

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY LEE SCOTT,
PETITIONER,

v.

DEXTER PAYNE, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

APPENDIX

- EXHIBIT A: OPINION OF THE ARKANSAS SUPREME COURT IN
*SCOTT v. PAYNE, DIRECTOR, ARKANSAS DEPARTMENT
OF CORRECTION*, 2022 Ark. 178, 652 S.W.3d 562
- EXHIBIT B: ORDER DISMISSING PETITION FOR WRIT OF HABEAS
CORPUS BY LINCOLN COUNTY (ARKANSAS) CIRCUIT
COURT IN NO. 40 CV-20-132; and ORDER DENYING
MOTION FOR NEW TRIAL
- EXHIBIT C: ORDER DENYING REHEARING ISSUED BY ARKANSAS
SUPREME COURT ON DECEMBER 1, 2022, IN *SCOTT v.
PAYNE, DIRECTOR*, NO. CV-22-34
- EXHIBIT D: APPELLANT SCOTT'S PETITION FOR REHEARING
FILED IN *SCOTT v. PAYNE, DIRECTOR*, NO. CV-22-34

EXHIBIT A:

OPINION OF THE ARKANSAS SUPREME COURT IN
SCOTT v. PAYNE, DIRECTOR, ARKANSAS DEPARTMENT
OF CORRECTION, 2022 Ark. 178, 652 S.W.3d 562

Scott v. Payne, 2022 Ark. 178 (2022)

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2022 Ark. 178
Supreme Court of Arkansas.

Ricky Lee SCOTT, Appellant

v.

Dexter PAYNE, Director, Arkansas Department of Correction, Appellee

No. CV-22-34

—

Opinion Delivered: October 6, 2022

Synopsis

Background: Following affirmance of petitioner’s first-degree murder conviction, 337 Ark. 320, 989 S.W.2d 891, he filed petition for habeas corpus. The Circuit Court, Lincoln County, Jodi Dennis, J., denied and dismissed the petition. Petitioner appealed.

[Holding:] The Supreme Court, Baker, J., held that petitioner’s claims, which all related to trial court’s failure to give first-degree murder instruction, were not cognizable on habeas review.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

****563** APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. 40CV-20-132],
HONORABLE JODI RAINES DENNIS, JUDGE

Attorneys and Law Firms

J. Thomas Sullivan, Little Rock, for appellant.

Leslie Rutledge, Att’y Gen., by: David L. Eanes, Jr., Ass’t Att’y Gen., for appellee.

Opinion

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KAREN R. BAKER, Associate Justice

****564** *1 Appellant Ricky Lee Scott appeals from the Lincoln County Circuit Court's order denying and dismissing his motion for new trial and petition for habeas corpus. Scott presents three arguments on appeal: (1) the circuit court lacked jurisdiction to impose his first-degree-murder conviction because the jury was not instructed on the elements of first-degree murder by the circuit court when it instructed jurors in open court; (2) Scott's life sentence was imposed illegally because the circuit court did not have jurisdiction to impose the sentence when the jury was not instructed on the elements of first-degree murder; and (3) Scott's conviction and life sentence violate due process under the Fourteenth Amendment to the United States Constitution because the jury that returned the guilty verdict at his trial was not instructed on the elements of first-degree murder, and further *2 prosecution is barred by the double-jeopardy protection afforded by the Fifth Amendment to the United States Constitution. We affirm.

In March 1996, Scott was arrested for the murder of fifteen-year-old Robert Smith. *Scott v. State*, 337 Ark. 320, 322, 989 S.W.2d 891, 892 (1999). The evidence at trial established that Smith and four other persons were changing a tire in Smith's aunt's driveway when Scott approached the group and began firing a gun. *Id.* Scott was identified as the shooter. *Id.* A Cross County Circuit Court jury convicted Scott of first-degree murder, and he was sentenced to life imprisonment. *Id.* On direct appeal, Scott argued that his right to a speedy trial was violated. We found no error and affirmed. *Id.* Subsequently, Scott appealed the denial of his petition for postconviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. *Scott v. State*, 355 Ark. 485, 139 S.W.3d 511 (2003). We found no error and affirmed the denial of his petition. *Id.*

On November 23, 2020, Scott filed a petition for habeas corpus in Lincoln County—the county where he is incarcerated.¹ Scott argued that the judgment entered in his case was arguably beyond the trial court's jurisdiction. Scott presented three claims for relief, each of which related to the circuit court's failure to instruct the jury on the elements of first-degree murder. First, Scott argued that the trial court lacked jurisdiction to impose a conviction because the court failed to instruct the jury on the elements of first-degree murder *3 when it instructed the jurors on the applicable law in open court.² Second, Scott argued that his sentence of life imprisonment was imposed illegally because **565 the circuit court did not have jurisdiction to impose the sentence when the jury was not instructed on the elements of first-degree murder. Scott's final claim was that his conviction and life sentence violated due process because the jury was not

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instructed on the elements of first-degree murder, and double jeopardy bars further prosecution.

