

SUPREME COURT OF ARKANSAS

No. CR 11-1183

DARCEL D. TOLLIVER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 2, 2012

PRO SE MOTIONS FOR
APPOINTMENT OF COUNSEL AND
TO SET APPEAL BOND [HEMPSTEAD
COUNTY CIRCUIT COURT, CR 2011-38,
HON. DUNCAN CULPEPPER, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

On March 21, 2011, appellant Darcel D. Tolliver entered in the Hempstead County Circuit Court a plea of guilty to multiple felony offenses. He was sentenced as a habitual offender to 240 months' imprisonment.

On September 12, 2011, which was 175 days after the judgment was entered, appellant filed in the trial court a pro se petition pursuant to Arkansas Code Annotated section 16-90-111 (Repl. 2011). While appellant styled the petition, "Petition to Correct an Illegal Sentence Pursuant to Ark. Code Ann. § 16-90-111(a) Act of 1991," he did not contend that the sentence itself was illegal. He contended, instead, that he was entitled to a reduction in sentence to accurately reflect the length of the term of imprisonment that he would be required to serve under the plea agreement he accepted when the guilty plea was entered. Appellant argued that he did not understand when he entered the plea that he would be required to serve any more than five years' imprisonment. The petition was dismissed on the ground that it was not timely filed. Appellant lodged an appeal in this court from the order, and he now seeks appointment

of counsel to represent him on appeal and for this court to set an appeal bond.

We need not consider the motions because it is clear that appellant could not prevail on appeal. This court will not permit an appeal from an order that denied a petition for postconviction relief to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 2011 Ark. 455 (per curiam); *Clemons v. State*, 2011 Ark. 345 (per curiam); *Gilcrease v. State*, 2011 Ark. 108 (per curiam); *Wormley v. State*, 2011 Ark. 107 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam); *Meraç v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

Arkansas Rule of Criminal Procedure 37.2(b) (2011) provides that all grounds for postconviction relief, including claims that a sentence is illegal or illegally imposed, must be raised in a petition under Rule 37.1. See *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (per curiam). Arkansas Code Annotated section 16-90-111, which permits the trial court to correct a sentence imposed in an illegal manner within ninety days after the sentence is imposed and to correct an illegal sentence at any time, is in conflict with the time limits imposed by Rule 37.2, which requires that a petition claiming relief under this rule must be filed in the trial court within ninety days of the date of entry of judgment when a defendant pleads guilty.

We have consistently held that Arkansas Code Annotated section 16-90-111 has been superseded to the extent that it conflicts with the time limitations for postconviction relief under Rule 37.1. *Velcoff v. State*, 2011 Ark. 267 (per curiam); *Wilburn v. State*, 2011 Ark. 237 (per curiam); *Robertson v. State*, 2010 Ark. 300 (per curiam); *DeLoach v. State*, 2010 Ark. 79 (per curiam)

(citing *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam)). A claim that a sentence should be reduced on the ground that the plea was not freely and voluntarily entered because petitioner did not fully understand the length of the term of imprisonment to be served must be raised in a petition filed in the trial court within ninety days of the date that the judgment was entered on a plea of guilty in accordance with Rule 37.2(c).¹ See *Biddle v. State*, 2011 Ark. 358 (per curiam). Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and, if they are not met, a trial court lacks jurisdiction to grant postconviction relief. *Wright v. State*, 2011 Ark. 356 (per curiam); *Miller v. State*, 2011 Ark. 344 (per curiam); *McLeod v. State*, 2010 Ark. 95 (per curiam); *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

Appellant did not timely file his petition for postconviction relief. Accordingly, the trial court did not err when it dismissed the petition.

Appeal dismissed; motions moot.

¹To the extent that appellant's petition could be considered a claim that the Arkansas Department of Correction had miscalculated the length of time appellant was required to serve under the judgment-and-commitment order, Arkansas Code Annotated section 16-90-111 does not provide a remedy to correct such errors.