

ARKANSAS SUPREME COURT

No. CR 08-391

KENNETH RAY MARSHALL
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered May 1, 2008

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
COLUMBIA COUNTY, CR 2005-64 &
CR 2005-104, HON. LARRY
CHANDLER, JUDGE]

MOTION DENIED.

PER CURIAM

A judgment and commitment order entered in Columbia County Circuit Court reflects that petitioner Kenneth Ray Marshall was sentenced to an aggregate term of 420 months' imprisonment on revocation of his probation for two counts of theft of property and one count of breaking or entering. Petitioner appealed the judgment and the Arkansas Court of Appeals affirmed. *Marshall v. State*, CACR 06-384 (Ark. App. Nov. 15, 2006).

On February 12, 2007, petitioner filed a pro se petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied by order entered December 14, 2007. On January 22, 2008, petitioner filed a notice of appeal of that order in the circuit court. Our clerk declined to lodge the record in this court because the notice of appeal was not filed within thirty days of the date the order was entered in accordance with Ark. R. App. P.--Civ. 4(a). Petitioner now brings this motion for belated appeal requesting permission to proceed with his appeal under Ark. R. App. P.--Crim. 2(e).

In his motion, appellant avers that the notice of appeal was mailed to the circuit clerk on

January 8, 2008. He does not indicate the date that the petition was actually received by the clerk. He also claims that the circuit clerk failed to promptly mail a copy of the order denying postconviction relief to him, even though he was aware of the order so as to mail the notice of appeal by January 8th.

We do not consider petitioner's stated cause for the delay in filing the notice of appeal, however, because it is clear from the partial record before us that petitioner could not prevail on appeal were we to permit the appeal to proceed. An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, petitioner's Rule 37.1 petition was not timely filed and the trial court could not address the merits of the petition.

Where the judgment was appealed, Ark. R. Crim. P. 37.2(c) requires that the petition for postconviction relief must be filed within sixty days of the date the mandate issued. Here, the mandate from the decision by the court of appeals issued on December 5, 2006. The sixtieth day from that date, February 3, 2007, fell on a Saturday, so that appellant's petition for postconviction relief was to be filed no later than February 5, 2007. His petition was therefore nine days late.

The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and the circuit court may not grant relief on an untimely petition. *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam). Petitioner asserted cause for the delay in filing his petition, but the trial court could not consider an untimely petition, regardless of the petitioner's reasons for delay. Because petitioner could not prevail were we to grant permission for an appeal, we deny the motion for belated appeal.

Motion denied.