On August 26, 2021, the circuit court entered its order denying and dismissing Scott's petition for writ of habeas corpus. In dismissing Scott's petition, the circuit court concluded that Scott failed to provide precedent that his claims fell "within the purview of habeas." The circuit court specifically found that his assertions of defective jury instructions were allegations of trial error and did not implicate the facial validity of the judgment or the jurisdiction of the circuit court. The circuit court acknowledged that Scott relied on numerous cases but that those were cases in which the defendants were seeking relief on direct appeal. Further, the circuit court found that his allegations should have been *4 addressed at trial, on direct appeal, or in a timely Rule 37 petition. Additionally, the circuit court found that Scott's due-process-violation claim likewise fails to implicate the facial validity of the judgment or the jurisdiction of the circuit court and is also not cognizable in habeas proceedings.

On September 9, 2021, Scott filed a motion for new trial pursuant to Rule 59 of the Arkansas Rules of Civil Procedure. In response to the circuit court's finding that Scott did not cite to precedent supporting his claim for habeas relief, Scott conceded that he was unable to find an Arkansas decision on point but argued that this does not preclude review on the merits.

On September 23, 2021, the circuit court entered its order and again denied and dismissed Scott's petition for writ of habeas corpus.³ The circuit court found as follows:

The crux of petitioner's claims is that the jury received improper jury instructions. As noted in the order of dismissal, petitioner's claims have previously been addressed by the Arkansas Supreme Court without success. A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when the trial court lacked jurisdiction over the matter. "Assertions of defective jury instructions are allegations of trial error that do not implicate the facial validity of the judgment or the jurisdiction of the trial court. *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136 (2018), reh'g denied (Feb. 22, 2018)."

Petitioner states that because he attached an appendix with a complete reference to the record, trial transcript, and exhibits, the finding that petitioner failed to make a showing, by affidavit or other evidence, of probable cause to believe that he is illegally detained, is in error. It is the substance of documents not the inclusion of documents that establishes probable cause. The substance of petitioner's documents supports his claim of error in the jury instructions given at his trial. The same argument is made in petitioner's claim that the Court erred when the order of dismissal did not address his express *5 reliance on A.C.A. § 16-112-118(b)(1). Defective jury instructions are trial error. Trial error does not present probable cause; therefore, he is not entitled to habeas relief.

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Petitioner seeks to expand habeas relief to include a boundless opportunity to challenge a conviction. He cannot offer any precedent to support his contention because none exist. The cases he cited are ones that address a defendant's **566 claims at trial, on direct appeal, or presented in a timely Rule 37 petition. The Court has reviewed each of petitioner's claims and finds that his theories do not fall within the purview of a habeas.

On October 18, 2021, Scott appealed the order denying his habeas petition and his motion for new trial.

I. *Standard of Review*

[1] [2]A circuit court's decision on a petition for writ of habeas corpus will be upheld unless it is clearly erroneous. *Hobbs v. Gordon*, 2014 Ark. 225, 434 S.W.3d 364. A decision 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 made. *Id.*

II. *Grounds for Issuance of the Writ*

[3] [4] [5]A writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a circuit court lacks jurisdiction over the cause. *Finney v. Kelley*, 2020 Ark. 145, 598 S.W.3d 26. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Id.* When the circuit court has personal jurisdiction over the appellant and also has jurisdiction over the subject matter, the court has authority to render the judgment. *Id.*

*6 [6] [7]Under our statute, a petitioner for the writ who does not allege his or her actual innocence and proceed under Act 1780 of 2001 must plead either the facial invalidity of the judgment or the circuit court's lack of jurisdiction and make a showing, by affidavit or other evidence, of probable cause to believe that he or she is being illegally detained. Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016). Proceedings for the writ do not require an extensive review of the record of the trial proceedings, and the circuit court's inquiry into the validity of the judgment is limited to the face of the commitment order. *McArthur v. State*, 2019 Ark. 220, 577 S.W.3d 385. Unless the petitioner can show that the circuit court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Fields v. Hobbs*, 2013 Ark. 416, 2013 WL 5775566.

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III. *Points on Appeal*

A. Imposition of Conviction

^{18]}For his first point on appeal, Scott argues that the circuit court lacked jurisdiction to impose his first-degree-murder conviction after failing to instruct the jury on the elements of first-degree murder at the conclusion of the evidence. Scott does not challenge the facial validity of the judgment. As to jurisdiction, Scott acknowledges that our habeas case law provides that relief may be available only on the showing that the circuit court lacked personal or subject-matter jurisdiction. *See Johnson v. Payne*, 2022 Ark. 77, 2022 WL 1042974. Scott concedes that the circuit court had both personal and subject-matter jurisdiction because it had jurisdiction over the prosecution of a murder committed in Cross County and personally over him under the information charging the offense. Rather than challenging the court's *7 personal or subject-matter jurisdiction, Scott's jurisdictional argument focuses on the limitations of the circuit court's authority to act even when it has personal and subject-matter jurisdiction. Stated differently, it is Scott's position that his jurisdictional argument presents a case of first impression based on the circuit court's lack of jurisdiction to impose his first-degree-murder conviction because the court did not instruct the jury on the **567 elements of first-degree murder in open court.

