

Cite as 2011 Ark. 437

SUPREME COURT OF ARKANSAS

No. CR 10-983

KENNY HALFACRE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 13, 2011

PRO SE APPEAL FROM THE
JEFFERSON COUNTY CIRCUIT
COURT, CR 85-103, HON. JODI
RAINES DENNIS, JUDGEAPPEAL DISMISSED.

PER CURIAM

In 2007, appellant Kenny Halfacre filed a petition under Arkansas Code Annotated section 16-90-111 (Supp. 2003) in Jefferson County Circuit Court to correct a sentence in appellant's 1985 conviction for burglary and theft of property.¹ In the petition, appellant sought relief on the basis that his conviction was illegally imposed as a result of testimony of his wife that was impermissibly admitted into evidence under our holding in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986). The trial court treated the petition as one for relief under Rule 37.1 of the Arkansas Rules of Criminal Procedure and dismissed on the basis that the petition was successive. Although the trial court's basis for dismissal below was in error, we dismiss the appeal, because the record before us does not establish that the trial court had jurisdiction over the subject matter of the petition.

The trial court treated the petition as one for postconviction relief under Rule 37.1,

¹ The Arkansas Court of Appeals affirmed the judgment. *Halfacre v. State*, CACR 85-171 (Ark. App. Mar. 12, 1986) (unpublished).

because it found that section 16-90-111 had been superseded by the rule. It is true that, to the extent that a claim under the statute conflicts with the time limitations for postconviction relief on a petition under Arkansas Rule of Criminal Procedure 37.1 (2011), the statute has been superseded. *Rudrud v. State*, 2010 Ark. 439 (per curiam). Appellant's conviction occurred in 1985, however, prior to the imposition of the time restrictions that were considered in our previous opinions so holding.² The rule applicable to the judgment in this case required the petitioner to seek permission from this court before proceeding with a petition in the trial court. See Ark. R. Crim. P. 37.2 (1987). This court declined appellant's only request for permission to seek relief under the postconviction rules applicable to his judgment.³ *Halfacre v. State*, CR 85-169 (Ark. May 5, 1986) (per curiam). The petition filed in the trial court in 2007, therefore, could not be treated as a petition for relief under Rule 37.1.

The petition, however, was not timely filed under the statute. Appellant asserted in the

²Under Arkansas Rule of Criminal Procedure 37.2 (1987), as is applicable here, a petitioner was required to seek his relief within three years of the date of commitment unless the ground for relief would render the judgment absolutely void. The current rule requires a petition to be filed in the trial court within sixty days of the date of the appellate court's mandate when the judgment was appealed. See Ark. R. Crim. P. 37.2(c) (2011).

³As with the current statute, Arkansas Rule of Criminal Procedure 37.2(b) (1987) contained language limiting the number of petitions that could be filed seeking relief under the rule. See *Williams v. State*, 273 Ark. 315, 619 S.W.2d 628 (1981) (per curiam); see also *James v. State*, 289 Ark. 560, 712 S.W.2d 919 (1986) (per curiam). Under the rule applicable here, there were exceptions, however, for allegations that would render the judgment of conviction absolutely void. See *Craft v. State*, 289 Ark. 466, 712 S.W.2d 303 (1986) (citing *Scott v. State*, 267 Ark. 536, 592 S.W.2d 122 (1980) (per curiam)). While appellant's asserted basis for relief would not appear to have voided the judgment and would therefore not have supported a subsequent petition, appellant nevertheless was required to seek leave of this court for consideration of his claims, and, until he did so and was granted permission to proceed, the trial court was without jurisdiction over the request for relief.

petition that it was timely filed because it was filed within 120 days after this court's mandate issued from the rejection of his petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.⁴ Section 16-90-111(b)(1),⁵ however, requires that a petition for relief under the statute may be filed on the grounds that the sentence was imposed in an illegal manner within ninety days of the date the sentence was imposed or sixty days after receipt of the appellate court's mandate affirming the judgment or dismissing the appeal.

The record before us does not establish that appellant's petition under the statute was filed within sixty days after the trial court received the mandate of the court of appeals affirming the judgment on direct appeal or ninety days after the sentence was imposed. To the contrary, the record indicates that appellant was sentenced in 1985. The records in this court show that the mandate from the court of appeals issued on April 1, 1986. Notice should have been received by the trial court within a few days of that date. The burden is on the party asserting error to bring up a sufficient record upon which to grant relief. *Barnes v. State*, 2011 Ark. 153 (per curiam). Where the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Grant v. State*, 2011 Ark. 309 (per curiam); see also *Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005). The record here provides no basis for our jurisdiction over the

⁴This court denied leave to proceed with a petition for writ of error coram nobis in *Halfacre v. State*, CACR 85-171 (Ark. Mar. 15, 2007) (unpublished per curiam). The mandate issued on March 15, 2007, and notice of it from our clerk is included in the record with a file mark of March 19, 2007.

⁵Although appellant would void the judgment against him, he bases his argument on the fact that his sentence was illegally imposed rather than illegal. Section 16-90-111(a) states that a petition to correct the judgment imposed in an illegal manner is subject to the time limitations in section 16-90-111(b).

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matter in order to grant relief, because it does not establish that the trial court had jurisdiction over the matter. Accordingly, the appeal is dismissed.

Appeal dismissed.