SUPREME COURT OF ARKANSAS

No. CV-18-569

ERIC C. BURGIE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 14, 2019 PRO SE APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. 60CV-18-2076] HONORABLE WENDELL GRIFFEN, JUDGE AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Appellant Eric C. Burgie sought to proceed as a pauper in the circuit court with a petition for declaratory judgment. Burgie appeals the order denying his petition for leave to proceed in forma pauperis, and he asserts error in the circuit court's finding that his declaratory-judgment petition failed to demonstrate a colorable cause of action. Because the circuit court did not abuse its discretion in finding that Burgie should not be permitted to proceed as a pauper, we affirm.

Our standard of review of a decision to grant or deny a petition to proceed in forma pauperis is abuse of discretion, and the circuit court's factual findings in support of its exercise of discretion will not be reversed unless clearly erroneous. *Whitney v. Guterres*, 2018 Ark. 133, *cert. denied*, 139 S. Ct. 482 (2018). An abuse of discretion occurs when the court acts arbitrarily or groundlessly. *Whitney v. State*, 2018 Ark. 138.

Arkansas Rule of Civil Procedure 72 (2017) conditions the right to proceed in forma pauperis in civil matters on indigency and the circuit court's satisfaction that the alleged facts indicate "a colorable cause of action." Ark. R. Civ. P. 72(c). A colorable cause of action is a claim that is legitimate and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. *Penn v. Gallagher*, 2017 Ark. 283.

In this case, the circuit court failed to make findings on Burgie's indigency. While this was error, when there are obvious defects in the underlying petition, this court may nevertheless dispose of an appeal from the denial of in forma pauperis proceedings. *Wood v. State*, 2017 Ark. 290. If the underlying petition clearly fails to state a colorable cause of action, there has been no abuse of discretion, and this court may summarily affirm the denial of in forma pauperis status. *Gardner v. Kelley*, 2018 Ark. 300; *see also Ashby v. State*, 2017 Ark. 233.

Burgie sought a declaratory judgment that our procedural rules governing postconviction relief for those persons not under a sentence of death, Arkansas Rule of Criminal Procedure 37.1–37.4 (2017), are unconstitutional. He alleged that these procedural rules are unconstitutional as applied to him because he was denied assistance of counsel in raising his claims of ineffective assistance under Rule 37 and that this constituted a denial of due process because Arkansas is a state in which collateral-review proceedings are the first time when a prisoner may practically assert this type of challenge to his conviction. He contends that because he is indigent and confined, he was unable, without appointment of counsel, to develop the evidentiary basis for a claim of ineffective assistance

of counsel. He also contends that the failure to have counsel in the proceedings was an impediment to seeking federal habeas relief. He would have the court declare that, as a result of the alleged defects in the procedural rules, the rules must be modified to require appointment of counsel and he should be permitted to file a new petition under the modified rules.

Declaratory relief may be granted if the petitioner establishes (1) a justiciable controversy; (2) that the controversy is between persons whose interests are adverse; (3) that the party seeking relief has a legal interest in the controversy; and (4) that the issue involved in the controversy is ripe for judicial determination. *Rogers v. Knight*, 2017 Ark. 267, 527 S.W.3d 719. A controversy is justiciable when a claim of right is asserted against one who has an interest in contesting it. *Id.* Declaratory relief is intended to supplement rather than supersede ordinary causes of action. *Martin v. Equitable Life Assur. Soc'y of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). It is not a substitute for an ordinary cause of action, nor is it a proper means of trying a case. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005).

Burgie challenged our rules for postconviction relief only on the basis that those rules fail to require appointment of counsel to assist a prisoner in applying for that postconviction relief. The right he asserts is one to have counsel appointed for Rule 37 proceedings. He admits that he previously filed a Rule 37.1 petition without success, and this is the type of

issue he could have raised and addressed in those proceedings. Declaratory relief may not be used in substitution for the ordinary cause of action.[1]

Moreover, the argument that Burgie relies on is not a viable one, given the facts presented and the current law or a reasonable and logical extension or modification of it. The same claim that Burgie makes in his declaratory-judgment petition has in fact been raised in Rule 37 proceedings and reviewed and rejected by this court on a number of occasions. *E.g.*, *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259 (noting that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), do not dictate appointment of counsel in postconviction proceedings). Because the underlying petition clearly failed to state a colorable cause of action, the circuit court did not abuse its discretion, and the decision denying in forma pauperis status is affirmed.

Affirmed.

BAKER, GOODSON, and HART, JJ., dissent.

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[1]The circuit court based its finding that Burgie failed to state a colorable cause of action on the conclusion that the issue should have been raised on direct appeal. Even if that conclusion was in error, the court's ultimate finding was correct. This court can always affirm when the circuit court reaches the right result, albeit for the wrong reason. *Jarrett v. State*, 371 Ark. 100, 263 S.W.3d 538 (2007).

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 MAY 2, 2019, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-18-569

ERIC C. BURGIE — APPELLANT

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION – 60CV-18-2076

STATE OF ARKANSAS — APPELLEE

APPELLANT'S PRO SE PETITION FOR REHEARING IS DENIED. BAKER AND HART, JJ., 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 2ND DAY OF MAY, 2019.

Stacey Pectol
CLERK

BY: _____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: ERIC C. BURGIE
CHRISTIAN HARRIS, ASSISTANT ATTORNEY GENERAL
HON. WENDELL GRIFFEN, CIRCUIT JUDGE