As set forth above, the circuit court found that Scott's argument—that the circuit court failed to instruct the jury on the elements of first-degree murder—involved a trial error, which is not cognizable in habeas proceedings. Scott asserts that the circuit court erred in mischaracterizing his claim as a matter of trial error. He claims that his argument does not rest on defective error in the jury instructions or failure to give a requested instruction. Instead, he argues that the circuit court committed a jurisdictional error in imposing the conviction after failing to instruct jurors on the elements of first-degree murder at the conclusion of the evidence—rendering the entry of conviction beyond its authority.

The State responds that however Scott may characterize his claim, Scott cannot escape the fact that his claims hinge on purported trial error in instructing the jury. We agree. Despite Scott's attempt to frame his trial-error argument as a jurisdictional argument, our case law is clear. Scott points out the narrow view taken by this court that a writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a trial court lacked jurisdiction

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over the cause. We acknowledge that this view is narrow in *8 scope. However, we decline to expand our habeas review in a manner that would encompass Scott's argument on appeal.

[9] Within this point on appeal, Scott also argues that there was no finding of sufficient evidence on each element of the offense required for his conviction. He contends that under Arkansas law, a conviction must be supported by evidence sufficient to establish every element of the offense charged by substantial evidence without speculation or conjecture. Stated differently, Scott argues that a legally valid conviction requires an affirmative jury finding that the evidence proves each element of the offense charged beyond a reasonable doubt. In a related subpoint, Scott argues that he is entitled to relief because the circuit court acted without an affirmative finding that the evidence supported each element of proof required for a valid first-degree-murder conviction. Despite Scott's attempt to frame the issue as one of jurisdiction, this claim is really one regarding the sufficiency of the evidence. Habeas proceedings are not a means to challenge the sufficiency of the evidence. *Clark v. Kelley*, 2020 Ark. 206, at 2, 2020 WL 2569266 (citing *Jones v. State*, 2019 Ark. 12, at 3, 565 S.W.3d 100, 102). Again, habeas proceedings are narrow in scope, and because this claim does not invoke either the facial validity of the commitment order or the jurisdiction of the trial court, it is not cognizable in a habeas proceeding. *Fields, supra*.

Next, Scott relies on *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436 (1990). In *Bennett*, the circuit court failed to instruct jurors at the conclusion of the evidence after having earlier read the applicable instructions to the jury following voir dire and before opening statements. At the conclusion of the evidence, appellant's counsel requested that the court *9 again instruct the jury on the applicable law. However, the circuit court refused to repeat all the instructions, but the court did give oral instructions on character evidence and range of punishment. On direct appeal, Bennett argued that the circuit court erred and that he had been prejudiced. We agreed. In *Bennett*, we applied Arkansas Code Annotated section 16-89-125(b), which states that "[w]hen the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case[.]" We do not find Scott's reliance on *Bennett* persuasive for two reasons. First, *Bennett* was a direct-appeal **568 case, which is not applicable here. Second, *Bennett* involved the application of section 16-89-125(b), which states that on the motion of either party the court shall instruct the jury on the applicable law. Here, there is no such assertion that the attorney made a specific request.

Next, Scott relies on certain provisions in Arkansas Code Annotated section 16-112-118(b)(1). Subdivision (b)(1) provides:

(b)(1) If it appears that the prisoner is in custody by virtue of process from any court legally constituted or issued by any officer in the exercise of judicial proceedings before him or her,

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the prisoner can only be discharged in one (1) of the following cases:

- (A) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum, or person;
- (B) Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the party has become entitled to his or her discharge;
- (C) Where the process is defective in some matter or substance required by law, rendering the process void;
- (D) Where the process, though in proper form, has been issued in a case, or under circumstances, not authorized by law;

***10** (E) Where the process, though in proper form, has been issued or executed by a person who is not authorized to issue or execute the process, or where the person having the custody of the prisoner, under the process, is not the person empowered by law to detain him or her; or

(F) Where the process is not authorized by any judgment, order, decree, or by any provision of law.

