

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT
BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON MARCH 8, 2018,
AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-17-646

RICKY WAYNE WHITE

APPELLANT

V. APPEAL FROM MILLER COUNTY CIRCUIT COURT - 46CR-90-424

STATE OF ARKANSAS

APPELLEE

APPELLANT'S PRO SE MOTION TO FILE A BELATED REPLY BRIEF.
AFFIRMED; MOTION MOOT. HART, J., DISSENTS. SEE **OPINION AND DISSENTING
OPINION** THIS DATE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF
THE ORDER OF SAID SUPREME COURT, RENDERED IN
THE CASE HEREIN STATED, I, STACEY PECTOL,
CLERK OF SAID SUPREME COURT, HEREUNTO
SET MY HAND AND AFFIX THE SEAL OF SAID
SUPREME COURT, AT MY OFFICE IN THE CITY OF
LITTLE ROCK, THIS 8TH DAY OF MARCH, 2018.



CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK (W/COPY OF OPINIONS)

CC: RICKY WAYNE WHITE (W/COPY OF OPINIONS)
MICHAEL A. HYLDEN, ASSISTANT ATTORNEY GENERAL
HONORABLE KIRK JOHNSON, CIRCUIT JUDGE (W/COPY OF OPINIONS)

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR-17-646

RICKY WAYNE WHITE

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered March 8, 2018

PRO SE APPEAL FROM THE
MILLER COUNTY CIRCUIT
COURT;
MOTION TO FILE BELATED REPLY
BRIEF
[NO. 46CR-90-424]

HONORABLE KIRK JOHNSON,
JUDGE

DISSENTING OPINION.

JOSEPHINE LINKER HART, Justice

Until the briefing is complete, all that this court has pending before it is Mr. White's motion to file a belated reply brief. In his motion, Mr. White asserts that the tardy filing of his reply brief was the result of his not receiving the State's appellee brief until November 12, 2017, and cessation of prison-mail services over the Thanksgiving Day holiday, which kept his outgoing mail at the prison. This is clearly good cause to allow a belated filing of a reply brief. Because we do not allow an appellant to raise new issues in a reply brief, a reply brief can only help us decide a case. It is generally our practice to be lenient and accept a tardy reply brief—unless it is submitted by an incarcerated person.

I respectfully dissent.

Cite as 2018 Ark. 81
SUPREME COURT OF ARKANSAS
No. CR-17-646

RICKY WAYNE WHITE
APPELLANT
V.
STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 8, 2018

PRO SE APPEAL FROM THE
MILLER COUNTY CIRCUIT COURT;
MOTION TO FILE A BELATED
REPLY BRIEF
[NO. 46CR-90-424]

HONORABLE KIRK JOHNSON,
JUDGE

AFFIRMED; MOTION MOOT.

RHONDA K. WOOD, Associate Justice

Appellant Ricky Wayne White appeals the trial court's denial of his petition to correct an illegal sentence. In 1991, White was sentenced as a habitual offender to seventy-five years' imprisonment for aggravated robbery. Because we agree that White's petition failed to state a basis for relief under either Arkansas Code Annotated section 16-90-111 (Repl. 2016) or Arkansas Rule of Criminal Procedure 37.1 (1991), we affirm. White's motion for permission to file a belated reply brief is therefore moot.

This court affirmed White's conviction for aggravated robbery in *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992). The mandate issued July 24, 1992. White filed the petition that is the subject of this appeal on May 24, 2017, which is almost twenty-five years after the mandate issued.

White's petition alleged that his sentence was illegal because two of the four prior convictions used at trial in support of the habitual-offender status were unconstitutionally admitted into evidence. This claim was based on White's contention that one of the prior convictions did not reflect that he was represented by counsel and one was for a misdemeanor crime that had been committed after the aggravated robbery.

The trial court's order discussed how there were multiple grounds upon which White would not be entitled to relief. One of those was that the petition failed to state a basis for relief under the statute because it did not raise a claim that the judgment was illegal or facially invalid, and instead, the claim was one that the judgment had been illegally imposed. The court found that because the claim was one that the judgment had been illegally imposed, the petition must be treated as one under Rule 37. As such, the court found that the petition was untimely and successive. Although the trial court found that it did not therefore have authority to grant relief, it addressed the claims that the two previous convictions were erroneously admitted into evidence and determined that the convictions had not been erroneously admitted.

