

SUPREME COURT OF ARKANSAS

No. CR11-259

HUTSON BURKS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 9, 2013APPELLEE'S MOTION TO DISMISS
APPEAL [PULASKI COUNTY
CIRCUIT COURT, CR 07-598, HON.
BARRY SIMS, JUDGE]

MOTION GRANTED.

PER CURIAM

In 2008, a jury found petitioner Hutson Burks guilty of aggravated robbery and theft of property in the armed robbery of two bank employees as they were filling an ATM machine. He was sentenced to 324 months' imprisonment and 216 months' imprisonment on the respective charges. We affirmed the judgment. *Burks v. State*, 2009 Ark. 598, 359 S.W.3d 402.

The mandate issued on affirmance of the judgment on January 28, 2010.

On April 12, 2010, seventy-four days after the mandate issued, appellant filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2012). The trial court denied the petition on the merits, and appellant has lodged an appeal in this court from the order. The appellee now asks that the appeal be dismissed on the ground that it was not timely filed. The timeliness issue may be raised by the appellee for the first time on appeal inasmuch as a trial court does not have jurisdiction to act on the merits of an untimely petition under the rule. *Maxwell v. State*, 298 Ark. 329,

767 S.W.2d 303 (1989).

We agree with the appellee that the petition was not timely filed and grant the motion to dismiss the appeal. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Carroll v. State*, 2012 Ark. 100 (per curiam); *Justus v. State*, 2012 Ark. 91; *Perry v. State*, 2012 Ark. 98 (per curiam); *Grant v. State*, 2011 Ark. 309 (per curiam).

When a judgment is affirmed on appeal, a petitioner under the rule is required, pursuant to Arkansas Rule of Criminal Procedure 37.2(c), to file his or her petition with the clerk of the trial court within sixty days of the date that the mandate was issued following affirmance of the judgment in the case. Appellant's petition was filed fourteen days after the sixty-day period to file a timely petition under the rule elapsed. While the trial court ruled on the merits of the petition, it was clearly subject to dismissal as an untimely petition. While a court always has the power and duty to examine a petition to determine its timeliness, its ruling concerning an untimely filed petition cannot extend beyond declaring that it is untimely. *Id.* Once the determination has been made that the petition is untimely, the disposition of the petition must be made on that basis. *Washington v. State*, 2010 Ark. 345 (per curiam).

This court has consistently held that time limitations imposed in Rule 37.2(c) for filing a petition are jurisdictional in nature. *Holliday v. State*, 2013 Ark. 47 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam). Again, if the time limitations are not met, a trial court

lacks jurisdiction to rule on the merits of a Rule 37.1 petition. *Washington*, 2010 Ark. 345.

Where the trial court lacks jurisdiction in a Rule 37.1 proceeding, the appellate court also lacks jurisdiction in an appeal from that proceeding. *Holliday*, 2013 Ark. 47.

Motion granted.

Hutson Burks, pro se appellant.

Dustin McDaniel, Att’y Gen., by: *Valerie Glover Fortner*, Ass’t Att’y Gen., for appellee.