

# ARKANSAS SUPREME COURT

No. CR 06-526

Opinion Delivered April 26, 2007

BOBBY SAVAGE  
A/K/A BOBBY WAYNE SAVAGE  
Appellant

PETITION FOR REHEARING AND  
MOTION FOR APPOINTMENT OF  
COUNSEL [CIRCUIT COURT OF  
BENTON COUNTY, CR 2003-1168,  
HON. DAVID S. CLINGER, JUDGE]

v.

STATE OF ARKANSAS  
Appellee

PETITION FOR REHEARING DENIED  
AND MOTION FOR APPOINTMENT  
OF COUNSEL DENIED.

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## PER CURIAM

In 2005, Bobby Savage, also known as Bobby Wayne Savage, entered a plea of guilty to first-degree sexual assault and aggravated assault on an employee of a correctional facility, and was sentenced to an aggregate term of 312 months' imprisonment. Subsequently, appellant timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Civ. P. 37.1, arguing that his guilty plea was entered as the result of ineffective assistance of counsel. The trial court denied the petition without a hearing, and appellant lodged an appeal here from the order.

We reversed and remanded the case to the trial court to vacate the judgment as to the first-degree sexual assault charge for retrial, finding merit to appellant's claim of ineffective assistance of counsel. Now before us is the State's petition for rehearing of our decision. Appellant has not filed a response to this petition.

The gravamen of the State's complaint is that this court committed "an error of law when it went into the record to reverse the trial court's ruling, as review on appeal is limited to the record

as abstracted.” It deemed the abstract of the court testimony to be deficient, and also argued that the addendum did not contain the judgment and commitment order. Alternatively, the State contends that the matter should be remanded to the trial court for a hearing on the Rule 37.1 petition so that the trial court would have the opportunity to reach a “proper decision[.]”

Contrary to the State’s argument, the court did not rely on the unabstracted record in making its ruling. Instead, appellant’s abstract showed prejudicial error and included the specific conversations necessary for consideration of the issue raised by appellant. Although the testimony cited by the court in its opinion encompassed more than the plea hearing testimony abstracted by appellant, the additional language utilized by this court merely placed the abstracted portions of the hearing testimony in its proper context for the readers of the opinion. Moreover, this court is not prohibited from considering the record in a postconviction matter if prejudicial error was properly shown by the abstract. *Bowers. v. State*, 292 Ark. 249, 729 S.W.2d 170 (1987); *see also Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995) (Brown, J., dissenting). As appellant abstracted the necessary and material parts of the hearing testimony, this court did not find that his abstract was flagrantly deficient or that re-briefing was warranted under these circumstances.

The State also complains that the judgment and commitment order was not contained in appellant’s addendum. However, appellant was appealing from the order denying his Rule 37.1 petition and not from the judgment. As such, the omission of the judgment from the addendum was not fatal to appellant’s pro se brief.

Finally, the State argues in its petition for rehearing that this court must affirm the decision of the circuit court because the State pointed out in a footnote in its brief on appeal that Savage failed to meet this court’s briefing requirements regarding the addendum. As authority, we are cited to

Ark. Sup. R. 4-2(a)(8); however, the footnote does not argue why under Rule 4-2(a)(8) the case must be affirmed. The argument in the footnote is not fully developed. In *Peavy v. WFAA-TV*, 221 F.3d 158 (5th Cir. 2000), the court declined to address an argument raised in a footnote because it was not adequately briefed. This court has often stated that where a party fails to provide convincing argument, we will not consider the merits of the argument. *Springs v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Dec. 7, 2006). We decline to address the issue in this case because it was raised in a footnote and was not adequately briefed.

As the State's petition for rehearing failed to state a specific error of law or fact contained in the prior opinion, the petition is denied. As to the alternative prayer for remand for the trial court to conduct a hearing on appellant's Rule 37.1 petition, the State failed to cite any basis, legal or otherwise, for this request other than appellant prevailed in his appeal. This request also has no merit.

Also before us is appellant's pro se motion for appointment of counsel. As this matter is remanded to the trial court, any motions for appointment of counsel must be filed in the trial court. Thus, the motion is denied.

Petition for rehearing denied; motion for appointment of counsel denied.