This court will not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Fischer v. State*, 2017 Ark. 338, 532 S.W.3d 40. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* Questions of law are reviewed de novo. *State v. Johnson*, 2010 Ark. 77, 360 S.W.3d 104. A judgment of conviction is presumed valid. *Coleman v. State*, 257 Ark. 538, 518 S.W.2d 487 (1975).

Arkansas Code Annotated section 16-90-111(a) provides authority to a trial court to correct an illegal sentence at any time. *Jenkins v. State*, 2017 Ark. 288, 529 S.W.3d 236. An illegal sentence is one that is illegal on its face. *Id.* A sentence is illegal on its face when it is void because it is beyond the trial court's authority to impose and gives rise to a question of subject-matter jurisdiction. *Id.* A sentence imposed within the maximum term prescribed by law is not illegal on its face. *Id.*

The time limitations on filing a petition under section 16-90-111(a)(b)(1) alleging that the sentence was imposed in an illegal manner are superseded by Rule 37.2(c), although the portion of section 16-90-111 that provides a means to challenge a sentence at any time on the ground that the sentence is illegal on its face remains in effect. *Gardner v. State*, 2017 Ark. 230.

White challenged whether there was sufficient evidence regarding two of his prior convictions and whether they were properly admitted. These are not challenges to the facial validity of his sentence. This court has held that to challenge the sufficiency of the evidence in support of a trial court's finding on the defendant's habitual-offender status, a contemporaneous objection is necessary to preserve the issue for review on appeal. *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819, (1992). Like a challenge to the sufficiency of the evidence to convict, a challenge to the sufficiency of the evidence to support a finding on the defendant's habitual-offender status does not implicate the facial validity of the judgment. See *Edwards v. Kelley*, 2017 Ark. 254, 526 S.W.3d 825. The Judgment and Commitment Order reflects that White was convicted of aggravated robbery, a class Y felony, and sentenced as a habitual offender to seventy-five years' imprisonment, which was

within the statutory range under Arkansas Code Annotated section 5-4-501(b)(1) (1987). This is not facially illegal.

Because White did not plead facts to support a finding that his sentence was facially invalid and only raised a claim challenging the legality of the imposition of his sentence, his claim was one that was cognizable under Rule 37.1 and subject to the time limitations set forth in Rule 37.2. *See Jenkins*, 2017 Ark. 288, 529 S.W.3d 236. Under Arkansas Rule of Criminal Procedure 37.2(c) (1991), a petition claiming relief under the rule must be filed in the circuit court within sixty days of the date the mandate issued if the judgment was appealed. Because the petition at issue was filed far outside of that time limitation, almost twenty-five years, the trial court did not err in finding that his petition was untimely.

Because we conclude the only timely challenge before the court was the facial challenge to his sentence and the circuit court did not err in denying relief, as such we need not consider the remaining arguments.

Affirmed; motion moot.

HART, J., dissents.

JOSEPHINE LINKER HART, JUSTICE, dissenting. Until the briefing is complete, all that this court has pending before it is Mr. White's motion to file a belated reply brief. In his motion, Mr. White asserts that the tardy filing of his reply brief was the result of his not receiving the State's appellee brief until November 12, 2017, and cessation of prison-mail services over the Thanksgiving Day holiday, which kept his outgoing mail at the prison. This is clearly good cause to allow a belated filing of a reply brief. Because we do not allow an appellant to raise new issues in a reply brief, a reply brief can only help us decide a case.

It is generally our practice to be lenient and accept a tardy reply brief—unless it is submitted by an incarcerated person.

I respectfully dissent.

Ricky White, pro se appellant.

Leslie Rutledge, Att’y Gen., by: *Michael A. Hylden*, Ass’t Att’y Gen., for appellee.

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS

RESPONDENT

V.

NO. CR-1990-424-3

RICKEY WHITE

PETITIONER

ORDER DENYING PETITION TO CORRECT ILLEGAL SENTENCE

On this the 19th day of June, 2017, came on for hearing the Motion to Correct Illegal Sentence, Rickey White, from the pleadings, the Court finds as follows:

History

The Petitioner was convicted by a jury of his peers for Aggravated Robbery with a finding that he was a habitual offender. Petitioner's sentence was enhanced pursuant to a class Y felony to either 40 years nor more than life because of four (4) or more felony convictions at the time of the trial. The jury recommended a sentence of a term of 75 years. The Court sentenced the Petitioner in accordance with the jury verdict. The judgment was signed July 23, 1991.

