurisdiction. *Tryon v. Hobbs*, 2011 Ark. 76 (per curiam); *see also Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990).

Appellant's claims of actual innocence were not cognizable as grounds to issue the writ in the county where he was incarcerated. A petitioner who seeks a writ of habeas corpus and alleges actual innocence must proceed in the trial court 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).

Appellant's contention that there was error in the admission of evidence is a claim of trial error, and mere trial error, even if established, is a matter to be addressed at trial. *Daniels*, 2011 Ark. 192. It is not grounds for habeas relief. *Tryon*, 2011 Ark. 76; *see also Hill v. Norris*, 2010 Ark. 287 (per curiam). A habeas corpus proceeding does not afford a convicted defendant an opportunity to retry his case, and it is not a substitute for direct appeal. *Key v. Norris*, 2010 Ark. 61 (per curiam); *Henderson v. State*, 2010 Ark. 30 (per curiam) (citing *Meny v. Norris*, 340 Ark. 418, 420, 13 S.W.3d 143, 144 (2000) (per curiam)).

With respect to appellant's allegation that he was not afforded effective assistance of counsel in the trial court, a claim of ineffective assistance of counsel is not within the purview

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of a habeas proceeding. *Daniels*, 2011 Ark. 192; *Tryon*, 2011 Ark. 76; *Grimes v. State*, 2010 Ark. 97 (per curiam). Allegations concerning counsel's effectiveness are properly raised in a timely petition pursuant to our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2011). *Daniels*, 2011 Ark. 192; *Moore*, 2010 Ark. 380; *Hill*, 2010 Ark. 287. A petition for writ of habeas corpus is not a substitute for proceeding under Rule 37.1. *Johnson v. Hobbs*, 2010 Ark. 459 (per curiam); *Rickenbaker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005).

Finally, turning to appellant's assertion that a writ of habeas corpus should issue because he was not given proper notice of an amendment to the Information in his case, if appellant was contending that the amendment deprived the court of jurisdiction, this court has consistently held that the proper time to object to the form or sufficiency of an indictment or information is prior to trial. See *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962). 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. If we considered the issue to be jurisdictional, we could overlook the failure to object and reverse the conviction, if necessary, on our own motion. See *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). Accordingly, appellant did not establish that the trial court lacked jurisdiction. If the claim was one of trial error, it should have been addressed in the trial court. *Davis v. State*, 2011 Ark. 88 (per curiam); see also *State v. Eason & Fletcher*, 200 Ark. 112, 143 S.W.2d 22 (1940). A nonjurisdictional challenge to the sufficiency of an

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information must be raised prior to trial. See *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001) (citing *McNeese v. State*, 334 Ark. 445, 976 S.W.2d 373 (1998)).

Appeal dismissed; motion moot.