^[10]As to subdivision (b)(1)(C), Scott argues that his conviction was not supported by a jury finding that he committed each element of the offense charged beyond a reasonable doubt, “rendering the process void.” Again, this argument stems from trial error on the part of the circuit court for its failure to read the first-degree-murder jury instructions. As set forth above, this is not a cognizable habeas claim. To the extent that Scott is raising a sufficiency-of-the-evidence claim, this is likewise not a valid habeas claim. Moreover, with regard to subdivision (b)(1)(C), we do not interpret the statute to encompass his arguments because the purported error raised by Scott does not rise to the level of rendering the process “defective” or “void.”

^[11]As to subdivision (b)(1)(D), Scott argues that the protection afforded by this subdivision applied to provide relief from his conviction and sentence because the order, while in proper form, is not authorized by law because the jury was not properly instructed on the elements of first-degree murder. His (b)(1)(D) argument focuses on the validity of the order. Unauthorized process with regard to an order is addressed in subdivision (b)(1)(F). Scott argues that under subdivision (b)(1)(F), the conviction entered by the circuit court is not authorized “by any provision of law” because the jury was not charged on each element *11 of first-degree murder. As conceded by Scott, the order was facially valid, and the circuit court had both personal and

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subject-matter jurisdiction over Scott's case. Thus, we hold that the order issued in his case was authorized by law.

In sum, our habeas jurisprudence is well established. We hold that despite Scott's attempt to formulate his argument as one invoking jurisdiction, his argument is really one of trial error. Stated differently, his trial-error argument is not within the purview of habeas proceedings because it does not implicate either the facial validity of **569 the judgment or the jurisdiction of the trial court. *Wade v. Payne*, 2021 Ark. 116, 623 S.W.3d 568. Accordingly, the circuit court did not clearly err when it dismissed Scott's petition for habeas relief.

B. Imposition of Sentence

¹¹²For his second point on appeal, Scott argues that his life sentence was imposed illegally because the circuit court did not have jurisdiction to impose the sentence when the jury was not instructed on the elements of first-degree murder. Scott's argument regarding his life sentence stems from the identical trial-error argument addressed in point one—the circuit court's failure to read the jury instructions. Having found that Scott's argument regarding his conviction is not a cognizable habeas claim, we likewise hold that this argument regarding his sentence is not a cognizable habeas claim. Again, habeas proceedings are narrow in scope, and because this claim does not invoke either the facial validity of the judgment or the jurisdiction of the trial court, it is not cognizable in a habeas proceeding. *Fields*, *supra*.

C. Constitutional Violations

***12** ¹¹³For his final point on appeal, Scott argues that his conviction and life sentence amount to a due-process violation under the Fourteenth Amendment to the United States Constitution because the jury that returned the guilty verdict at his trial was not instructed on the elements of first-degree murder. Additionally, Scott argues that further prosecution is barred by the double-jeopardy protection afforded by the Fifth Amendment to the United States Constitution. Scott contends that the evidence supported a conviction for second-degree murder on which the jury was properly instructed. Scott argues that he has discharged a sentence of twenty years—the maximum for a Class B felony—which was applicable to second-degree murder on the date of the offense in 1996. Thus, retrial and imposition of another sentence of imprisonment would violate the protection afforded by the due-process and double-jeopardy protections.

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The State responds that Scott’s assertions of due-process and double-jeopardy violations are premature, at best, because Scott has not established that he has been detained for an illegal period of time, and he has not been subjected to, nor is he at risk of, a second prosecution or of multiple punishments for the same offense. We agree. Again, our habeas jurisprudence is well established, and unless the petitioner can show that the circuit court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Fields, supra*. Accordingly, the circuit court did not clearly err when it rejected Scott’s claim for habeas relief.

Affirmed.

All Citations

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Footnotes

¹ Scott filed a corrected petition on August 11, 2021, which corrected references to exhibits appended to the petition.

² The record establishes that the circuit court did not orally instruct the jurors on the elements of first-degree murder at the conclusion of evidence; rather, instead of reading the first-degree-murder instruction, the circuit court proceeded directly to read the second-degree-murder instruction. It appears that the circuit court intended to instruct the jury on first-degree murder because during the jury-instructions conference, the circuit court agreed to adopt defense counsel’s requested instruction on first-degree murder. The record demonstrates that the circuit court did provide written instructions to the jury prior to deliberations. However, the written instructions are not in the record. As Scott acknowledged in his petition, it was not until 2019 when subsection (b) of Rule 33.6 of the Arkansas Rules of Criminal Procedure was added to require that “[t]he verdict forms and written jury instructions shall be filed in the clerk’s case file at the conclusion of the jury’s deliberations.”

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3 As the circuit court noted, Scott filed a motion for new trial, but no trial was held.

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EXHIBIT B:

ORDER DISMISSING PETITION FOR WRIT OF HABEAS
CORPUS BY LINCOLN COUNTY (ARKANSAS) CIRCUIT
COURT IN NO. 40 CV-20-132; and ORDER DENYING
MOTION FOR NEW TRIAL

IN THE CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT, WEST - FIFTH DIVISION

RICKY SCOTT
Inmate # 112513

v. No. 40CV-20-132-5

DEXTER PAYNE, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION

PETITIONER

RESPONDENT

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

From the examination of the pleadings and review of applicable law, the Court finds:

Petitioner was convicted by a Pulaski County jury of murder in the first degree and was sentenced to life in the Arkansas Department of Correction.