The Petitioner filed an appeal of his conviction which was affirmed by the Arkansas Supreme Court in *White v. State*, 310 Ark 200, 833 S.W.2d 771 (1992). There was no allegation that the introduction of the previous convictions were improper in his appeal. A review of that opinion clearly shows that the only argument raised in the appeal was the issue of a speedy trial violation which was denied and the trial court affirmed.

The Court's review shows that petitioner filed an untimely Rule 37 petition June 3, 1993. Judge Purifoy denied the petition on October 15, 1993. The issues raised in the current petition to

APPENDIX "B"

eligibility is moot and rests upon the validity of his arguments as to the sentence being illegal.

A. C. A. §16-90-111

Arkansas Code Annotated §16-90-111(a) provides authority to a circuit court to correct an illegal sentence at any time and to correct a sentence imposed in an illegal manner within the time limits provided in Ark. Code Ann. §16-90-111(b). See *Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41, 44 (1999); *Renshaw v. Norris*, 337 Ark. 494, 500, 989 S.W.2d 515, 518 (1999). This statute has been held to conflict with Criminal Procedure Rule 37.1 and been declared superceded by the time limitations in Ark. R. Cr. P. 37.2. (c), which provides for post conviction relief while in custody.

The Court finds that although the petition is styled as a petition to correct an illegal sentence pursuant to Ark. Code Ann. §16-90-111(b) it is in the nature of a Rule 37 petition. The Arkansas Supreme Court has consistently held, regardless of the label placed on a pleading by Defendant, a pleading that mounts a collateral attack on a judgment is governed by the provisions of post-conviction rules. *Holliday v. State*, 2013 Ark. 47. See Ark. R. Crim. P. 37.2(b). All grounds for post-conviction relief from a sentence imposed by a Circuit Court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under that rule. In this case, the Petitioner is claiming that the sentence is illegal because it should not have been imposed because of trial errors in admitting into evidence convictions which were allegedly not valid convictions allowed for enhancement purposes.

Rule 37.2(c)(ii) provides that if an appeal was taken of the judgment of conviction, a petition seeking relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate is issued by the appellate court. The deadlines set under this rule are jurisdictional in nature. If these deadlines are not met the circuit court lacks jurisdiction to consider a Rule 37 petition. This Rule 37 petition was filed with the circuit clerk by the Petitioner on May 24, 2017.

correct illegal sentence were not raised in the original Rule 37 petition.

The Petitioner has filed essentially the same Petition to Correct Illegal Sentence on at least four (4) prior occasions with the subject matter being that the enhancement provision was illegally used to enhance his sentence. The first Petition to Correct Illegal Sentence was filed on August 2, 1994 and another was filed on July 26, 1994. Judge Purifoy denied both of these petitions on February 28, 1995. A third Petition to Correct Illegal Sentence was filed on April 19, 1995. There is no record that this petition was ever heard by the Court but contains the same allegations denied in the previous two petitions. A fourth Petition to Correct Illegal Sentence was filed on March 4, 2001 alleging the same issues raised in the previous three petitions. There is no record to indicate that this petition was ever considered or acted upon by the Court.

The Petitioner has not served the State of Arkansas with this petition as of the date of this opinion and should be dismissed on that ground. However, the Court will address the allegations contained herein for the final time although Petitioner did not appeal the order of Judge Purifoy denying the same allegations on February 28, 1995. The issue of an illegal sentence based on the use of felony convictions in the enhancement phase under the habitual criminal statute is *res judicata* based on Judge Purifoy's ruling on February 28, 1995.

Issues

The Petitioner's Petition to Correct an Illegal Sentence pursuant to A. C. A. §16-90-111 is based on his argument that the sentence imposed was in excess of the range allowed by the habitual criminal enhancement statute. Petitioner argues that two (2) of the convictions used to enhance the sentence were not admissible. If these convictions were excluded, the sentence range would have been 20 to 60 years or life rather than 40 years to not more than life. The Petitioner's other arguments that the statute is an *ex post facto* law is unsupported by facts or the law and the issue of parole

The mandate affirming the judgment of the circuit court was issued by the appellate court on July 6, 1992. See *Jamie Darnell Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). The Petitioner had sixty (60) days to file his petition but waited more than twenty-six (26) years after the mandate was issued to file his current petition. The circuit court lacks jurisdiction to hear this petition. See *Tillman v. State*, 2010 Ark. 103; *McLeod v. State*, 2010 Ark. 95; *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1996) and *O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999).

