

SUPREME COURT OF ARKANSAS

No. CR 09-1079

CALVIN JEMAR PERRY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** October 13, 2011APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT, CR
2007-102, HON. CHRIS E WILLIAMS,
JUDGEAFFIRMED.**PER CURIAM**

In the Hot Spring County Circuit Court, appellant Calvin Jemar Perry and two codefendants stood trial in 2007 on charges of first-degree battery, kidnapping, and possession of a firearm by certain persons, along with possible sentencing enhancements for committing a felony with a firearm and for committing a felony in the presence of a child. The State alleged that appellant and his cohorts bound and held the victim against his will and tortured him. The jury found appellant guilty of the lesser-included offense of second-degree battery, guilty of kidnapping, and guilty of being a felon in possession of a firearm. The jury also found that appellant possessed a firearm during the commission of a felony and that he committed a felony in the presence of a child. The jury fixed appellant's sentences for second-degree battery, kidnapping, and being a felon in possession of a firearm at 24, 120, and 60 months, respectively. Appellant's sentence was also enhanced by twelve months for committing a felony in the presence of a child. The circuit court, rather than the jury, imposed an additional 180 months' imprisonment for commission of a felony with a firearm, pursuant to Arkansas

Code Annotated section 16-90-120 (Supp. 2009). The court ordered all sentences to be served consecutively for a total of 396 months in prison. The Arkansas Court of Appeals affirmed. See *Watkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635. Although appellant and his codefendants challenged the trial court's decision to set the sentences for the firearm enhancement, the court of appeals held that the issue was not preserved for appeal.

Appellant and his codefendants subsequently filed separate petitions for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009). After a joint hearing, the circuit court denied the petitions, finding no merit in the claims of ineffective assistance of counsel. Appellant now brings this appeal, contesting the court's finding that his counsel was not ineffective for failing to protect his right to jury sentencing on the firearm enhancement. We affirm.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on a totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___ (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that the deficient performance prejudiced the defense to the

extent that the appellant was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). With respect to the requirement that prejudice be established, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Watkins*, 2010 Ark. 156, ___ S.W.3d ___; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Sparkman*, 373 Ark. 45, 281 S.W.3d 277.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1 (2009). A finding 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 committed. *Clarks v. State*, 2011 Ark. 296 (per curiam).

In this appeal, appellant asserts that the performance of his counsel at trial was deficient because counsel failed to object when the trial court decided to impose sentence on the firearm enhancement rather than submitting the question to the jury. He maintains that he was entitled under the law to have the jury set the sentence on the firearm enhancement and that he was prejudiced by counsel's failure to preserve the issue because the trial court meted out the maximum sentence, whereas the jury had set his other sentences at or near the statutory minimums.

The identical claim was raised by appellant's codefendant in *Watkins*, 2010 Ark. 156, ___ S.W.3d ___. In his appeal from the denial of postconviction relief, *Watkins* also argued that he received ineffective assistance of counsel based on his counsel's failure to object to the

trial court's imposition of sentence for the firearm-enhancement. As in this case, the trial court sentenced Watkins to fifteen years for the firearm enhancement, and the jury assessed Watkins's sentences for second-degree battery, kidnapping, and being a felon in possession of a firearm at or near the statutory minimums. Watkins claimed prejudice on the ground that "it [was] obvious that the jury wanted him to have the minimum." *Id.*, at 4, ___ S.W.3d at ___. This court rejected Watkins's claim, holding that Watkins had failed to demonstrate the prejudice necessary to warrant postconviction relief. First, we observed that presuming to know the mental state of a jury presents no rational basis in fact in support of a petitioner's argument. *Id.* (citing *Jones v. State*, 2009 Ark. 436 (per curiam)). Thus, we held that Watkins's allegation of prejudice was conclusory and without factual substantiation, which resulted in the failure to satisfy his burden of providing facts that affirmatively supported his claim of prejudice. *Id.* We also noted as a basis for denying relief that Watkins did not support his argument with citation to authority. *Id.* (citing *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam)). Moreover, we observed that his claim of prejudice based on the severity of the sentence was an issue for a plea of executive clemency, which is not cognizable in a Rule 37.1 petition. *Id.* (citing *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988)).

Because we found no prejudice, we did not decide whether counsel's failure to object to sentencing by the court on the firearm enhancement fell below a reasonable standard of professional judgment. We alluded, however, to our prior decisions regarding Arkansas Code Annotated section 16-90-120 and its predecessor statutes, which hold that sentencing by the trial court was improper. *See Cotton v. State*, 256 Ark. 527, 508 S.W.2d 738 (1974); *Redding*

v. State, 254 Ark. 317, 493 S.W.2d 116 (1973); *Johnson v. State*, 249 Ark. 208, 458 S.W.2d 409 (1970). We noted that those decisions were distinguishable because the felony information filed against Watkins contained a charge for using a firearm in the commission of a felony and because the jury had found that Watkins used a firearm during the commission of another crime.

As in *Watkins*, appellant's claim of prejudice is equally as speculative and bereft of factual support for the assumption that the jury would have assessed a more lenient sentence than the trial court. See *Jones*, 2009 Ark. 436. Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, and such statements and allegations will not warrant granting postconviction relief. *Payton v. State*, 2011 Ark. 217 (per curiam). In addition, appellant's claim of prejudice based on the severity of the sentence is more in the nature of a plea for executive clemency, which is unavailing in a Rule 37.1 petition. *Pettit*, 296 Ark. 423, 758 S.W.2d 1. For these reasons, we conclude that appellant failed to demonstrate prejudice as is required under *Strickland*, and, thus, he has failed to establish that he was not afforded effective assistance of counsel.

Affirmed.