

SUPREME COURT OF ARKANSAS

No. CR 11-1218

JEFFERY D. MORGAN

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 24, 2012

PRO SE MOTION TO FILE A
BELATED BRIEF [MILLER COUNTY
CIRCUIT COURT, CR 02-463, HON.
JOE E. GRIFFIN, JUDGE]APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

Appellant Jeffery D. Morgan filed a petition to correct an illegal sentence under Arkansas Code Annotated section 16-90-111 (Supp. 2011) in the Miller County Circuit Court on October 17, 2011. The petition challenged appellant's life sentence on his 2003 conviction for kidnapping. The trial court denied the petition, and appellant lodged an appeal in this court. He has filed a motion to file a belated brief in the case. We dismiss the appeal, and the motion is moot.

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. *Turner v. State*, 2012 Ark. 99 (per curiam). In a case such as this, where it is clear that appellant could not prevail on appeal, we need not consider the motion. *Tolliver v. State*, 2012 Ark. 46 (per curiam).

Appellant presented a single claim in the petition: he alleged that the evidence in the court proceedings was that he had released the victim in a safe place and that he should therefore have

been convicted of no more than a Class B felony. The claim that appellant presented to the court seeking relief from his sentence was not presented as timely filed.

To the extent that a claim under section 16-90-111 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for postconviction relief on a petition under Arkansas Rule of Criminal Procedure 37.1 (2011), the statute has been superseded. *Turner*, 2012 Ark. 99. Appellant appealed the judgment in this case,¹ and this court affirmed. *Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004). To the extent that appellant's claim was one of an invalid sentence, which is a claim also cognizable under Rule 37.1, his request for relief, filed almost seven years after the mandate issued, would not be timely. See *Williamson v. State*, 2012 Ark. 170 (per curiam) (where an appeal was taken of the judgment of conviction, a petition under Rule 37.1 must be filed in the trial court within sixty days of the date that the mandate is issued by the appellate court); *Tolliver*, 2012 Ark. 46 (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 also Ark. R. Crim. P. 37.1(a); Ark. R. Crim. P. 37.2(c)(ii).

The trial court did not dismiss the petition on the basis that it was an untimely Rule 37.1 petition, instead finding that appellant's constitutional rights had not been violated. Even if the claim could be considered under section 16-90-111, however, it would nevertheless fail because it was not presented in a timely manner.

Appellant alleged that the sentence was void, but the claim was, at best, one that would have resulted in a reduction of appellant's sentence because the conviction was not implicated. See *Griffin v. State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981) (noting that an error concerning a

¹The judgment also reflects appellant's conviction on a charge of second-degree battery.

failure to find that the evidence had been sufficient to show that the victim had been released in a safe place affected only the extent of the punishment imposed and the appellate court could reduce the punishment, remand for a new assessment of penalty, or grant a new trial). Section 16-90-111(b)(1) requires that an order under the statute that reduces a sentence must be entered within ninety days after the sentence is imposed or within sixty days after receipt of a mandate affirming the judgment or dismissing an appeal. Ark. Code Ann. § 16-90-111(b)(1); *see also Reynolds v. State*, 2011 Ark. 5 (per curiam). Appellant's petition, filed almost seven years after the sentence was imposed and the mandate issued, was well outside of the requisite period.

Appeal dismissed; motion moot.