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Cite as 2011 Ark. 375

SUPREME COURT OF ARKANSAS

No. CR 09-1100

JIM HENRY HENSON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 22, 2011 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, CR 2008-319, HON. WILLIAM A. STOREY, JUDGE AFFIRMED.

PER CURIAM

Appellant Jim Henry Henson appeals the denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2008). For reversal, appellant argues that the circuit court erred in denying his petition when it concluded that appellant failed to demonstrate that the representation of his counsel was deficient and that appellant did not suffer any prejudice as a result of his counsel's representation. We find no error and affirm.

On February 19, 2008, the State charged appellant with three counts of rape or deviate sexual activity with a thirteen-year-old victim. Appellant raised the defense of mental disease or defect, as set forth in Arkansas Code Annotated section 5-2-304 (Repl. 2006). A forensic psychiatrist determined that appellant did not have a mental disease or a mental defect and was fit to proceed.

Appellant confessed to having sexual intercourse and deviate sexual activity with the victim in a tape-recorded interview with law enforcement officials and admitted to the forensic psychiatrist that he had no defense to the crimes. DNA testing confirmed his contact with the

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victim, who also gave statements that detailed sexual activity with appellant. Counsel did not seek to suppress appellant's statements to the police. After several continuances, appellant's case proceeded to trial on September 3, 2008, but appellant failed to appear. That afternoon, appellant was arrested and formally charged with failure to appear. When appellant appeared for his arraignment on the failure-to-appear charge, defense counsel inquired if a plea bargain that had been offered by the State remained available to appellant. After learning that the plea bargain was still acceptable to the State, appellant entered a plea of guilty to three counts of first-degree sexual assault for a term of 360 months' imprisonment on each county to be served consecutively. He also entered a plea of guilty to the failure to appear charge and was sentenced to 120 months' imprisonment to be served concurrently to the sentences for sexual assault.

Appellant filed a petition to vacate his sentence pursuant to Rule 37.1, asserting ineffective assistance of counsel. In his petition, appellant alleged that (1) he suffered from mental disease and defect at the time of the plea; (2) counsel failed to share discovery with him; (3) counsel failed to file a motion to suppress his statements; (4) appellant did not make his pleas of guilty either knowingly or voluntarily; and (5) counsel failed to raise appellant's alleged unfitness. After a hearing, the circuit court entered an order with findings of fact and conclusions of law that (1) appellant's guilty pleas were voluntary and not the result of threats, coercion, or intimidation; (2) appellant knowingly and voluntarily waived his right to a jury trial; (3) appellant was fully cognizant of the consequences of his decision to enter his pleas of guilty; (4) appellant failed to demonstrate that he suffered any prejudice as a result of his counsel's representation; (5) appellant failed to show that his counsel's performance was deficient and fell

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below an objective standard of reasonableness; and (6) appellant failed to show that there was a reasonable probability that, absent any errors allegedly made by his counsel, a jury trial would have resulted in a more favorable result. In conclusion, the circuit court denied appellant's petition for postconviction relief.

On appeal, appellant argues that the court erred in concluding that he had failed to establish that counsel's performance was deficient and that he was prejudiced by counsel's conduct. Appellant asserts that the evidence established that his change of plea was not voluntary.

The burden is on the petitioner to prove his allegations for post-conviction relief. *Porter v. State*, 264 Ark. 272, 570 S.W.2d 615 (1978). We do not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Dunlap v. State*, 2010 Ark. 111 (per curiam). 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. *Britt v. State*, 2009 Ark. 569, ___ S.W.3d ___ (per curiam).

We assess the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. Under the two-prong *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Miller*

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v. State, 2011 Ark. 114 (per curiam). In order to meet the second prong of the test, the petitioner must show that counsel's deficient performance prejudiced petitioner's defense so that he was deprived of a fair trial. *Id.*; *see also Mitchem v. State*, 2011 Ark. 148 (per curiam). A claimant must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Delamar v. State*, 2011 Ark. 87 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

On appeal from the denial of a Rule 37.1 petition following pleas of guilty, there are only two issues for review—one, whether the plea of guilty was intelligently and voluntarily entered and, two, whether the pleas were made on the advice of competent counsel. *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987).

