

**SUPREME COURT OF ARKANSAS**

No. CR 11-518

KEITH EDWARD MILLER  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE**Opinion Delivered** September 8, 2011APPELLEE'S MOTION TO DISMISS  
APPEAL AND MOTION TO STAY  
BRIEF TIME PENDING  
DETERMINATION OF MOTION TO  
DISMISS APPEAL [POLK COUNTY  
CIRCUIT COURT, CR 2008-72, CR  
2008-80, HON. J.W. LOONEY, JUDGE]MOTION TO DISMISS APPEAL  
GRANTED; MOTION TO STAY  
BRIEF TIME MOOT.**PER CURIAM**

On May 11, 2009, judgment was entered in the Polk County Circuit Court reflecting that appellant Keith Edward Miller had entered a plea of guilty to theft by receiving and robbery. An aggregate sentence of 480 months' imprisonment was imposed.

On November 30, 2010, appellant filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), seeking to withdraw the plea of guilty. The petition was denied in a letter order entered December 10, 2010, on the ground that the petition was not timely filed.

Appellant has lodged an appeal here from the order that denied his petition for postconviction relief. Now before us is a motion filed by the appellee State, seeking dismissal of the appeal on the ground that it is clear on the face of the record that the petition was untimely, and, thus, that appellant could not succeed on appeal.

The appellee's motion is granted.<sup>1</sup> 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. *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (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); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

The trial court correctly held that the Rule 37.1 petition filed by appellant was not timely filed. If a defendant elects to enter a plea of guilty or nolo contendere, a Rule 37.1 petition must be filed within ninety days of the date the judgment of conviction was entered-of-record. Ark. R. Crim. P. 37.2(c). Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and, if they are not met, a trial court lacks jurisdiction to consider a Rule 37.1 petition. *Sims v. State*, 2011 Ark. 135 (per curiam); *Trice v. State*, 2011 Ark. 74 (per curiam) (citing *Mills v. State*, 2010 Ark. 390 (per curiam)); *Gardner v. State*, 2010 Ark. 344 (per curiam); *Harris v. State*, 2010 Ark. 314 (per curiam); *Crawford v. State*, 2010 Ark. 313 (per curiam).

Appellant filed his petition approximately eighteen months after the judgment of conviction in his case was entered. As such, the trial court was without jurisdiction to consider it. *Sims*, 2011 Ark. 135. Where the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Id.*; see also *Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005) (citing *Priest*

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<sup>1</sup>The appellee also filed a motion to stay the brief time for the appeal depending on the outcome of the motion to dismiss appeal. As the motion to dismiss the appeal is granted, that motion is moot.

*v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995)). Accordingly, an appeal from the Rule 37.1 order is subject to dismissal for lack of jurisdiction.<sup>2</sup>

Motion to dismiss appeal granted; motion to stay brief time moot.

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<sup>2</sup>On December 22, 2010, the court entered an amended judgment changing the Arkansas Code citation for the offense of theft by receiving, which was incorrectly stated in the original judgment. It should be noted that the court's decision to correct a clerical error in the judgment did not alter the time limitations on filing a Rule 37.1 petition. A court may enter an amended judgment *nunc pro tunc* to correct a clerical error after a sentence is in execution without extending the time for a convicted defendant to proceed under the rule. See *Burgie v. Norris*, 2010 Ark. 267 (per curiam).