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SUPREME COURT OF ARKANSAS

No. 10-942

Opinion Delivered February 24, 2011

CARL DAVIS, JR.
Appellant

v.

STATE OF ARKANSAS and RAY HOBBS, DIRECTOR
Appellee

PRO SE MOTION FOR LEAVE TO FILE BELATED REPLY BRIEF AND MOTION TO AMEND MOTION FOR RULE ON CLERK [LEE COUNTY CIRCUIT COURT, CV 2010-99, HON. RICHARD PROCTOR, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 1991, appellant Carl Davis, Jr., was found guilty of aggravated robbery and sentenced as a habitual offender to seventy years' imprisonment. We affirmed. *Davis v. State*, CR 91-290 (June 22, 1992) (unpublished). A pro se petition for rehearing was denied. *Davis v. State*, CR 91-290 (October 5, 1992) (unpublished).

On July 19, 2010, appellant, who is incarcerated in the custody of the Arkansas Department of Correction by virtue of the conviction, filed in the circuit court in the county where he is incarcerated a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006) in which he challenged the judgment. The petition was denied, and appellant lodged an appeal here.

Appellant now seeks by pro se motion leave to file a belated reply brief and leave to amend that motion. We need not address the merits of the motions because it is clear from the record that appellant could not prevail on appeal. Accordingly, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *McCullough v. State*, 2010 Ark. 394 (per curiam); *Moore v. Hobbs*, 2010 Ark. 380 (per curiam); *Hutcherson v. State*, 2010 Ark. 368 (per curiam); *Washington v. Norris*, 2010 Ark. 104 (per curiam); *Edwards v. State*, 2010 Ark. 85 (per curiam); *Grissom v. State*, 2009 Ark. 557 (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. *Moore*, 2010 Ark. 380; *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). Under our statute, a petitioner who does not allege his actual innocence[1] 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

[1]A petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). Ark. Code Ann. § 16-112-103(a)(2) (Repl. 2006).

other evidence, [of] probable cause to believe" that he is illegally detained. *Young* at 221, 226 S.W.3d at 798–99; Ark. Code Ann. § 16-112-103(a)(1).

Appellant contended in his petition that the trial court lacked jurisdiction in his case because the felony information charging him with aggravated robbery was defective in that a deputy prosecutor, rather than the prosecuting attorney, signed and filed it. He cited *Johnson v. State*, 199 Ark. 196, 133 S.W.2d 15 (1939), as authority. However, in *State v. Eason & Fletcher*, 200 Ark. 112, 143 S.W.2d 22 (1940), we revisited *Johnson* and noted that an information filed in the name of a deputy was *voidable*, rather than void. We said

> There is a presumption that a deputy prosecuting attorney acts under the direction of his superior. Until the authority is questioned and there is a failure of the prosecuting attorney to affirm, the information, being voidable only, is sufficient to bring the defendant before the court, and in consequence such court acquires jurisdiction.

In *Eason & Fletcher*, this court further held that an information must be challenged in the trial court before it can be declared void. We found that neither Eason nor Fletcher, at any stage in the proceedings, objected to the form of the information. Consequently, we held that a "presumption of verity" attached to the information throughout the trial, and we reversed the judgment with directions to dismiss the writs of habeas corpus.

Since our decision in *State v. Eason & Fletcher*, we have consistently held that the proper time to object to the form or sufficiency of an indictment or information is prior to trial. *See Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962); Ark. Code Ann. § 16-85-705 (1987). We have declined to review

the sufficiency of an information on appeal when there was no proper objection in the court below. *Prince*, 304 Ark. 692. If we considered the issue to be jurisdictional, we could have overlooked the failure to object and reversed the conviction, if necessary, on our own motion. *See Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). Accordingly, appellant here did not establish that the trial court lacked jurisdiction by virtue of a defective information.

Appellant also contended in his petition that the information was invalid because it did not list the prior convictions that the state intended to rely on to prove that he was a habitual offender. The claim was one that is properly raised in the trial court, not as a ground for a writ of habeas corpus. A nonjurisdictional challenge to the sufficiency of an information must be raised prior to trial. *See Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001) (citing *McNeese v. State*, 334 Ark. 445, 976 S.W.2d 373 (1998).

Appellant further argued that the prosecutor's remarks to the jury that appellant should be sentenced to eighty years' imprisonment amounted to prosecutorial misconduct. Arkansas Code Annotated section 5-12-103 (Repl. 1997) provides that aggravated robbery is a Class Y felony. Arkansas Code Annotated section 5-4-501(b) (Repl. 2006) provides that a defendant with four or more prior felony convictions may be sentenced to not less than forty years nor more than life imprisonment. Appellant offered nothing to show that his seventy-year sentence under the statues was excessive; thus, he failed to show that a writ of habeas corpus should be issued.

As for the prosecutor's remarks at trial, mere trial error, even if established, is a matter to be addressed at trial. It is not grounds for habeas relief. *See Hill v. Norris*, 2010 Ark. 287 (per curiam).

Appeal dismissed; motions moot.