

SUPREME COURT OF ARKANSAS

No. CR12-447

DAVID EVANS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 4, 2012

APPELLEE'S MOTION TO DISMISS APPEAL; APPELLANT'S PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL, EXTENSION OF TIME TO FILE BRIEF, AND FOR COPY OF APPELLANT'S BRIEF [SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR-96-139, HON. J. MICHAEL FITZHUGH, JUDGE]

APPELLEE'S MOTION TO DISMISS APPEAL GRANTED; APPELLANT'S MOTIONS FOR APPOINTMENT OF COUNSEL AND FOR EXTENSION OF TIME TO FILE BRIEF MOOT; APPELLANT'S MOTION FOR COPY OF APPELLANT'S BRIEF DENIED.

PER CURIAM

In 1996, judgment was entered reflecting that appellant David Evans had been found guilty of rape and first-degree sexual abuse, for which he was sentenced to an aggregate term of 564 months' imprisonment. We affirmed. *Evans v. State*, 331 Ark. 240, 959 S.W.2d 745 (1998).

On April 5, 2012, more than fourteen years after the judgment was affirmed, appellant filed in the trial court a pro se motion seeking a new trial. Appellant contended in his motion that he was entitled to a new trial on the grounds that he was denied his constitutional rights prior to trial and at trial, that he was denied effective assistance of counsel at trial, and that the

evidence adduced at trial was insufficient to sustain the judgment. The motion was denied on the ground that it was an untimely and unverified petition for postconviction relief. Appellant lodged an appeal from the order in this court, and now before us are appellee's motion to dismiss the appeal and appellant's motions for appointment of counsel and for extension of time to file his brief-in-chief. After the motion was filed, appellant timely filed the brief, and he asks by motion for a copy of it at public expense.

The appellee's motion to dismiss the appeal is granted, rendering appellant's motions for appointment of counsel and for an extension of brief time moot. The motion for a copy of the appellant's brief, which appears to be based on appellant's belief that he was entitled to a copy of whatever he had filed, is denied. Appellant's mere desire for a copy of the brief does not constitute good cause to provide him with a copy of it at public expense. Indigency alone does not entitle a petitioner to free photocopying. *Vance v. State*, 2012 Ark. 254 (per curiam); *Cox v. State*, 2011 Ark. 96 (per curiam); *Evans v. State*, 2009 Ark. 529 (per curiam); *Nooner v. State*, 352 Ark. 481, 101 S.W.3d 834 (2003) (per curiam).

The appeal is dismissed because it is clear from the record that the motion filed in the trial court was indeed an untimely petition for postconviction relief, and, thus, the appeal is subject to dismissal. See *Tucker v. State*, 2012 Ark. 216 (per curiam). This court has consistently held that a postconviction appeal will not be permitted to go forward where it is clear that the appellant could not prevail. *Carroll v. State*, 2012 Ark. 100 (per curiam); *Velcoff v. State*, 2011 Ark. 267 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam);

Sparacio v. State, 2010 Ark. 335 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (citing *Pierce v. State*, 2009 Ark. 606 (per curiam)).

The trial court correctly treated appellant's motion for new trial as an untimely petition for postconviction relief. Regardless of the label placed on a pleading, a pleading that mounts a collateral attack on a judgment is governed by the provisions of our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2005). *Carroll*, 2012 Ark. 100; *Turner v. State*, 2012 Ark. 99; *Bell v. State*, 2011 Ark. 379 (per curiam) (citing *Lewis v. State*, 2011 Ark. 176 (per curiam)); *Wright v. State*, 2011 Ark. 356 (per curiam).

Pursuant to Arkansas Rule of Criminal Procedure 37.2(c) (2011), when there was an appeal from a judgment of conviction, a petition for relief must be filed in the trial court within sixty days of the date that the mandate was issued by the appellate court. The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and, if the petition is not filed within that period, a trial court lacks jurisdiction to grant postconviction relief. *Tucker v. State*, 2012 Ark. 216; *Romero v. State*, 2012 Ark. 133 (per curiam); *Watson v. State*, 2011 Ark. 202 (per curiam); *Sims v. State*, 2011 Ark. 135 (per curiam); *Trice v. State*, 2011 Ark. 74 (per curiam); *O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999); *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996). Appellant's claims of ineffective assistance of counsel were cognizable under Rule 37.1 and should have been raised in a timely petition under the rule.

With respect to appellant's assertions that he was denied his constitutional rights, even where a petitioner files a timely petition for postconviction relief under Rule 37.1, the rule does not permit a direct attack on the judgment or substitute for a direct appeal from the

judgment. *Hill v. State*, 2010 Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). It is well settled that even questions of a constitutional dimension are waived if not brought on direct appeal in accordance with the prevailing rules of procedure. See *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam).

As to appellant's allegation that the evidence was insufficient to sustain the judgment, questions pertaining to the sufficiency of the evidence are matters to be addressed at trial and on direct appeal and are not cognizable in a postconviction proceeding. See *Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___. As stated, a postconviction proceeding is not a substitute for direct appeal. Likewise, it is not an opportunity to challenge the strength of evidence. See *Jones v. State*, 2012 Ark. 215 (per curiam).

Appellee's motion to dismiss appeal granted; appellant's motions for appointment of counsel and for extension of time to file brief moot; appellant's motion for copy of appellant's brief denied.

David Evans, pro se appellant.

No response.