

SUPREME COURT OF ARKANSAS

No. 09-975

WESLEY ELISHA GRISSOM
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 5, 2009

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [CIRCUIT COURT OF
LINCOLN COUNTY, LCV 2009-30,
HON. JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

On September 18, 2008, judgment was entered reflecting that appellant Wesley Elisha Grissom had entered a plea of guilty to sexual assault in the first degree for which a sentence of 660 months' imprisonment was imposed. While the transcript of the hearing when appellant entered the plea establishes that appellant was repeatedly informed that the sentence was enhanced under Ark. Code Ann. §5-4-501 (Repl. 2006) by virtue of his having been found guilty of four or more prior felony offenses, the original judgment did not reflect that appellant was sentenced as a habitual offender. On March 31, 2009, an amended judgment was entered correcting the omission.

On March 17, 2009, shortly before the amended judgment was entered, appellant filed a petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to-123 (Repl. 2006) in the county where he was incarcerated. In the petition, he raised the claim that because the original judgment did not show that the sentence was enhanced, he was entitled to have the judgment dismissed or modified to reduce the sentence. The circuit court denied the petition, and appellant has lodged an appeal of the order in this court. He now seeks by pro se motion an extension of time to file his brief-

in-chief. Because it is clear that appellant cannot prevail on appeal, we dismiss the appeal. The motion for extension of time is moot.

An appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam). Here, appellant failed to state a claim in his petition that was cognizable in a habeas proceeding.

The burden is on the petitioner in a habeas corpus 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" he is illegally detained. *Id.* at 221, 226 S.W.3d at 798-799.

The sentence imposed on appellant did not exceed the statutory maximum. As stated, the record of the plea hearing contains repeated references to the fact that appellant was to be sentenced as a habitual offender. He answered affirmatively when asked by the court if the court had correctly stated that he was charged as a habitual offender with four or more prior felony convictions. While Arkansas Rule of Civil Procedure 60(a) allows for a circuit court to modify or vacate a judgment, order, or decree, within ninety days of its having been filed with the clerk, we have held that Rule 60(a) does not apply to criminal proceedings. *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000). As we said in *State v. Rowe*, 374 Ark. 19, 25, 285 S.W.3d 614, 619 (Ark.2008), we have, however, applied the theory behind Arkansas Rule of Civil Procedure 60(b) to criminal cases because Rule 60(b) embodies the common law rule of nunc pro tunc orders that is applicable in both civil and criminal cases. *See McCuen*

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v. State, 338 Ark. 631, 999 S.W.2d 682 (1999) (interpreting former version of the rule). Pursuant to Rule 60(b) a circuit court can enter an order nunc pro tunc at any time to correct clerical errors in a judgment or order. Ark. R. Civ. P. 60(b) (2008). A circuit court's power to correct mistakes or errors is to make “the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.” *Lord v. Mazzanti*, 339 Ark. 25, 29, 2 S.W.3d 76, 79 (1999). Moreover, clerical errors do not prevented enforcement of a judgment and commitment order. *See Baker v. Norris*, 369 Ark. 405, 414, 255 S.W.3d 466, 471 (Ark.2007); *see also Carter v. Norris*, 367 Ark. 360, 240 S.W.3d 124 (2006).

Here, the amended judgment corrected a clerical oversight. An excessive sentence was not imposed on appellant, and he did not state a basis for a writ of habeas corpus to issue. Accordingly, the appeal is dismissed and the motion for extension of time to file the brief is moot.

Appeal dismissed; motion moot.