

# ARKANSAS SUPREME COURT

No. CR 07-816

DANNY LEE HOOPER  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered November 29, 2007

PRO SE MOTION FOR DUPLICATION  
OF BRIEF AT PUBLIC EXPENSE  
[CIRCUIT COURT OF WASHINGTON  
COUNTY, CR 2005-761, HON.  
WILLIAM A. STOREY, JUDGE]

APPEAL DISMISSED; MOTION  
MOOT.

## PER CURIAM

In 2005, appellant Danny Lee Hooper was found guilty by a jury of three counts of rape, kidnapping, robbery, residential burglary, and third-degree battery and sentenced as a habitual offender to an aggregate sentence of 1,320 months' imprisonment. The Arkansas Court of Appeals affirmed. *Hooper v. State*, CACR 05-1381 (Ark. App. Aug. 30, 2006).

Subsequently, appellant timely filed in the trial court a verified pro se petition for relief pursuant to Ark. R. Crim P. 37.1. The trial court denied the petition after a hearing, and appellant has lodged an appeal here from the order.

Now before us is appellant's pro se motion for duplication of his brief-in-chief at public expense. We need not consider the motion as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward. Accordingly, we dismiss the appeal and hold the motion moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward, where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per

curiam).

Evidence adduced at trial showed that appellant broke into the victim's house, tied her up, raped her, and hit her. In the Rule 37.1 petition and at the hearing on the petition, appellant raised the following arguments: (1) that he should have been found guilty of a single count of rape, rather than three counts; (2) that trial counsel rendered ineffective assistance by failing to move for a directed verdict after the defense rested; (3) that the sentences appellant received for all counts should have been imposed concurrently, rather than consecutively; (4) that he was not told by counsel that he did not have to testify.

In his first argument, appellant raised a direct attack on the judgment, and such claims are not cognizable in a Rule 37.1 proceeding. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001) (citing *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001)). Rule 37.1 is a means to collaterally attack a conviction and does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Id.* His argument regarding whether he should have been convicted for one count or three counts of rape was previously raised in his direct appeal. Rule 37.1 does not provide appellant a means to raise the issue again. *Davis, supra.*

For his second argument, appellant contended that trial counsel rendered ineffective assistance by failing to renew the defense's motion for directed verdict at the end of the trial. This failure, he maintains, denied him his right to challenge his conviction on the grounds that the evidence was insufficient to sustain the judgment. In an appeal from a trial court's denial of a petition under Rule 37.1, the question presented 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).

The standard for proving ineffective assistance of counsel places the burden on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Conclusory statements cannot be the basis for postconviction relief. *Jackson, supra*.

In his direct appeal, the court of appeals refused to consider the issue of whether appellant should have been found guilty of one count or three counts of rape or address the sufficiency of the evidence, based on counsel's failure to renew the motion for directed verdict. However, failure to renew a motion for directed verdict is not, in itself, sufficient to support a claim of ineffective assistance. Here, appellant failed to show that an argument based on the sufficiency of the evidence or attacking his conviction for three counts of rape would have been successful at trial or on appeal. Without such a showing, appellant could not meet his burden of proving the prejudice component of *Strickland*. *Nelson, supra*. As a result, appellant's argument was merely conclusory and could not overcome the presumption that counsel was effective. *Jackson, supra; Nelson, supra*.

Next, as to whether his sentences should have been imposed concurrently or consecutively,<sup>1</sup>

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<sup>1</sup>The judgment entered in this matter reflected that the sentence imposed for Count 3 will run consecutively to the sentences imposed in Counts 1 and 2. The sentences imposed in Counts

that decision was solely within the province of the trial judge. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). So long as appellant's sentences were not excessive, the issue of whether his sentences should have run concurrently or consecutively should have been raised at trial or on appeal and does not present the proper basis for a Rule 37.1 claim. *Camargo, supra; Davis, supra*. To the degree that the issue could be raised as a claim that counsel was ineffective for failure to obtain concurrent sentences, appellant failed to show how counsel could have achieved that result. *Jackson, supra; Nelson, supra*.

As to his fourth claim, in the Rule 37.1 hearing, appellant maintained that counsel failed to advise him that he did not have to testify at trial. However, counsel testified that he discussed with appellant his right not to testify, and a strategic decision was made for appellant to take the stand. Matters of trial strategy and tactics fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Camargo, supra; Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

Conflicts in the testimony at the hearing were for the trial judge to resolve. The judge was not required to believe the testimony of any witness, especially that of the petitioner as he was the person most interested in the outcome of the proceedings. *See Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). Here, the trial court found the testimony of counsel to be more believable and that appellant had been advised of his right not to testify.

Appeal dismissed; motion moot.

4, 5 and 6 will run concurrently as to each other but will run consecutively to the sentences for Counts 1, 2 and 3.