Petitioner contends that his conviction should be vacated, and he should be released from the Arkansas Department of Correction. In the alternative, petitioner asks that his conviction be reduced to murder in the second degree and his sentence modified to a term within the statutory range of punishment for murder in the second degree in effect at the time he committed the crime.

Petitioner claims that the trial court did not instruct the jury on the elements of murder in the first degree; therefore, 1) the trial court lacked jurisdiction to sentence Scott on murder in the first degree; 2) his life sentence was imposed illegally; and 3) his rights to due process in the 14th Amendment to the United States Constitution were violated and further prosecution is barred by the double jeopardy protection of the 5th Amendment to the United States Constitution.

A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when the trial court lacked jurisdiction over the matter. There is no basis for a court to find that a writ of habeas corpus should issue, unless a petitioner can make a “showing, by affidavit or other evidence,

[of] probable cause to believe” that he or she is illegally detained. A.C.A. § 16–112–103(a)(1) (Repl. 2006); *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503 (2015).

Petitioner relies on numerous cases, but the cases are ones seeking relief on direct appeal. Petitioner cannot provide precedent that his claims are cognizable in a habeas. Petitioner’s allegations are ones that should have been addressed at trial, on direct appeal, or in a timely Rule 37 petition. Assertions of defective jury instructions are allegations of trial error that do not implicate the facial validity of the judgment or the jurisdiction of the trial court. *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136 (2018), reh’g denied (Feb. 22, 2018). An alleged error in an amended information would not take away the trial court’s personal or subject-matter jurisdiction. *Smith v. State*, 2016 Ark. 201, 491 S.W.3d 463 (2016). Claims of due-process violations do not implicate the facial validity of the judgment or the jurisdiction of the trial court, and those claims are not cognizable in proceedings for the writ. *Hooper v. Hobbs*, 2013 Ark. 31 (per curiam); *Girley v. Hobbs*, 2012 Ark. 447; *Bliss v. Hobbs*, 2012 Ark. 315 (per curiam).

Petitioner has failed to make a “showing, by affidavit or other evidence, [of] probable cause to believe” that he is illegally detained. A.C.A. § 16–112–103(a)(1) (Repl. 2006); *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503 (2015).

The petition is DENIED and DISMISSED.

IT IS SO ORDERED this 26th day of August 2021.



JODI RAINES DENNIS
CIRCUIT JUDGE
40CV-20-132-5

IN THE CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT, WEST - FIFTH DIVISION

RICKY SCOTT
Inmate # 112513

PETITIONER

v.

No. 40CV-20-132-5

DEXTER PAYNE, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION

RESPONDENT

ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL
AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

On August 26, 2021, an order of dismissal was entered based on petitioner's failure to present probable cause that he was entitled to a writ of habeas corpus.

On September 9, 2021, although no trial was held, petitioner filed a motion for a new trial pursuant to Arkansas Rules of Civil Procedure Rule 59 and Rule 6(a). The Arkansas Rules of Civil Procedure do not apply to a post-conviction habeas proceeding. *Darrough v. Kelley*, 2017 Ark. 314, 530 S.W.3d 332 (2017). Petitioner is asking for reconsideration by arguing that the dismissal order failed to address his claims. The petition listed the following grounds to support the issuance of a writ:

- I. Petitioner's confinement in the Arkansas Department of Correction is illegal because the trial court lacked jurisdiction to impose a conviction, as reflected in the judgment and commitment order entered in petitioner Scott's case, where the jury was not instructed on the elements of murder in the first degree by the trial court when it instructed jurors in open court.
- II. Petitioner's life sentence, under which he has been confined since his jury imposed the sentence at his trial, was imposed illegally because the Cross County Circuit Court did not have jurisdiction to impose the sentence when the jury was not instructed on the elements of first-degree murder at trial.
- III. Petitioner's conviction and life sentence violate due process under the 14th Amendment to the United States Constitution because the jury that returned

the guilty verdict at his trial was not instructed on the elements of murder in the first degree and further prosecution is barred by the double jeopardy protection afforded by the 5th Amendment to the United States Constitution. (Emphasis added.)

The crux of petitioner's claims is that the jury received improper jury instructions. As noted in the order of dismissal, petitioner's claims have previously been addressed by the Arkansas Supreme Court without success. A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when the trial court lacked jurisdiction over the matter. "Assertions of defective jury instructions are allegations of trial error that do not implicate the facial validity of the judgment or the jurisdiction of the trial court. *Garrison v. Kelley*, 2018 Ark. 8, 534 S.W.3d 136 (2018), reh'g denied (Feb. 22, 2018)."

