

ARKANSAS SUPREME COURT

No. CR 06-1213

ALAN RAY CLUCK
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 25, 2007

PRO SE APPEAL FROM THE CIRCUIT
COURT OF CRAWFORD COUNTY,
CR 2003-311, HON. GARY COTTRELL,
JUDGE

AFFIRMED.

PER CURIAM

In 2004, appellant Alan Ray Cluck was found guilty by a jury of possession of paraphernalia with intent to manufacture methamphetamine and sentenced to 180 months' imprisonment. On appeal, the Arkansas Court of Appeals reversed the conviction. *Cluck v. State*, 91 Ark. App. 220, 209 S.W.3d 428 (2005). Upon review, this court affirmed the jury's verdict. *Cluck v. State*, 365 Ark. 166, ___ S.W.3d ___ (2006).

Subsequently, appellant filed in the trial court pro se petitions for relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petitions after a hearing that spanned three days,¹ and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was 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. *Flores v.*

¹Rule 37.1 hearings were held on May 17, 2006, July 12, 2006, and July 13, 2006.

State, 350 Ark. 198, 85 S.W.3d 896 (2002).

We first address jurisdictional matters before discussing any substantive issues raised by appellant. In the instant matter, appellant failed to comply with the requirement that Rule 37.1 pleadings be verified. The original Rule 37.1 petition was verified. Appellant later filed in the trial court “additional grounds” in support of his petition, and then filed a “brief in support of Rule 37 petition and amended petition,” although no amended petition was filed by appellant. The latter two pleadings did not contain appellant’s verified signature as required by Rule 37.1(c). The verification requirement for a petition seeking postconviction relief is of substantive importance to prevent perjury. *Boyle v. State*, 362 Ark. 248, 208 S.W.3d 134 (2005) (per curiam). In order to serve this purpose, a pro se petitioner must execute the verification. *Boyle, supra*.

Rule 37.1(c) does not distinguish between the original petition and an amended petition with regard to the verification requirement. See e.g. *Howard v. State*, 366 Ark. 453, ___ S.W.3d ___ (2006) (per curiam); *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005) (per curiam). As a result, the trial court lacked jurisdiction to consider the “additional grounds” pleading and “brief in support” of the petition. Any issues raised by appellant in Rule 37.1 pleadings filed subsequent to the original petition must therefore be excluded from consideration, as those issues were not properly before the trial court.²

In appellant’s first point on appeal, which contains seven sub-points, he argues that the trial court erred by failing to grant Rule 37.1 relief. The majority of the arguments are based upon various allegations related to ineffective-assistance-of-counsel claims. In an appeal from a trial court’s denial of a petition under Rule 37.1 premised on ineffective assistance of counsel, the question presented

²We note that at the Rule 37.1 hearing, appellant misrepresented to the trial court that the subsequent pleadings contained no new issues.

is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Under *Strickland*, a petitioner must show that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, a petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam).

In his first sub-point, appellant contends that trial counsel was ineffective because counsel's work case load was too great to represent appellant competently, or prepare an adequate defense. He further complains that he had limited contact with counsel prior to trial. This specific allegation was not contained in appellant's original Rule 37.1 petition. As explained above, any issues not contained in appellant's original Rule 37.1 petition will not be considered as the issue was not properly raised in the trial court. It is well settled that the we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

In his next sub-point, appellant complains that he was viewed by jurors while hand-cuffed and shackled. He maintains that trial counsel was ineffective for failing to seek a mistrial based upon the jurors' view of him while being restrained.

The trial transcript reveals that on the morning of the second day of trial, the sheriff's office transported appellant from the jail to the courtroom through the main hallway, where several jurors stood, rather than through a back elevator reserved for transportation of prisoners. These jurors may have been able to see that appellant was restrained in shackles and handcuffs during transportation,

but the restraints were removed upon entering the courtroom for trial. As the first order of business that day, trial counsel moved for a mistrial. The trial court denied the motion, finding that it was not certain that appellant was viewed by the jurors in the hallway, and if they did see the restraints, it was not sufficient to declare a mistrial. The trial court offered to admonish the jury, but trial counsel declined, stating that he did not want to bring the shackles to the attention of jurors who had not already seen the restraints.

Appellant cannot meet either prong of *Strickland* regarding this allegation, as trial counsel did move for a mistrial, contrary to appellant's contention, but was overruled by the trial court. Additionally, the decision to reject an admonishment to the jury amounted to trial strategy on the part of counsel. Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

On appeal, appellant extends this allegation to include the claim that appellate counsel was also ineffective for failing to raise this issue on direct appeal. However, he did not make this allegation in his original Rule 37.1 petition, and the argument will not be considered for the first time on appeal. *Ayers, supra*.