The rule further provides that all grounds for relief must be raised in his or her original petition. Any ground not raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or in any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence may not be the basis for a subsequent petition. The Petitioner filed a Rule 37 petition on or about April 28, 1993 (no file mark on either the type written nor handwritten petition in the file). The Rule 37 petition was denied by Judge Purifoy on October 15, 1993. Thus, the Petitioner has had a previous petition for Rule 37 denied which did not raise the issues now before the court in his Petition to Correct Illegal Sentence. Petitioner has not complied with the requirements of Rule 37 to include all grounds for relief in the original petition. The Arkansas Supreme Court has ruled it will not consider any petitions subsequent to an original Rule 37 petition unless the petition was specifically denied without prejudice. Judge Purifoy did not deny the petition without prejudice. See *Williams v. State*, 273 Ark 315, 619 S.W.2d 628 (1981) and *Grooms v. State*, 293 Ark. 358, 737 S.W.2d 648 (1987). In addition to the Rule 37, the Petitioner has filed four virtually identical petitions pursuant to A. C. A. §16-90-110 previously as stated above which were denied. The Petition is denied pursuant to Rule 37.2(b) as the two earlier petitions had been denied on the same allegation as contained herein. See *Hickson v. State*, 2016 Ark. 4.

Allegations Convictions Were Not Admissible in Sentencing

Although this is a subsequent petition to correct an illegal sentence and the issues are *res judicata*, the court will address the merits of the case in the event there was some doubt as to whether this was an illegal sentence or just a sentence imposed in an illegal manner.

The Petitioner alleges that his two (2) of his convictions should not have been admitted into evidence for the jury to consider in sentencing. The Petitioner concedes that his June 9, 1983 conviction in Texas for Robbery resulting in a nine (9) year prison sentence is admissible. The Petitioner further concedes that his conviction for burglary of a habitation in Texas resulting in a prison sentence of twelve (12) years is admissible. Therefore, the Court will address only the two (2) convictions which he alleges invalidate the ability of the state to use them for enhancement purposes.

(1) The Petitioner argues that his first conviction in 1981 for forgery 2nd degree in Lafayette County was unconstitutional is incorrect. The Petitioner cites the presumption that the Petitioner was denied assistance of counsel. The 1991 Judgment and Conviction clearly shows that the Petitioner waived counsel at his hearing where he plead guilty on the Forgery 2nd Degree felony conviction before Circuit Judge John Goodson. The court believes that the judgment showing that Petitioner waived his rights to an attorney satisfied the presumption and it was incumbent on the Petitioner to come forth with proof that he was denied his constitutional right to an attorney. The Petitioner carefully avoided saying in his petition that he was denied counsel nor did he deny that he waived his right to counsel in that proceeding. Instead, Petitioner's argument rests solely upon his belief that because he did not have a lawyer, appointed or retained, that the judgment is void. The judgment clearly states that he waived counsel and became his burden to show that this was not the case once the presumption was overcome. Constitutional issues that are waived may not be

argued for the first time in a Rule 37 petition even if timely.

(2) The Petitioner attempts to attack the second conviction (Texas Burglary of a Vehicle) in two ways. First, he alleges that it is improperly admitted for enhancement purposes since it is a class A misdemeanor rather than a felony. To support this argument he provides a copy of the Texas statute showing the offense of burglary of a vehicle to be a class A misdemeanor in Vernon's Texas Code Annotated §30.04. The Petitioner fails to advise the Court that this statute was enacted by the 80th session of the Texas legislature in 2007 to take effect on September 1, 2007. At the time of his conviction in 1991, the controlling statute was Vernon's Texas Code Annotated §30.04, making this offense a third degree felony. See *Grant v. State of Texas*, 647 S.W.2d 788 (1983) and Acts 1973, 63rd Tex. Leg., p. 883, ch. 399, §1. Subsequent to his conviction, V.T.C.A. §30.04 was amended in 1993, 1994 and 2007. The Court is convinced that the Petitioner intended to mislead the court as to the penalty for burglary of a vehicle by his incorrect assertions that it was a misdemeanor. The Texas judgment conclusively shows that it provided for punishment in excess of one year in a penal institution (18 years in Texas Department of Corrections) and no misdemeanor statute authorizes such a penalty. The Texas judgment clearly shows that the conviction was for a third degree felony. Therefore, the Petitioner's arguments as to why this conviction should not be considered as admissible are not valid and the petition is hereby denied on the merits.

