

ARKANSAS SUPREME COURT

No. CR 07-454

KEDRICK DARROUGH
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 8, 2007

APPELLEE'S MOTION TO DISMISS
[CIRCUIT COURT OF DREW
COUNTY, CR 2005-66, HON. ROBERT
BYNUM GIBSON, JR., JUDGE]

MOTION GRANTED; APPEAL
DISMISSED.

PER CURIAM

A jury found appellant Kedrick Darrough guilty of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver and sentenced him to an aggregate term of 1,080 months' imprisonment. Appellant pursued an appeal of the judgment, and this court granted a motion for rule on the clerk to lodge the record. *Darrough v. State*, ___ Ark. ___, ___ S.W.3d ___ (Mar. 22, 2007) (per curiam). In accordance with the order, that appeal was submitted to the Arkansas Court of Appeals and the judgment has now been affirmed. *Darrough v. State*, CACR 07-223 (Ark. App. Oct. 24, 2007).

During the time that the appeal was pending, on March 20, 2007, appellant filed in the trial court a petition that sought to vacate and set aside the judgment. While appellant raised some allegations in that petition which were not appropriate to a petition under that act, he based his plea for relief solely on Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Ark. Code Ann. §§ 16-112-201 – 16-112-208 (Repl. 2006). The trial court denied the petition,

and appellant now brings this appeal of that order in this court. The appellee State has filed a motion to dismiss the appeal, arguing that neither the trial court nor this court has jurisdiction to consider the matter.

We agree that the trial court did not have jurisdiction to hear appellant's petition for relief under Act 1780. Section 16-112-201(a) and section 16-112-202 both clearly state that a proceeding under the act may be brought "[e]xcept when direct appeal is available." Appellant cites *Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (per curiam), as authority that the circuit court has jurisdiction to consider a petition even though an appeal may be pending in this court or the court of appeals. However, that case dealt with an appeal of a petition for postconviction relief under Ark. R. Crim. P. 37.1, not a direct appeal of the judgment. Even under those circumstances, where an appeal that was not a direct appeal was pending, we found it prudent to stay the appellate proceeding under section 16-112-201(b). Here, a direct appeal of the judgment was pending, and the statute clearly does not permit a cause of action under these circumstances.

Appellant further argues that his action was not barred because the record had not been lodged when his petition was filed. Nevertheless, a direct appeal was still available to him. It was not made unavailable simply because counsel was required to file a motion for rule on clerk to lodge the record so that the case might proceed. Here, it is evident that an appeal was still available at the time appellant filed his petition because counsel did file a motion for rule on clerk, the motion was granted, the record lodged and the appeal has now been docketed. That remedy was not foreclosed when appellant filed his petition.

The trial court correctly determined that it could not address appellant's petition while a direct appeal remained available. Because the trial court did not have jurisdiction to address the petition

on April 3, 2007, this court also lacks jurisdiction to address an appeal. *Lawrence v. City of Texarkana*, 364 Ark. 466, 221 S.W.3d 370 (2006). Accordingly, we grant the State's motion to dismiss the appeal.

Motion granted; appeal dismissed.