

# ARKANSAS SUPREME COURT

No. CR 08-02

ROBERT EARL THOMPSON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered April 10, 2008

PRO SE MOTION FOR EXTENSION  
OF BRIEF TIME AND MOTION TO  
AMEND BRIEF AND FOR  
DUPLICATION OF BRIEF AT PUBLIC  
EXPENSE [CIRCUIT COURT OF  
DREW COUNTY, CR 2005-204, HON.  
SAMUEL B. POPE, JUDGE]

APPEAL DISMISSED; MOTIONS  
MOOT.

---

## PER CURIAM

In 2006, appellant Robert Earl Thompson was found guilty by a jury of rape, sexual indecency with a child, and two counts of second-degree sexual assault, and sentenced to an aggregate term of 552 months' imprisonment. The Arkansas Court of Appeals affirmed. *Thompson v. State*, 99 Ark. App. 422, \_\_\_ S.W.3d \_\_\_ (2007). Subsequently, appellant timely filed in the trial court a verified pro se petition pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

Now before us are appellant's pro se motion for extension of time to file his brief-in-chief, and pro se motion to amend his tendered brief and for duplication of the brief at public expense. As appellant could not be successful on appeal, the appeal is dismissed and the motions are moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208

S.W.3d 783 (2005) (per curiam).

In his Rule 37.1 petition, appellant argued that the charge of rape was never proved, that trial counsel was ineffective for failing to inform appellant about an argument made on appellant's behalf, and that appellant was not the guardian of the victim. Rule 37.1 provides a means to collaterally attack a conviction, and is not a method for a direct attack on the judgment or a substitute for an appeal. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam).

Appellant's first argument that rape was not proved at his trial was a direct attack on the judgment and amounted to a claim of actual innocence. A claim of actual innocence is a direct challenge to the sufficiency of the evidence that supported a conviction, and sufficiency of the evidence can not be raised in a Rule 37.1 proceeding. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Moreover, appellant raised sufficiency of the evidence as to this charge in the direct appeal. Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

Appellant's next point was that trial counsel was ineffective for failing to inform appellant that he intended to argue at trial that appellant was not the guardian of the victim. A guardian relationship between the perpetrator and the victim was one of the elements that the State was required to prove for rape pursuant to Ark. Code Ann. § 5-14-103(a)(1)(D)(i)(a) (Supp. 2005).

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v.*

*State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Here, appellant did not demonstrate he was prejudiced by trial counsel's actions.

Appellant's final argument was that he was actually not the guardian of the victim. This argument presented a direct attack on the judgment and was resolved on direct appeal. Thus, appellant presented no basis for postconviction relief. *Wainright, supra; Coulter, supra*.

Appeal dismissed; motions moot.