Also, the Petitioner complains that a conviction for a July 11, 1990 offense which occurred a month after this crime occurred on June 3, 1990 could not be considered for enhancement purposes as an *ex post facto* clause. The Petitioner plead guilty for this offense on October 18, 1990 some seven or eight months prior to the conviction for Aggravated Robbery which is the subject of this petition. The Petitioner failed to raise this issue at the time of trial or his sentencing in the trial court or upon his direct appeal and has waived any allegation of a constitutional violation in his

subsequent Rule 37 petition. See *Stover v. State*, 2017 Ark. 66. Even if he had raised the issue in trial or appeal, there was no application of an *ex post facto* law as the statute under which he was sentenced was enacted in 1983. See A. C. A. §5-4-501(b)(1). The Petitioner is merely raising an argument that has no basis in the facts of this case and is a mere red herring.

Finally, the Petitioner's argument that a conviction for a subsequent offense cannot be used for enhancement purposes. Petitioner committed the offense of burglary of motor vehicle on July 11, 1990. The Petitioner was convicted on October 18, 1990 as a third degree felony. The Aggravated Robbery charge in Arkansas alleged that the offense occurred on June 3, 1990. The Petitioner was convicted on July 23, 1991. Arkansas law does not prohibit the state from using any conviction of a felony for enhancement purposes whether the offense occurred prior to the offense on trial or subsequent to it's commission. The fact is that pursuant to the habitual offender act the intent is to punish repeat offenders and whether the offense occurred before or after the present trial is immaterial. See *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983). The Arkansas Supreme Court has held that Arkansas's habitual criminal statute is not designed to act as a deterrent but is simply a punitive statute which provides in clear language that a prior conviction, regardless of the date of the crime may be used to increase punishment. See *Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981).

Therefore, the Petitioner's arguments as to why these two convictions should not have been considered as admissible are not valid and the petition is hereby denied on the merits.

Evidentiary Hearing

The record is conclusive that the Petitioner is not entitled to the requested relief and a hearing is not required pursuant to Rule 37. 3. The Court has relied on the petition filed by the Petitioner, the Judgment and Conviction, exhibits attached to Petitioner's petition, the Plea Waiver, previous

petitions and orders regarding Rule 37 and Petition's to Correct Illegal Sentences, appellate opinion on direct appeal and mandate affirming trial court and the allegations by the Petitioner in making this determination. See *Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) and *Luna-Holbird v. State*, 315 Ark. 735, 871 S.W.2d 328 (1994).

IT IS THEREFORE ORDERED and ADJUDGED that the Petition for Correction of an Illegal Sentence pursuant to Ark. Code Ann. §16-90-111(b) and Rule 37 is hereby denied for the multiple reasons stated above.

Dated this 19th day of June, 2017.



CIRCUIT JUDGE

FILED
2017 JUN 19 P 4 17
RK
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FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT
BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 26, 2018, AMONGST
OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-17-646

RICKY WAYNE WHITE

APPELLANT

V. APPEAL FROM MILLER COUNTY CIRCUIT COURT - 46CR-90-424

STATE OF ARKANSAS

APPELLEE

APPELLANT'S PRO SE MOTION FOR RECONSIDERATION IS DENIED. HART,
J., WOULD GRANT.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF
THE ORDER OF SAID SUPREME COURT, RENDERED IN
THE CASE HEREIN STATED, I, STACEY PECTOL,
CLERK OF SAID SUPREME COURT, HEREUNTO
SET MY HAND AND AFFIX THE SEAL OF SAID
SUPREME COURT, AT MY OFFICE IN THE CITY OF
LITTLE ROCK, THIS 26TH DAY OF APRIL, 2018.



CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: RICKY WAYNE WHITE

MICHAEL A. HYLDEN, ASSISTANT ATTORNEY GENERAL

HONORABLE KIRK JOHNSON, CIRCUIT JUDGE

APPENDIX "C"