

**SUPREME COURT OF ARKANSAS**

No. CR11-695

RICKY HERSHEL JUSTUS  
PETITIONER,  
  
V.  
  
STATE OF ARKANSAS  
RESPONDENT

**Opinion Delivered** March 1, 2012

PRO SE PETITION FOR WRIT OF CERTIORARI AND MOTIONS TO SUPPLEMENT RECORD AND FOR TRANSCRIPT [GARLAND COUNTY CIRCUIT COURT, NO. CR 2004-248, HON. MARCIA R. HEARNSBERGER, JUDGE]

PETITION GRANTED IN PART;  
APPEAL DISMISSED; MOTIONS  
MOOT.

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**KAREN R. BAKER, Associate Justice**

Ricky Hershel Justus pled guilty to two counts of false imprisonment, theft of property, and domestic battery in Garland County Circuit Court on March 31, 2004. A jury trial was held on the issue of sentencing, and after hearing the evidence, the maximum sentence was imposed. The judgment was entered on April 22, 2005. The Arkansas Court of Appeals affirmed. *Justus v. State*, CACR 06-878 (Ark. App. Nov. 29, 2006) (unpublished). On June 8, 2010, pro se Justus filed a belated petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2005). The circuit court denied the petition on May 5, 2011. On May 17, 2011, Justus filed a timely notice of appeal. Pending in this case are (1) a petition for writ of certiorari to lodge the record to appeal the order denying the

Rule 37.1 petition, (2) a motion to supplement the record with copies of the original judgment and the amended judgment, and (3) a motion seeking a copy of the transcript of the guilty-plea hearing.

The petition for writ of certiorari requests this court to compel the Garland County Circuit Clerk to lodge the certified record with the Arkansas Supreme Court Clerk. A partial record has been prepared and tendered to this court. We grant the writ as to the partial record tendered in order that it may be filed and considered in this case. However, because it is clear that Justus could not prevail, his motions to supplement the record and for a copy of the transcript are moot.<sup>1</sup> An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the petitioner could not prevail. *Gonder v. State*, 2011 Ark. 248, \_\_\_ S.W.3d \_\_\_ (per curiam).

The time limits imposed by Rule 37.2(c) are jurisdictional. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). Where the circuit court lacks jurisdiction, the appellate court also lacks jurisdiction. *Clark v. State*, 362 Ark. 545, 210 S.W.3d 59 (2005). Arkansas Rule of Criminal Procedure 37.2(c) requires that a postconviction Rule 37.1 petition be filed within sixty days of the date the mandate is issued by the appellate court. *See Polivka v. State*, 2010 Ark. 152, \_\_\_ S.W.3d \_\_\_. A mandate issues within eighteen days after the decision becomes final upon appeal. Ark. Sup. Ct. R. 5-3.

The court of appeals' mandate was issued on December 19, 2006. To be timely, Justus was required to file his petition by February 19, 2007. Justus tacitly concedes that his Rule

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<sup>1</sup>The record does contain a file-marked copy of the original judgment.

37.1 petition is untimely as regards the original judgment. However, he contends that the circuit court's amendment of the judgment "opened the door" for his present petition. We disagree.

The original judgment entered on April 22, 2005, reflects that Justus pled guilty to one count of false imprisonment in the first degree of a victim over the age of eighteen, one count of false imprisonment in the first degree of a victim under the age of eighteen, one count of theft of property over \$500 of a victim over the age of eighteen, and one count of domestic battery in the second degree of a victim over the age of eighteen. The judgment also stated that Justus (1) was not a sex or child offender as defined in Arkansas Code Annotated section 12-12-903 and was not ordered to complete the sex offender registration form, (2) was not alleged to be a sexually violent predator and was not ordered to undergo an evaluation at a facility designated by the Arkansas Department of Correction, and (3) had not committed an aggravated sex offense. The order denying the Rule 37.1 petition states that the judgment was amended because Arkansas Code Annotated section 12-12-903(12)(A)(i)(r) requires registration as a sex offender for persons convicted of false imprisonment in the first degree when the victim is a minor.

In his Rule 37.1 petition, Justus argues (1) that the amendment was void and illegal, (2) that counsel was ineffective for failing to advise Justus regarding the reporting requirements, (3) that the trial court should have advised him of the reporting requirements, and (4) that he would not have entered the plea if he had been aware of the reporting requirements. Justus sought a declaration that his sentence and conviction be declared void,

an evidentiary hearing, appointment of counsel, and a new trial. He contended that his petition was timely as regards the amended judgment, not the original judgment. The order denying the petition states that the Sex Offender Registration Act of 1997 was regulatory, nonpunitive in nature, and not a form of punishment.