Petitioner states that because he attached an appendix with a complete reference to the record, trial transcript, and exhibits, the finding that petitioner failed to make a showing, by affidavit or other evidence, of probable cause to believe that he is illegally detained, is in error. It is the substance of documents not the inclusion of documents that establishes probable cause. The substance of petitioner's documents supports his claim of error in the jury instructions given at his trial. The same argument is made in petitioner's claim that the Court erred when the order of dismissal did not address his express reliance on A.C.A. §16-112-118(b)(1). Defective jury instructions are trial error. Trial error does not present probable cause; therefore, he is not entitled to habeas relief.

Petitioner seeks to expand habeas relief to include a boundless opportunity to challenge a conviction. He cannot offer any precedent to support his contention because none exist. The cases he cited are ones that address a defendant's claims at trial, on direct appeal, or presented in a timely Rule 37 petition. The Court has reviewed each of petitioner's claims and finds that his theories do not fall within the purview of a habeas.

The petition is DENIED and DISMISSED.

IT IS SO ORDERED this 23rd day of September 2021.

A handwritten signature in cursive script, reading "Jodi Raines Dennis".

JODI RAINES DENNIS
CIRCUIT JUDGE
40CV-20-132-5

EXHIBIT C:

ORDER DENYING REHEARING ISSUED BY ARKANSAS
SUPREME COURT ON DECEMBER 1, 2022, IN
SCOTT v. PAYNE, DIRECTOR, NO. CV-22-34

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

DECEMBER 1, 2022

RE: SUPREME COURT CASE NO. CV-22-34
RICKY LEE SCOTT V. DEXTER PAYNE, DIRECTOR, ARKANSAS DEPARTMENT OF
CORRECTION

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE
ABOVE STYLED CASE:

“APPELLANT’S PETITION FOR REHEARING IS DENIED. WEBB, J., WOULD GRANT.”

SINCERELY,

A handwritten signature in black ink, appearing to read "Kyle Burton", written in a cursive style.

KYLE E. BURTON, CLERK

CC: J. THOMAS SULLIVAN
DAVID L. EANES, ASSISTANT ATTORNEY GENERAL
LINCOLN COUNTY CIRCUIT COURT
(CASE NO. 40CV-20-132)

EXHIBIT D: APPELLANT SCOTT'S PETITION FOR REHEARING
FILED IN *SCOTT v. PAYNE, DIRECTOR*, NO. CV-22-34

CV-22-34

IN THE SUPREME COURT OF ARKANSAS

RICKY LEE SCOTT,

APPELLANT/PETITIONER,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DEPARTMENT
OF CORRECTION,

APPELLEE.

APPELLANT SCOTT’S PETITION FOR REHEARING

TO THE SUPREME COURT OF ARKANSAS:

APPELLANT RICKY LEE SCOTT, through counsel of record, J. Thomas Sullivan, respectfully moves for rehearing of the Court’s decision issued on October 6, 2022. *Scott v. State*. 2022 Ark. 178, --- S.W.3d ----. This petition is timely if filed on or before October 24, 2022. This petition is not brought for purposes of delay, but on undersigned counsel’s good faith belief in the merits of the argument presented here. Scott petitions for rehearing based on the following ground:

THE COURT MISCHARACTERIZED APPELLANT’S CLAIM
BOTH AS “TRIAL ERROR” AND AN INSUFFICIENT EVIDENCE
CHALLENGE IN REJECTING HIS ARGUMENT FOR HABEAS
CORPUS RELIEF: THAT HIS CONVICTION AND LIFE
SENTENCE VIOLATE DUE PROCESS PROTECTED BY THE 14th

AMENDMENT AND ARKANSAS LAW BECAUSE HIS
CONVICTION FOR MURDER IN THE FIRST-DEGREE RESTS ON
THE VERDICT OF THE JURY WHICH WAS NOT INSTRUCTED
ON THE ELEMENTS OF THIS OFFENSE AT TRIAL, BASED ON
THE TRIAL RECORD.

In support of his petition, Appellant Scott offers the following argument:

A. The Court accepts that the trial record supports Appellant's argument that jurors were not instructed by the trial judge on the elements of first-degree murder.

At the outset, Appellant Scott's claim rests on facts sufficient to demonstrate the significance of the trial court's failure to instruct his jury on the elements of first-degree murder, the offense with which he stood charged after the prosecutor reduced the charge from capital to first-degree murder prior to the beginning of trial. The Court correctly notes the fact that the trial record shows that the trial court did not instruct jurors on the elements of first-degree murder when it instructed the jury orally on the law governing the jury's disposition of the charge. *Scott*, 2022 Ark. 178, at *4 ("The substance of petitioner's documents supports his claim of error in the jury instructions given at his trial."); and *2-*3, n. 2. In footnote 2, the Court acknowledges that the trial transcript shows that the trial court did not orally instruct jurors on the elements of the offense, as provided by the mandatory instruction--AMCI 2d 1002--and explains that the written instructions provided the jury were not

included in the trial record. Thus, there is no way to conclusively determine whether jurors were ever instructed on the elements at all. Nevertheless, the jury convicted Scott of murder in the first-degree.

