

Cite as 2010 Ark. 70

**SUPREME COURT OF ARKANSAS**

No. CR 81-74

CARDELL HUNES  
Petitioner

v.

STATE OF ARKANSAS  
Respondent**Opinion Delivered** February 12, 2010PRO SE PETITION FOR  
POSTCONVICTION RELIEF  
PURSUANT TO ARKANSAS RULE OF  
CRIMINAL PROCEDURE 37.1  
[CIRCUIT COURT OF PULASKI  
COUNTY, CR 80-2085]

PETITION DENIED.

**PER CURIAM**

In 1981, petitioner Cardell Hunes was found guilty by a jury of rape, aggravated robbery, and two counts of kidnapping and sentenced to an aggregate term of 170 years' imprisonment. We affirmed. *Hunes v. State*, 274 Ark. 268, 623 S.W.2d 835 (1981). Petitioner subsequently challenged the judgment in this court in 1988 pursuant to our postconviction rule, Arkansas Rule of Criminal Procedure 37.1. Ark. R. Crim. P. 37.1 (1985). The petition was denied. *Hunes v. State*, CR 81-74 (Ark. Nov. 21, 1988) (unpublished).

Petitioner Hunes now seeks leave from this court for a second time to proceed in the trial court with a petition for postconviction relief pursuant to 37.1.<sup>1</sup> The petition is properly

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<sup>1</sup>For clerical purposes, the petition has been filed under the docket number assigned to the direct appeal of the judgment when it was lodged in the this court in 1981.

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filed here. The version of Rule 37.1 in effect when petitioner's criminal judgment was entered in 1981 applied to petitioners with judgments entered before July 1, 1989, that have been affirmed on appeal, as is the case here. Petitioner is thus required to obtain leave from this court before filing a postconviction petition in the trial court. Ark. R. Crim. P. 37.2(a) (1989).

Under the applicable version of Rule 37.1, timely petitions must have been filed within three years from the date the judgment was entered. Ark. R. Crim. P. 37.2(c) (1989). An exception to the time limitation is applicable when a petition states a ground sufficient to render the judgment of conviction absolutely void. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985). An allegation on which a judgment can be voided must present a question of such fundamental and basic nature that the judgment is a complete nullity, such as a conviction obtained in a court without jurisdiction to try the accused or a judgment obtained in violation of double-jeopardy principles. *Id.* Even questions of a constitutional dimension are not preserved beyond the direct appeal or available for collateral attack unless the issue renders the judgment void. *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam).

It is thus apparent that review of mere trial error is not sufficient to warrant granting relief under Rule 37.1, and the petition cannot be used as a substitute for raising an issue at trial and on appeal. *Id.* If a defendant's argument fails to present a claim of constitutional deprivation of rights sufficient to render the judgment void, the Rule 37.1 petition is deemed

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to be untimely filed. *Mackey v. State*, 286 Ark. 188, 690 S.W.2d 353 (1985) (per curiam) (citing *Moore v. Illinois*, 408 U.S. 786 (1972)). The burden is on the defendant to establish grounds to void the judgment of conviction. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935.

Petitioner here alleges only that his confession was not admissible into evidence at trial. As the claim was raised at trial and addressed on appeal, it is not cognizable in a petition under Rule 37.1. Rule 37.1 does not provide an opportunity to reargue points settled on appeal. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989); *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1 (1981) (per curiam).

Petition denied.