

SUPREME COURT OF ARKANSAS

No. CR 12-493

TONY HICKMAN, A/K/A TONY
HICKMAN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 27, 2012

APPELLANT'S PRO SE MOTIONS
FOR A COPY OF RECORD FOR
APPEAL AND TO STAY THE
APPEAL, AND APPELLEE'S
MOTIONS TO DISMISS APPEAL
AND FOR EXTENSION OF TIME
[PULASKI COUNTY CIRCUIT
COURT, CR 10-3022, HON.
HERBERT T. WRIGHT, JR., JUDGE

APPELLEE'S MOTION TO DISMISS
APPEAL GRANTED; APPELLANT'S
MOTIONS FOR A COPY OF
RECORD AND TO STAY APPEAL
AND APPELLEE'S MOTION FOR
EXTENSION OF TIME MOOT.

PER CURIAM

Appellant Toney Hickman, who is also known as Tony Hickman, lodged an appeal in this court from an order of the Pulaski County Circuit Court that denied his petition to correct an illegal sentence pursuant to Arkansas Code Annotated section 16-90-111 (Supp. 2011). Appellant filed a motion to be provided a copy of the record and a motion to stay the appeal. The motion to stay appears to seek an extension of brief time, although appellant has since filed his brief. The appellee State has filed a motion to dismiss the appeal and a motion for extension of time should the motion to dismiss not be granted. We dismiss the appeal, and the remaining motions are rendered 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). The State would have us dismiss the appeal on the basis that the trial court correctly determined that the petition was an untimely petition under Arkansas Rule of Criminal Procedure 37.1 (2012). Whether the petition was one under Rule 37.1 or under the statute, it was not timely filed, and the trial court did not therefore err in dismissing the petition.

To the extent that a claim under section 16-90-111 conflicts with the time limitations for postconviction relief on a petition under Rule 37.1, the statute has been superseded. *Talley v. State*, 2012 Ark. 314 (per curiam). A petition that seeks postconviction relief cognizable under Rule 37.1 is governed by that rule regardless of the label placed on it by a petitioner. *Gonder v. State*, 2011 Ark. 248, ___ S.W.3d ___ (per curiam). To the extent that appellant's claims were cognizable under Rule 37.1, his request for relief was properly treated as a petition under Rule 37.1 and was subject to the time limitations associated with the rule. *Lambert v. State*, 2012 Ark. 310 (per curiam).

Appellant alleged in the petition that his sentence was illegal, but the grounds stated in the petition were founded on claims of trial error, including allegations of due-process violations, judicial bias, prosecutorial misconduct, and ineffective assistance of counsel. Those claims, such as ineffective assistance of counsel, which are cognizable in a Rule 37.1 petition were subject to the time limitations set forth in Arkansas Rule of Criminal Procedure 37.2(c). *See Talley*, 2012 Ark. 314. Rule 37.2(c) requires that, where an appeal of the judgment of

conviction was dismissed, a petition must be filed within sixty days of the date that the appeal was dismissed. Ark. R. Crim. P. 37.2(c)(iii). Appellant's appeal of the judgment was dismissed on his motion to dismiss by an order entered in the trial court on July 12, 2011. Appellant's petition was filed more than seven months after that date, 231 days after entry of the order of dismissal. The petition was untimely as to any claims cognizable under Rule 37.1.

To the extent that any of appellant's claims were not cognizable under Rule 37.1, the claims did not provide grounds reflecting the type of error to support a claim of an illegal sentence. See *Lambert*, 2012 Ark. 310. Rather, appellant's claims may have stated grounds that the sentence was imposed in an illegal manner, not that the sentence imposed was illegal. *Id.* Section 16-90-111(a) indicates that a circuit court may correct a sentence imposed in an illegal manner within the time allowed under the statute for a reduction of sentence, and 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 by the court of a mandate affirming the judgment or dismissal of the appeal. Ark. Code Ann. § 16-90-111; see also *Reynolds v. State*, 2011 Ark. 5 (per curiam).

The judgment reflecting appellant's conviction indicates that the sentence was imposed on April 7, 2011. The latest possible calculation of the date that appellant's petition could be filed under the statute would again place the deadline sixty days after the dismissal of appellant's appeal. Appellant's petition was therefore not timely filed under the statute for purposes of any claims that may not have been cognizable under Rule 37.1

Cite as 2012 Ark. 359

Because appellant's petition was not timely filed under either Rule 37.1 or section 16-90-111, the trial court did not err in concluding that the petition was not timely. Appellant cannot prevail, and we grant the motion to dismiss the appeal. The remaining motions therefore are moot.

Appellee's motion to dismiss appeal granted; appellant's motions for a copy of record and to stay appeal and appellee's motion for extension of time moot.

Toney Hickman, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.