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SUPREME COURT OF ARKANSAS

No. 11-428

JOE EDWIN CLEM
Appellant

v.

RAY HOBBS
Appellee**Opinion Delivered** July 27, 2011APPELLANT'S PRO SE MOTION
FOR EXTENSION OF TIME TO FILE
BRIEF [LINCOLN COUNTY
CIRCUIT COURT, LCV 2010-150,
HON. JODI RAINES DENNIS,
JUDGE]APPEAL DISMISSED; MOTION
MOOT.**PER CURIAM**

In 2001, appellant Joe Edwin Clem was found guilty by a jury in the Craighead County Circuit Court of one count of rape and three counts of accomplice to rape. The victims were his son and daughter. He was sentenced to three terms of life imprisonment and one term of 480 months' imprisonment. We affirmed. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002). In 2010, appellant filed in the circuit court in the county in which he was incarcerated a pro se petition for writ of habeas corpus. 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.

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

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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) (Repl. 2006). Appellant did not demonstrate that the trial court in his case lacked jurisdiction or that the commitment entered was illegal on its face.

Appellant contended that he was entitled to release on a writ of habeas corpus because venue was not proper in Craighead County, he was denied effective assistance of counsel at trial, a conflict of interest was created because two public defenders from the same firm represented him and his wife in separate proceedings against them, he and his wife had shared

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an attorney in a custody matter while appellant was awaiting arraignment, he was denied counsel at an unspecified critical stage of the proceedings, the evidence was insufficient to sustain the judgment of conviction, the rules of evidence did not permit his wife to testify against him, and the lengthy sentence imposed was cruel and unusual and thus a violation of the Eighth Amendment.

Petitioner did not explain his contention that venue was not proper in Craighead County where the trial was held. If petitioner intended the claim to call into question the jurisdiction of the trial court, a conclusory allegation of lack of jurisdiction is not sufficient to support a petition for writ of habeas corpus. *McCullough v. State*, 2010 Ark. 394 (per curiam); *see also Barnes v. State*, 2011 Ark. 153 (per curiam).

With respect to appellant's assertion that he was denied effective assistance of counsel, a claim of ineffective assistance of counsel is not cognizable in a habeas proceeding. *Tryon v. Hobbs*, 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). *Moore*, 2010 Ark. 380; *Hill v. Norris*, 2010 Ark. 287. A petition for writ of habeas corpus is not a substitute for proceeding under Rule 37.1. *See Tryon*, 2011 Ark. 76; *see also Johnson v. Hobbs*, 2010 Ark. 459 (per curiam); *Rickenbaker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005). Likewise, the claim that there was a conflict of interest created by counsel was a claim that should have been raised under Arkansas Rule of Criminal Procedure 37.1, not in a habeas proceeding. *See Lee v. State*, 2009 Ark. 255, 308 S.W.3d 596.

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As to appellant's argument that the rules of evidence were violated when his wife testified against him, Arkansas Rule of Evidence 504(d) (2011) provides that there is no husband-wife privilege when one spouse is charged with a crime against the other spouse's child or any person residing in the household of either. Moreover, the issue, like the other claims of trial error and challenges to the sufficiency of the evidence raised in the habeas petition, was an issue that could have been addressed and settled at trial or on the record on appeal. The sufficiency of the evidence and claims of trial error, even if error were established, are matters to be addressed at trial. Such grounds are not grounds for habeas relief. *Daniels*, 2011 Ark. 192; *see Tryon*, 2011 Ark. 76 (per curiam); *see also Hill*, 2010 Ark. 287. 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)). Jurisdiction is the power of the court 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. *Anderson*, 2011 Ark. 35. Mere trial error does not deprive a court of jurisdiction. *Van v. Hobbs*, 2011 Ark. 287 (per curiam); *Tryon*, 2011 Ark. 76; *see also Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990).

Finally, appellant's contention that he was entitled to release on the ground that his sentence violated the Eighth Amendment was not well taken. Appellant did not contend that

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the sentences imposed on him were outside the statutory limits for the offenses. The mere fact that the maximum sentence may have been imposed for an offense does not entitle a petitioner to release on a writ of habeas corpus. *See Jackson*, 2011 Ark. 49, ___ S.W.3d ___.

Appeal dismissed; motion moot.