Cite as 2011 Ark. 353

# SUPREME COURT OF ARKANSAS

**No.** CR 09-1201

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| OLIVER L. LEAK, JR.<br>APPELLANT<br><br>v.<br><br>STATE OF ARKANSAS<br>APPELLEE | Opinion Delivered September 15, 2011<br><br>PRO SE APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [CR 2006-199] HON. DON GLOVER, JUDGE<br><br>AFFIRMED. |

PER CURIAM

In 2007, a jury in Ashley County found appellant Oliver L. Leak, Jr., guilty of battery in the first degree and being a felon in possession of a firearm. He was sentenced to ten years in prison on the battery charge and a five-year suspended imposition of sentence on the felon-in-possession charge. The Arkansas Court of Appeals affirmed. *Leak v. State*, CACR 08-331 (Ark. App. Oct. 22, 2008) (unpublished).

Appellant subsequently filed a timely, verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007). The circuit court denied the petition without a hearing, and appellant brings this appeal. Because the circuit court did not clearly err in denying appellant's petition, we affirm.

The jury at appellant's trial found that appellant used a handgun to shoot Dennis Williams in the right hand and left thigh during an altercation that took place outside the home of Brooks and Phillip Minnieweather in Crossett, Arkansas. In so finding, the jury rejected appellant's defense that he was accosted outside the home in an attempted robbery and that he

was not the person who shot Williams.

In this appeal, appellant first contends that he was denied due process of law because the police did not thoroughly investigate the incident. Specifically, he asserts that the police failed to investigate his claim of an attempted robbery, failed to test the handgun for fingerprints, failed to perform a "nasal preceptor (sic) ship test," failed to test for blood and DNA, and failed to ballistically match any bullets to the handgun. Appellant also asserts that the police officer's testimony did not connect him with the handgun.

This court has consistently held that Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *See, e.g.*, *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001); *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001); *Cothren v. State*, 344 Ark. 697, 42 S.W.3d 543 (2001); *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999) (per curiam). The only exception is where the questions timely raised are so fundamental as to render the judgment void and open to collateral attack. *Camargo*, 346 Ark. 118, 55 S.W.3d 255. Here, appellant's challenges to the investigatory process could have been raised at trial. In addition, the fundamental-question exception does not apply, as this court has recognized that the State is not obligated to perform certain scientific tests and that "the defendant's right to a fair trial as embraced within the Due Process Clause is not violated 'when the police fail to use a particular investigatory tool.'" *State v. Pulaski County Cir. Ct*, 316 Ark. 514,516, 872 S.W.2d 414, 416 (1994) (quoting *Ariz. v. Youngblood*, 488 U.S. 51, 58-59 (1988)). For these reasons, the circuit court's decision on this issue was not clearly erroneous.

Appellant also argues that the testimony of the investigating officer did not connect him with the handgun. However, this allegation constitutes a challenge to the sufficiency of the

evidence, which was an issue raised and decided adversely to appellant on direct appeal. Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *McGahey v. State*, 2009 Ark. 80 (per curiam) (citing *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000)). Therefore, this point is also without merit.

As his next argument, appellant asserts that evidence was obtained as a result of an illegal arrest. However, appellant does not identify what evidence he is referencing, nor does he specify whose arrest or how the arrest was illegal. Neither conclusory statements nor allegations without factual substantiation are sufficient to warrant granting postconviction relief. *Herron v. State*, 2011 Ark. 71 (per curiam); *Frost v. State*, 2010 Ark. 440 (per curiam). And again, this issue could have been raised at trial and argued on appeal, and thus it is not a claim that is cognizable under Rule 37.1. *See Camargo*, 346 Ark. 118, 55 S.W.3d 255. Under this point, appellant also contends that the trial court erred in admitting the handgun into evidence. However, the admissibility of evidence is also a matter that could have been raised at trial, and such an issue is not so fundamental as to render the judgment void and open to collateral attack. *See Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984).

Appellant's last issue involves the claim that he did not receive effective assistance of counsel at trial. He asserts that his counsel had a conflict of interest after suffering two strokes. Appellant adds that his counsel failed to seek a pretrial report and neglected to carry out a field investigation. In addition, appellant maintains that his counsel failed to subpoena Brooks Minnieweather "after he didn't show up for court" and that counsel failed to question the credibility of Phillip Minnieweather, who was a convicted felon.

In making a determination on a claim of ineffective assistance of counsel, this court

considers the totality of the evidence. *Anderson v. State*, 2010 Ark. 404, ___ S.W.3d ___ (per curiam). Our standard of review requires that we assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Shipman v. State*, 2010 Ark. 499 (per curiam). Under the *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. *Croy v. State*, 2011 Ark. 284, ___ S.W.3d ___ (per curiam). A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Miller 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 to such an extent that he was deprived of a fair trial. *Carter v. State*, 2011 Ark. 226 (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. *Mingboupha v. State*, 2011 Ark. 219 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Payton v.. State*, 2011 Ark. 217 (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. *Moore v. State*, 2011 Ark. 269 (per curiam).

With respect to appellant's claim that his counsel was laboring under a conflict of interest,

we note that, to prevail on such a claim, a defendant must demonstrate the existence of an actual conflict of interest that affected counsel's performance, as opposed to a mere theoretical division of loyalties. *See Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006). Appellant has not specified what conflict of interest existed, nor has he made any allegation as to how counsel's performance was affected. More importantly, appellant failed to obtain a ruling from the circuit court on this issue. Failure to obtain a ruling precludes our review of that argument on appeal. *Reed v. State*, 2011 Ark. 115 (per curiam); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

Regarding appellant's allegation that his counsel did not conduct an adequate investigation, appellant was required to demonstrate how a more searching pretrial investigation would have changed the results of trial. *See Wormley v. State*, 2011 Ark. 107 (per curiam); *McCraney v. State*, 2010 Ark. 96 (per curiam). Appellant did not set forth any facts in the petition to demonstrate that, had counsel performed further investigation, he could have presented any additional witnesses or evidence so as to change the results of trial. The petition contained only the conclusory statement that counsel neglected to perform an investigation. Such conclusory statements do not provide sufficient facts to support the allegation. *See Shipman v. State*, 2010 Ark. 499 (per curiam).

Appellant next argues that his counsel was ineffective because he did not subpoena Brooks Minnieweather. For ineffective assistance claims based on failure to call a witness, this court has held that it is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Smith v. State*, 2010 Ark. 137, ___ S.W.3d ___; *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). This appellant has failed to do.

Appellant's final contention is that his attorney was ineffective because he did not question the credibility of the State's witness Phillip Minnieweather, a "convicted felon." However, the witness's criminal background was exposed by the prosecution on direct examination. The decision of appellant's counsel not to delve into the matter further on cross-examination was in all likelihood a matter of trial strategy and therefore not within the purview of Rule 37.1. *See Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). Counsel is allowed great leeway in making strategic and tactical decisions. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Those decisions are a matter of professional judgment, and matters of trial tactics and strategy are not grounds for postconviction relief on the basis of ineffective assistance of counsel. *Id.* In addition, appellant has not demonstrated how a more vigorous cross-examination would have benefitted the defense. Conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Carter v. State*, 2011 Ark. 226 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam).

To the extent that appellant argues that counsel should have inquired into specific instances of conduct probative of the witness's truthfulness or untruthfulness, appellant did not make that argument in his Rule 37.1 petition. Also, in the portion of his brief titled "Conclusion," appellant raises several other issues that he did not raise below. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005); *see also Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Affirmed.