

Cite as 2018 Ark. 42  
**SUPREME COURT OF ARKANSAS**  
No. CR-17-919

JAMES EDWARD WHITNEY  
PETITIONER  
  
V.  
  
STATE OF ARKANSAS  
RESPONDENT

Opinion Delivered February 15, 2018

PRO SE PETITION FOR REVIEW EN  
BANC OF THE CLERK'S DECISION  
[WASHINGTON COUNTY CIRCUIT  
COURT, NO. 72CR-13-912]

HONORABLE MARK LINDSAY, JUDGE

PETITION TREATED AS MOTION FOR  
RULE ON CLERK AND DISMISSED.

---

**COURTNEY HUDSON GOODSON, Associate Justice**

Petitioner James Edward Whitney filed in this court a pro se “petition for review en banc of the clerks [sic] decision” in which he requests permission to proceed with an appeal of an order dismissing his pro se petition under Arkansas Rule of Criminal Procedure 37.1 (2017). We need not consider Whitney’s proposed bases for cause to allow the appeal to go forward because it is clear that the appeal cannot succeed. We therefore treat the petition as a motion for rule on clerk, and we dismiss the motion.

A Washington County jury convicted Whitney on eighteen counts of possession of child pornography, and he appealed. On May 24, 2017, the Arkansas Court of Appeals affirmed the judgment. *Whitney v. State*, 2017 Ark. App. 341, 520 S.W.3d 326. On the same day that the decision on direct appeal was handed down, but prior to issuance of the mandate on June 21, 2017, Whitney filed his pro se petition under Rule 37.1 in the trial

court. The court entered an order that disposed of the petition on May 30, 2017, and it is this order dismissing the Rule 37.1 petition that Whitney wishes this court to review.

Whitney filed a timely notice of appeal of the order, but the record was tendered to our clerk 116 days after the notice of appeal had been filed, and our clerk declined to file the record because it was not timely tendered.<sup>1</sup> Whitney then filed the instant petition in which he alleges that this procedural default should be excused because the trial court failed to timely provide approval for Whitney's request to proceed as a pauper on appeal, and that he should not be held responsible for the resulting delay by the circuit clerk in preparing the record on appeal.

When a petitioner fails to perfect an appeal in accordance with the prevailing rules of procedure, the burden is on the petitioner, even if he or she is proceeding pro se, to establish good cause for failure to comply with the procedural rules. *Marshall v. State*, 2017 Ark. 208, 521 S.W.3d 456. This court need not consider a petitioner's claims for good cause for a delay in submitting the record on appeal, however, when the petitioner cannot prevail on appeal. *Id.* An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the petitioner could not prevail. *Justus v. State*, 2012 Ark. 91.

---

<sup>1</sup>Under Arkansas Rule of Appellate Procedure–Criminal 4, unless an extension of time has been granted in accord with the provisions of the Rule, the record must be filed with the clerk of the appellate court within ninety days from the filing of the notice of appeal. Ark. R. App. P.–Crim. 4(b) (2017).

Rule 37.2 provides that no proceeding under Rule 37 shall be entertained while the direct appeal of a judgment is pending, and a Rule 37.1 petition filed after the judgment is affirmed but before the mandate is issued, as Whitney's petition was, is to be treated as filed on the day after the mandate was issued. Ark. R. Crim. P. 37.2(a) & (c)(ii) (2017). The trial court lacked authority to act on the merits of the petition until the mandate issued. *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945). When the court acted, it could do no more with respect to a Rule 37 petition than examine it to see if it had the authority to act on it. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

The trial court addressed the merits of the Rule 37.1 petition, and it also determined that the petition did not include a verified affidavit as required by Rule 37.1(c). To the extent that the trial court addressed the merits of the petition, the order was premature, and this court can not address the trial court's rulings. Ark. R. Crim. P. 37.1(d); see *State v. Richardson*, 2010 Ark. 207 (dismissing appeal when the order appealed was a nullity and there was therefore no appealable order).

As the record demonstrates, the trial court correctly found that the petition filed did not have the necessary affidavit under Rule 37.1(c). Without the affidavit, neither the trial court nor this court has the authority to reach the merits of the Rule 37.1 petition. See *Bradley v. State*, 2015 Ark. 144, 459 S.W.3d 302 (holding that the appellate court must dismiss the appeal when the petitioner's Rule 37.1 petition was not accompanied by an affidavit that was sworn before a notary or other officer authorized to administer oaths; in substantially the form noted in Rule 37.1(c); and attesting that the facts stated in the

petition are true, correct, and complete to the best of the petitioner's knowledge and belief). Therefore, even if the trial court had waited until the Rule 37.1 petition was deemed filed to enter an order that was appealable, the trial court did not have authority to consider the merits of the petition as filed, because the petition was unverified. Because the trial court did not have authority to consider the merits of the petition when it did or later, Whitney cannot succeed on appeal.

Petition treated as motion for rule on clerk and dismissed.

HART, J., dissents.

**JOSEPHINE LINKER HART, Justice, dissenting.** However inartfully styled, all that is before this court is Mr. Whitney's motion for rule on clerk. *See Marshall v. State*, 2017 Ark. 208, 521 S.W.3d 456. As the majority notes, Mr. Whitney's notice of appeal was timely filed, but his transcript was tendered some 26 days late. *See Ark. R. Crim. P. 4(b)*. Accordingly, the only issue before this court is whether Mr. Whitney has shown "good cause" for failing to file his record within the time specified by Rule 4(b). Because Mr. Whitney has not yet perfected his appeal, we have no jurisdiction to consider anything else.

It is totally disingenuous for the majority to dispose of this case on the merits. Whether or not Mr. Whitney has raised a meritorious ground for Rule 37 relief relies on information that is contained in the transcript that the clerk of this court has not allowed Mr. Whitney to file!

I respectfully dissent.