B. The Court mischaracterizes the failure to instruct the jury on the elements of the offense as “trial error,” not susceptible to review in habeas corpus under ARK. CODE ANN. §§ 16-112-103.

In characterizing Scott’s claim as a matter of “trial error,” the Court mischaracterizes the concept of “trial error,” applying it inconsistently in rejecting the claim as cognizable in habeas corpus. In *Gay v. State*, 2022 Ark. 23, at 31, the Court relied on the Supreme Court’s decision in *Sullivan v. Louisiana*, 508 U.S. 274 (1993), in its discussion of the “trial error” concept earlier explained in *Arizona v. Fulminante*, 499 U.S. 299, 307-309 (1991), in rejecting the claim that jury instruction error is a matter of “structural error,” distinguishable from “trial error.”

The *Fulminante* Court held that “trial error” may be evaluated for harmfulness based on review of the record, 499 U.S. at 307-309, so that some jury instruction error in terms of a missing element of the offense—for instance, the level of intent required for conviction—may be evaluated on its likely harm to the defendant in compromising his right to due process of law in the trial process. *California v. Roy*, 519 U.S. 2, 6 (1996) (*misdescription* of an element of the offense in a jury instruction

is not “structural error” which would otherwise require relief because it defies analysis by harmless error standards).

This Court adopted the *Fulminante* standard defining “trial error” in *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999), later confirmed in *Clark v. State*, 374 Ark. 292, 305, 287 S.W.3d 567, 576 (2008). Here, the affect of the trial court’s error in failing to orally instruct jurors on the elements of first-degree murder cannot be assessed in light of the record for *harmlessness* because the record does not contain the written instructions referenced in the transcript, but shows only that jurors were not orally instructed on the elements as provided AMCI 2d 1002 by the trial court.

Although the error in failing to instruct jurors on the elements of the offense was committed during the course of trial, it could not be assessed for harm or *harmlessness* based on consideration of the record and, thus, the characterization of this error as “instruction error” deemed “trial error” is simply incorrect. In his controlling opinion in *Fulminante*, Chief Justice Rehnquist noted a number of prior decisions in which the Court had determined that trial error, including jury instruction error, could be assessed for harmlessness, 499 U.S. at 306-307. None, however, involved the failure to instruct the jury on all necessary elements for proof of the offense charged. The Court’s inclusion of the trial court’s omission in failing to instruct jurors on the elements of the offense as “trial error” that could have been considered on appeal is inconsistent with its adoption of the *Fulminante* test for “trial

error” based on the ability of a reviewing court to determine whether the error was harmless in light of the totality of the trial record.

C. The Court’s mischaracterization of Scott’s claim that imposition of the conviction and sentence without an affirmative finding on the prosecution’s burden of proof of each element of the offense on which it convicted as an issue evidentiary sufficiency wholly misstates his due process argument.

Scott has never argued that his claim involves insufficiency of the evidence offered in support of his conviction for first-degree murder, contrary to the Court’s characterization of his argument. *Scott*, 2022 Ark. 178, at *8 (“Despite Scott’s attempt to frame the issue as one of jurisdiction, this claim is really one regarding the sufficiency of the evidence. Habeas proceedings are not a means to challenge the sufficiency of the evidence.”); and at *10 (“To the extent that Scott is raising a sufficiency-of-the-evidence claim, this is likewise not a valid habeas claim.”). He did argue and cited authority, however, for the proposition that this Court has authority to modify a judgment to reflect its finding that the evidence was insufficient to support conviction on a greater charge in reducing the conviction to a lesser charge. (Appellant’s Brief, at 41). Scott has never challenged the sufficiency of evidence that could establish his guilt for a homicide offense. In fact, he expressly concedes that the evidence adduced at trial was sufficient to support his conviction

for murder in the second-degree, upon which jurors were orally instructed as to all necessary elements to support conviction on that lesser-included offense.

Rather contesting the evidence as insufficient, Scott argues that the Court should modify his conviction to the lesser second-degree murder charge because the failure to instruct jurors on the intent element required for proof of first-degree murder, that he acted “purposely,” precludes the necessary affirmative finding on this necessary element of intent for a valid conviction for first-degree murder. Because the jury was not instructed that conviction for first-degree murder required proof that he acted “purposely,” the conviction does not rest on required process under Arkansas law.

D. The Court’s discussion of the applicability of Section 16-112-118(b)(1) fails to provide any authority for its proposition that a conviction not based on a finding of proof of all elements of the offense is “valid” if the court had jurisdiction over the action and the accused.