In his third sub-point, appellant posits that trial counsel and appellate counsel failed to argue at trial and on direct appeal that the jury should have been instructed as to a lesser-included offense. This argument was not included in appellant's original Rule 37.1 petition, and cannot be raised on appeal for the first time. *Ayers, supra*.

Next, appellant complains that trial counsel failed to investigate all witnesses suggested by appellant, and that counsel's failure to do so resulted in deficient performance and violated his

constitutional rights. As with most of his prior arguments on appeal, appellant failed to make this claim in his original petition. Thus, our court will not address this matter on appeal. *Ayers, supra*.

Appellant's fifth sub-point is that trial counsel failed to call appellant's doctor as a witness or introduce evidence that appellant had been given a prescription for Sudafed, which contained an ingredient used to make methamphetamine, pseudoephedrine. The police seized three boxes of allergy medicine belonging to appellant. This argument was not contained in appellant's Rule 37.1 petition, and will not be considered on appeal. *Ayers, supra*.

Next, appellant argues that counsel failed to pursue a motion to suppress the introduction of items obtained by the police during a search of the residence where appellant was located. These items formed the basis of the charge of possession of paraphernalia with intent to manufacture methamphetamine. During the Rule 37.1 hearing, appellant maintained that he was not a resident of the house, and did not have access to or own the confiscated items.³ Thus, he claims he should not have been charged with possession of these items. However, appellant simultaneously contended that the police failed to properly inform him that he could have refused permission to search the residence, resulting in an illegal and unconstitutional search and seizure.

At trial, counsel initially filed a motion to suppress the evidence, but later withdrew the motion after determining that it had no merit or basis in the law. In its order denying appellant's Rule 37.1 petition, the trial court concluded that had counsel pursued the motion to suppress, the court would have denied the motion. Appellant did not demonstrate in the Rule 37.1 petition that counsel could have argued meritorious grounds for suppressing the evidence. Trial counsel is not ineffective

³Testimony at trial showed that appellant's mother owned the house where appellant was located, and appellant had been living in the house for approximately seven months prior to his arrest, and he had access to all areas of the house. Appellant's father testified that appellant co-owned the house with his mother.

for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra; Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant failed to meet either prong of the *Strickland* test as to this argument, and we affirm the trial court on this point.

In his next sub-point, appellant argues that the trial court abused its discretion when it denied appellant's motion for the trial court to recuse from presiding over the postconviction proceeding. Here, while the Rule 37.1 petition was pending, appellant sought to issue a subpoena for the trial court to be a witness at the Rule 37.1 hearing. He also filed a motion for either mandatory disqualification of the court, or the court's recusal from presiding over disposition of the Rule 37.1 petition. In the motion, appellant claimed that the trial court was a material witness in the matter.

The record reveals that the trial court denied the motion to recuse in an order filed on July 11, 2006, and at the continuation of the Rule 37.1 hearing on July 12, 2006, the trial court explained to appellant the basis for the ruling from the bench. On July 20, 2006, appellant filed a notice of appeal from the denial of the Rule 37.1 petition from the order "entered on July 13, 2006,"⁴ and on August 21, 2006, appellant filed a notice of interlocutory appeal from the order "entered on July 13th, 2006, Motion to Recluse [sic] for Material Witness purposes."

We do not reach this issue as it is not properly before this court on appeal. The notice of appeal was filed more than thirty days after entry of the July 11, 2006, order denying the motion, making the notice of appeal untimely filed. Ark. R. App. P.–Civ. 4(a). Further, the notice incorrectly stated that the appeal was being taken from the order "entered on July 13, 2006," and if appellant

⁴Pursuant to Ark. R. App. P.–Civ. 4(a), a notice of appeal that is filed prior to entry of the order from which the appeal will be taken "shall be treated as filed on the day after" the order is entered. Here, the trial court orally denied the Rule 37.1 petition at the conclusion of the July 13, 2006, hearing. Appellant filed a notice of appeal on July 20, 2006, and the trial court entered the order denying the Rule 37.1 petition on August 10, 2006. Therefore, the notice of appeal was deemed timely filed on August 11, 2006.

intended to refer to the trial court's final order disposing of the Rule 37.1 petition entered on August 10, 2006, that order did not concern or address the motion to recuse. Therefore, appellant failed to properly appeal the trial court's denial of the motion to recuse. Moreover, even had appellant timely sought an interlocutory appeal of the trial court's order, Ark. R. App. P.–Civ. 2 does not authorize an interlocutory appeal from the denial of a motion to recuse. *Manila School District No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

For his second point on appeal, appellant argues that he was improperly convicted and sentenced for a crime with which he was not charged. He specifically alleges that he was charged pursuant to Ark. Code Ann. §5-64-403 (Supp. 2003), but was convicted under section 5-64-403(c)(5). However, he did not raise this issue in his original Rule 37.1 petition. As he is raising this issue for the first time on appeal, we will not consider it. *Ayers, supra*.

Affirmed.

Brown, J., not participating.