

Cite as 2009 Ark. 605

SUPREME COURT OF ARKANSAS

No. CR 09-916

ELDON RAY COBB
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 3, 2009

APPELLEE'S MOTIONS TO DISMISS
AND FOR BRIEF TIME [APPEAL
FROM CIRCUIT COURT OF BAXTER
COUNTY, CR 98-343, HON. GORDON
WEBB, JUDGE]

MOTION TO DISMISS GRANTED;
APPEAL DISMISSED; MOTION FOR
BRIEF TIME MOOT.

PER CURIAM

In 1999, appellant Eldon Ray Cobb pled guilty to commercial burglary and theft of property. The original judgment entered on June 4, 1999, reflected that appellant was sentenced to an aggregate term of twenty-one years' imprisonment in the Arkansas Department of Correction, with that term to run concurrently with the sentences on other charges, and that appellant was to pay court costs and an amount of restitution to be determined later. The trial court entered amended judgments on June 10, 1999, and June 24, 1999, so that the final judgment reflected an aggregate term of fifteen years' imprisonment, also served concurrently, and that appellant was to pay court costs and \$9,000 in restitution.

On April 16, 2009, appellant filed in the trial court a pro se motion to dismiss restitution, in which he sought to have the judgment against him modified so as to set aside the restitution requirement of his sentence. The court entered an order denying and dismissing the motion on

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May 7, 2009, and appellant lodged an appeal of the order in this court. Appellee State has now filed motions to dismiss the appeal on the grounds that the trial court lacked jurisdiction to consider the motion, and to extend the time for filing appellee's brief, in the event that the motion to dismiss is denied. We agree that the trial court was without jurisdiction to consider appellant's motion, and grant the motion to dismiss the appeal.

Appellant's motion to dismiss restitution sought to modify his sentence, alleging that his rights were violated because he was not present at the hearing concerning the restitution amount and alleging that his attorney did not act appropriately to reduce the amount of restitution. Claims that seek to modify the sentence on the basis of constitutional or statutory violations and ineffective assistance of counsel are the type of claims that must be raised in a postconviction proceeding pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. Ark. R. Crim. P. 37.1(a) & (d) (1999). Grounds that are available under Rule 37.1 must be raised in a petition under that rule. Ark. R. Crim. P. 37.2(b) (1999). A petition for postconviction relief attacking the judgment on such a basis is considered pursuant to Rule 37.1 regardless of the label given it by the petitioner. *See Crosby v. State*, 2009 Ark. 555 (per curiam) (citing *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007)).

As a petition under Rule 37.1, appellant's motion to dismiss restitution was not timely filed. Under Rule 37.2, a Rule 37.1 petition challenging a conviction obtained on a plea of guilty must be filed within ninety days of the date of entry of judgment. The latest amended judgment entered in this case was on June 24, 1999, and September 22, 1999, was the ninetieth day from

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that date. Appellant filed his motion more than nine years after expiration of the ninety-day period.

The time limitations imposed in Rule 37.2 are jurisdictional in nature, and the circuit court may not grant relief on an untimely petition. *Stuart v. State*, 2009 Ark. 492 (per curiam). An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Id.* Here, appellant clearly cannot prevail because the trial court did not have jurisdiction to consider his motion; the trial court could not consider the motion and dismissal was required. Because we grant the State's motion to dismiss, the motion for additional time to file appellee's brief is moot.

Motion to dismiss granted; appeal dismissed; motion for brief time moot.