The Court’s conclusion that Section 16-112-118(b)(1) affords no basis for exercise of habeas jurisdiction because the trial court had jurisdiction over both the cause of action and Scott, the accused, *Scott*, 2022 Ark. 178, at *11, eviscerates this statutory enactment, which clearly addresses the type of situation here—an error in the process by which the criminal law is enforced and prosecuted in compliance with subsections (b)(1)(C)(D) and (F). Under this view, a defendant charged with an

offense within the jurisdiction of the trial court would have no remedy even if the court convicted him based on nothing but an affidavit supporting the information, without hearing any evidence at trial. This would undoubtedly constitute a violation of due process, although it would be consistent with the Court’s reasoning here.

E. The Court fails to address the requirement that a conviction rest on more than an allegation of jurisdiction of the trial court over the accused appearing on the face of a judgment in order to satisfy the requirements of constitutional due process.

Scott has expressly relied on the principle that a conviction cannot comport with the standard for due process protected by the federal constitution if it does not rest on an affirmative finding of guilt on each element of the offense charged beyond a reasonable doubt. Here, of course, the record only affirmatively reflects that his jury convicted without being instructed orally by the court on the elements of first-degree murder. In *Sullivan v. Louisiana*, *supra*, Justice Scalia wrote for a unanimous Court in explaining the constitutional requirement of due process of law:

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, *e.g.*, *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952), and must persuade the factfinder “beyond a reasonable doubt” of the facts necessary to establish each of those elements. . . .

508 U.S. at 277-278. This Court’s decision upholding Scott’s conviction by a jury not instructed on all elements of the offense—as included in AMCI 2d 1002—cannot possibly meet the basic requirement of a jury finding of guilt on all elements.

The Court, in characterizing Scott's claim as one of "trial error," notes the finding of the lower court: "the circuit court found that his allegations should have been addressed at trial, on direct appeal, or in a timely Rule 37 petition." *Scott*, 2022 Ark. 178, at *3-*4. But the circuit court's formula itself cannot be correct because the error committed by the trial court was not preserved by an objection at trial, thus barring its consideration on direct appeal because it was procedurally defaulted; and further, was not cognizable in Rule 37 because it could have been raised at trial for review on direct appeal, but was, in fact, procedurally defaulted.

Thus, the Court's decision rejecting Scott's claim as "trial error" effectively insulates it from any attack for failure to comply with due process because it was essentially defaulted when no objection was raised at trial to the court's failure to instruct on all elements of proof necessary for conviction. This application of state procedural default rules results in the continued incarceration of Scott on a life sentence without any record demonstrating that jurors found the prosecution's evidence sufficient—beyond a reasonable doubt—as to each element of the first-degree murder where jurors were not instructed that this conviction on this offense required proof that the homicide was committed with *purposeful* intent, a higher degree of culpability than that supporting proof of second-degree murder. Denial of relief by habeas corpus despite the clear legislative intent evident in Section 16-112-118(b)(1)(C)(D) and (F), reflects an arbitrary imposition of procedural default

contrary to the reasonableness requirement imposed by the Court in *Lee v. Kemna*, 534 U.S. 362, 366-67 (2002) for application of state rules of procedural default, including claims resting on federal constitutional protections.

F. The Court's concern that Scott seeks to "expand habeas relief" to permit a "boundless opportunity" to challenge convictions is not warranted by the record.

Scott brought his claim for habeas relief in good faith, contrary to the suggestion that he seeks a "boundless opportunity" to expand the scope of the writ. *Scott*, 2022 Ark. 178, at *5. First, he consistently argued that this was a case of first impression, that no Arkansas decisions had apparently addressed the circumstance in which a trial court failed to instruct the jury on the elements of the offense on which it ultimately convicted. The Court itself cites no precedent in addressing his claim and it appears that this is a true case of first impression. Not only has this issue not appeared in Arkansas decisions, but given the mandatory use of the instructions adopted by this Court, it is unlikely that it will again arise in any but the rarest of cases, as here. Moreover, because Rule 33.6(b) now requires inclusion of the jury instructions in the trial record, the question of harmlessness with respect to a failure of the court to orally instruct jurors could be considered on appeal.

CONCLUSION and PRAYER FOR RELIEF

Based upon the foregoing argument, Appellant Scott moves the Court grant his Petition for Rehearing, withdraw its decision and opinion, and order his

conviction and sentence to be modified to reflect a conviction for the offense of murder in the second-degree and maximum sentence of twenty years imprisonment in the Arkansas Department of Correction.

Respectfully submitted this 24th day of October, 2022.

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CERTIFICATE OF SERVICE

I, J. Thomas Sullivan, certify that on the 24th day of October, 2022, I electronically filed the foregoing document with the Clerk of the Court using the eFlex system, which is deemed service on the following:

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