

Cite as 2011 Ark. 169

SUPREME COURT OF ARKANSAS

No. 10-508

RANDY WILKINS
Appellant

v.

LARRY NORRIS
Appellee

Opinion Delivered April 14, 2011

APPELLEE'S MOTION TO DISMISS
APPEAL AND APPELLANT'S PRO SE
MOTION TO FILE BELATED
APPEAL BRIEF [LINCOLN COUNTY
CIRCUIT COURT, LCV 2009-126,
HON. JODI RAINES DENNIS,
JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

In 1995, appellant Randy Wilkins was found guilty by a jury and sentenced to life imprisonment without parole. Appellant, who was fifteen when the crime was committed, appealed to this court, contending, among other issues, that the trial court erred by not granting his motion to transfer the case to juvenile court. We affirmed. *Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996).

Appellant subsequently filed a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated § 16-112-103 (1987) in which he argued that the trial court lacked jurisdiction because it did not hold a juvenile transfer hearing within ninety days as provided by Arkansas Code Annotated § 9-27-318 (Repl. 1993). The petition was denied, and on

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appeal, this court held that the ninety-day requirement was not jurisdictional. Finding no error in the court's denial of the habeas petition, we affirmed the order. *Wilkins v. State*, CR 97-913 (Ark. Sept. 17, 1998) (unpublished per curiam).

In 2009, appellant sought a petition for writ of habeas corpus pursuant to Arkansas Code Annotated §§ 16-112-101 to -123 (Repl. 2006) from the circuit court in the county where he was incarcerated. Appellant again raised the issue of whether the trial court erred by denying the transfer to juvenile court. He further argued that he was not afforded effective assistance of counsel in the hearing on the motion to transfer to juvenile court. The petition was denied, and appellant lodged an appeal in this court. As he did not timely file his brief-in-chief, the appellee State has filed a motion to dismiss the appeal on that basis. In turn, appellant filed a motion for belated appeal, which we treat as a motion to file a belated brief.

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 because the appeal is clearly without merit, 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. *Anderson v. State*, 2011 Ark. 35 (per curiam); *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); *Pineda v. Norris*, 2009 Ark. 471 (per curiam).

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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. *Jackson v. Norris*, 2011 Ark. 49, ___ S.W.3d ___; *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 innocence¹ 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 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’s contention that the trial court lacked jurisdiction in his case because his motion to transfer the matter to juvenile court was denied is wholly without merit. As we noted when appellant raised the issue in this court previously, the ninety-day requirement in the statute is not jurisdictional. *Wilkins*, CR 97-913 (citing *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991)). Appellant’s claim is rather one of trial error, and mere trial error, even if established, is a matter to be addressed at trial. It is not grounds for habeas relief. *Tryon v. Hobbs*, 2011 Ark. 76 (per curiam); see also *Hill v. Norris*, 2010 Ark. 287 (per curiam). A habeas

¹A 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).

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corpus proceeding does not afford a convicted defendant an opportunity to retry his case, and it is not a substitute for direct appeal. *Key v. Norris*, 2010 Ark. 61 (per curiam); *Henderson v. State*, 2010 Ark. 30 (per curiam) (citing *Meny v. Norris*, 340 Ark. 418, 420, 13 S.W.3d 143, 144 (2000) (per curiam)). Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Anderson*, 2011 Ark. 35; *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes. *Id.* Mere trial error does not deprive a court of jurisdiction. *Tryon*, 2011 Ark. 76; *see also Birchett v. State*, 303 Ark. 220, 795 S.W.3d 53 (1990).

With respect to appellant's allegation that he was not afforded effective assistance of counsel in the trial court, a claim of ineffective assistance of counsel is not cognizable in a habeas proceeding. *Tryon*, 2011 Ark. 76; *Grimes v. State*, 2010 Ark. 97 (per curiam). Allegations concerning counsel's effectiveness are properly raised in a timely petition pursuant to our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2010). *Moore*, 2010 Ark. 380; *Hill*, 2010 Ark. 287. A petition for writ of habeas corpus is not a substitute for proceeding under Rule 37.1. *Johnson v. Hobbs*, 2010 Ark. 459 (per curiam); *Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005).

Appeal dismissed; motions moot.