Justus's assertion of entitlement to Rule 37.1 relief regarding the first claim is premised on an incorrect assumption regarding the nature and application of the Sex Offender Registration Act of 1997 (SORA), presently codified at Arkansas Code Annotated section 12-12-901 to -923 (Supp. 2007). As opposed to being "sentenced" under the act, we have held that the registration and notification components of the SORA are regulatory and "not a form of punishment[.]" *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 287, 5 S.W.3d 402, 410 (1999). Further, pursuant to section 12-12-906(a)(1)(A)(i), trial courts must designate criminal defendants who are convicted of certain crimes to register as sex offenders. Because Justus pled guilty to false imprisonment in the first degree of a minor victim, which was a designated crime at the time he was sentenced pursuant to section 12-12-903(12)(A)(i)(r), he was subject to SORA's requirements regardless of whether it was reflected on the original judgment. Correction of the judgment to reflect SORA's requirements does not demonstrate error so fundamental as to render the judgment void and subject to collateral attack pursuant to Rule 37.1. *See Cothren v. State*, 344 Ark. 697, 42 S.W.3d 543 (2001) (postconviction relief available for a double-jeopardy violation as it is a fundamental error rendering a judgment void). Thus, any challenge to SORA must be by direct attack on the amended judgment. Rule 37.1 is not the appropriate vehicle for a direct attack on a

judgment. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Nor can it serve as a substitute for an appeal. *Id.*

Justus's second, third, and fourth claims are an attack on the original judgment. With the exception of claims presenting as an indirect attack on the judgment or that allege fundamental error relating to a separate sentencing proceeding, cognizable claims where a defendant pleads guilty are limited to those asserting that the petitioner's plea either was not entered intelligently and voluntarily or was entered without the advice of competent counsel. *Polivka, supra*. Justus has not tendered a petition as to the original affirmed judgment of conviction. Instead, he asserts that his petition is timely as to the amended judgment. Our rules regarding postconviction proceedings contemplate a single opportunity for postconviction relief as Rule 37.2(b) specifically requires that all grounds be raised in the original petition unless the petition was denied without prejudice. *See Roberts v. State*, 2011 Ark. 502, \_\_\_ S.W.3d \_\_\_; *see also White v. State*, 2011 Ark. 355 (per curiam). This opportunity encompasses claims known or that should have been known, as well as for those that subsequently become available. Clearly, Justus's petition is untimely as to the original judgment. Here, the amended judgment did not extend the time for Justus to file for postconviction relief, and his Rule 37.1 petition is untimely. Because the circuit court lacked jurisdiction, this court also lacks jurisdiction and the appeal is dismissed.

Petition granted in part; motions moot; appeal dismissed.

HANNAH, C.J., concurs.

JIM HANNAH, Chief Justice, concurring. I agree with the result reached by the majority. I write separately to state my analysis. Justus seeks Rule 37 relief from the entry of an amended judgment and commitment order, which adds a civil order that Justus register under the Sex Offender Registration Act of 1997.<sup>1</sup> Justus asserts that under Rule 37 he had ninety days from the date his sentence was “amended” by the new judgment and commitment order to file a petition. Justus’s sentence was not amended, and he is not entitled to relief under Rule 37.

Registration as a sex offender is purely regulatory, nonpunitive, and civil in nature. See *Parkman v. Sex Offender Screening Comm.*, 2009 Ark. 205, at 16, 307 S.W.3d 6, 16; *Kellar v. Fayetteville Police Dep’t*, 339 Ark. 274, 287, 5 S.W.3d 402, 410 (1999). The civil order to register under the Act is included in the criminal judgment and commitment order pursuant to Ark. Code Ann. § 12-12-906(a) (Supp. 2011); however, it is not part of the criminal conviction and sentence. Rule 37, which permits relief only from an improper or illegal criminal sentence, is inapplicable in this case. See Ark. R. Crim. P. 37.1.

Further, there is no merit to Justus’s argument that the sentence is invalid because counsel failed to warn of the obligation to register under the Act at the time he accepted the plea. Given that registration is civil, purely regulatory and nonpunitive, and not a sentence at all, Justus would have no relief under Rule 37 on this basis either.

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<sup>1</sup>I suggest that the General Assembly consider clarifying the title to the Sex Offender Registration Act of 1997 to more accurately reflect that it requires registration of not only sex offenders but also those who, as in this case, have committed certain nonsexual offenses against a child. The title as presently drafted creates confusion.