Remaining mindful of these principles, we turn to the present case. First, we address whether appellant's plea of guilty was intelligently and voluntarily entered. At the hearing, Rose testified that appellant asked him if a plea bargain "could be put back on the table." The circuit court advised appellant of the pending charges and their sentences. The court also advised appellant that, if he pled guilty, he waived his right to a jury trial and his right to remain silent. The court further stated that appellant could not appeal or withdraw his pleas at a later date and receive a trial. Appellant indicated that he understood that he was waiving any objections or errors in the proceedings and that he had made a voluntary decision. At that time, appellant told the court that he fully understood the plea hearing and plea negotiation. Thus, the evidence supports the circuit court's findings that appellant's guilty pleas were voluntarily and intelligently made. *Id.*

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Turning to the remaining issue of ineffective assistance, we note that counsel is presumed to be competent. *Id.* (citing *Rightmire v. State*, 275 Ark. 24, 627 S.W.2d 10 (1982)). A defendant assumes a heavy burden in asserting that counsel's advice was lacking in competence. *Id.* (citing *United States v. Cronic*, 466 U.S. 648 (1984)). Here, the evidence demonstrates that appellant's guilty plea was made following his failure to appear and on the advice of competent counsel. The record of the plea hearing reveals that appellant in his statement to police stated that he had time to talk with his attorney and believed that his attorney acted soberly, diligently, and competently in representing him. Further, defense counsel testified that he went over discovery and the victim's testimony with appellant. After appellant failed to appear for his jury trial, defense counsel met with appellant to advise him of the new failure-to-appear charge. According to counsel, appellant asked about a plea bargain, and counsel entered into negotiations with the State. Based on advice of counsel, appellant accepted the bargain to plead guilty to reduced charges for a total of 1080 months' imprisonment with the sentence for the failure-to-appear offense to run concurrently. Counsel also testified that, because the Class A felony offenses to which appellant pled guilty did not have the seventy-percent requirement for parole eligibility, appellant would actually serve less prison time than if he had gone to trial or pled guilty to three Class Y felony offenses charged. The state in negotiations agreed not to pursue a charge relating to a sawed-off shotgun. The evidence shows that appellant's guilty pleas were made on the advice of competent counsel. *Id.*

Further, appellant raises three additional ineffective-assistance-of-counsel claims. First, appellant argues that counsel was ineffective for his failure to file a motion to suppress

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appellant's statement. In his petition, appellant asserted that the victim only stated that they had had sex twice, but, on appeal, appellant argues that "his confession of any multiple or second or third counts of rape was not corroborated." Because appellant pled guilty, he waived his right to make this claim. *See Mills v. State*, 338 Ark. 603, 999 S.W.2d 674 (1999). Also, appellant failed to obtain a ruling in order to preserve this issue for appeal. *See Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Thus, we are precluded from reaching this specific claim on appeal.

Second, appellant asserts that a mental evaluation should have been ordered on the day that he pled guilty. However, appellant previously received a mental evaluation, and no mental disease or defect was found. According to defense counsel, appellant was lucid at the time of his plea. Thus, appellant failed to show that there was a reasonable probability that, had an evaluation been requested by counsel, the outcome of the proceeding would have been different. *See Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

Finally, appellant asserts that his sentence demonstrates prejudice. Here, appellant pled guilty to three Class A felony offenses and one Class C felony offense and received three sentences of thirty years' imprisonment to be served consecutively and a ten-year sentence to be served concurrently, totaling ninety years' imprisonment. However, had appellant not pled guilty, he potentially faced up to life in prison for each rape offense and up to ten years' imprisonment for the failure-to-appear offense, pursuant to Arkansas Code Annotated section 5-4-401(a)(1) and (4) (Repl. 2006). Thus, under the *Strickland* test, appellant did not demonstrate prejudice by his sentence alone.

In order to prevail on an ineffective-assistance argument, appellant must show that

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counsel's performance was so deficient as to deprive him of the opportunity of a fair trial. *Strickland*, 466 U.S. 668. For the foregoing reasons, we hold that appellant failed to meet that burden. Accordingly, we affirm the circuit court's denial of appellant's petition for postconviction relief.

Affirmed.