

Cite as 2009 Ark. 436

ARKANSAS SUPREME COURT

No. CR 88-05

MILTON JASPER JONES
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered September 24, 2009

PRO SE MOTION FOR
RECONSIDERATION [CIRCUIT
COURT OF JEFFERSON COUNTY, CR
86-396]

MOTION DENIED.

PER CURIAM

On May 21, 2009, this court handed down *Jones v. State*, 2009 Ark. 308 (unpublished per curiam), wherein we denied petitioner's pro se petition to reinvest jurisdiction in the trial court to consider a petition under Arkansas Rule of Criminal Procedure 37.1 (1985). Now before us is petitioner's pro se motion for reconsideration of that decision.

As petitioner failed to seek postconviction relief within three years from the entry of the judgment, he was required to demonstrate that the underlying judgment of conviction was absolutely void. Ark. R. Crim. P. 37.2(c) (1985); *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985). One of petitioner's arguments was that he was entitled to a jury instruction on first-degree murder as a lesser-included offense of capital murder. He now clarifies in the instant motion that his intended allegations were that trial counsel proffered such instruction to be given to the jury, but that the trial court refused to give the instruction based upon his prejudice against petitioner, and that the trial

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court refused to allow the proffered instruction to be included in the record on appeal. Nevertheless, as before, petitioner is entitled to no relief in this matter.

The burden was on petitioner to establish grounds to void the judgment of conviction. *Travis v. State, supra*. As noted in our decision denying Rule 37.1 relief:

Petitioner argued at trial, and reiterates in the Rule 37.1 petition, that he had absolutely no involvement in the victim's murder and was not present when it occurred. He continues to accuse Ferguson and McCoy of being the actual perpetrators of the crime and to proclaim his complete innocence. It would have therefore made no sense to instruct the jury on first-degree murder, second-degree murder or any lesser-included offense, because a lesser-included offense was inconsistent with petitioner's trial defense. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

In the motion for reconsideration, petitioner admits that his defense at trial was that he was innocent of the victim's murder and of committing the theft. However, he now claims that "all present" at his trial, i.e., the jurors, the judge, and the prosecutor, "understood" that petitioner "had in fact facilitated the theft of property . . . offense by providing co-defendant Roosevelt Ferguson with transportation out of state in immediate flight from the felony offense of theft of property (cash) taken in the burglary."

The holding in *Hall v. State, supra*, comprises the linchpin of this matter. Petitioner's proclamation, at this late date, of some guilt in the underlying felony fails to negate his defense at trial of complete innocence. Also, presuming to know what the jurors "understood" presents no rational basis in fact in support of petitioner's argument. That being the case, petitioner does not establish that the trial court had no valid grounds to allegedly refuse trial counsel's proffered first-degree murder jury instruction. He also fails to establish that *Hall v. State, supra*, is inapplicable here, or that a fundamental error rendered the judgment absolutely void. In sum, petitioner fails to

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meet his burden of demonstrating that there was some error of fact or law in the decision that would merit reconsideration of the denial of the petition to reinvest jurisdiction in the trial court to consider a petition under Rule 37.1.

Motion denied.