

SUPREME COURT OF ARKANSAS

No. CR 09-1233

BERNARD MARKS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 8, 2011

PRO SE APPEAL FROM THE
JEFFERSON COUNTY CIRCUIT
COURT [CR 2004-682, HON. JODI
RAINES DENNIS, JUDGE]

AFFIRMED.

PER CURIAM

Appellant Bernard Marks was convicted in the Jefferson County Circuit Court of capital murder and was sentenced to life imprisonment without parole. This court affirmed. *Marks v. State*, 375 Ark. 265, 289 S.W.3d 923 (2008). Appellant then filed a petition and an amended petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The circuit court denied the petitions without a hearing. Appellant now appeals, arguing that the circuit court erred by failing to conduct a hearing and by not making findings of fact in support of its decision. We affirm the circuit court's order.

As grounds for postconviction relief, appellant contended that his trial counsel was ineffective for successfully opposing the prosecution's request for the jury to be instructed on lesser-included offenses. Appellant asserted that his counsel advised him that instructions on lesser-included offenses would give the jury "too many options to convict." The circuit court ruled that counsel's decision to forgo lesser-included-offense instructions was a matter of trial strategy and, thus, was not a basis for a claim of ineffective assistance of counsel.

As his first point on appeal, appellant contends that the circuit court committed error by failing to hold a hearing on his petitions. Arkansas Rule of Criminal Procedure 37.3(a) requires an evidentiary hearing in a postconviction proceeding unless the files and records of the case conclusively show that the petitioner is entitled to no relief. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

The victim in this case died as a result of injuries he sustained after being beaten and run over with a vehicle. The trial record reflects that appellant denied being the person who harmed the victim and that appellant's counsel pursued an "all-or-nothing" strategy to dispense with instructions on lesser-included offenses. This court has held that, as a matter of trial strategy, competent counsel may elect not to request an instruction on lesser-included offenses. *Johnson v. State*, 2009 Ark. 460, ___ S.W.3d ___ (citing *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984) (per curiam)). While the trial court may err to refuse instructions on a lesser-included offense where the defense is not inconsistent with those instructions, counsel is not ineffective merely because an all-or-nothing strategy fails. *Henderson*, 281 Ark. 406, 664 S.W.2d 451. Moreover, mere errors, omissions, or improvident strategy do not warrant postconviction relief. *Id.* In this instance, the record demonstrates that appellant's defense at trial was that of complete denial. Accordingly, he elected not to request instructions on lesser-included offenses. In his petition, appellant confirmed that counsel's objection to instructions regarding lesser-included offenses was a tactical decision. As counsel is not ineffective for employing such a strategy, the record and appellant's petition conclusively show

that appellant's allegation of ineffectiveness is without merit. Therefore, the circuit court did not err by failing to conduct a hearing on appellant's petition for postconviction relief.

Appellant also raises the issue that the circuit court erred by failing to make findings of fact as required by Arkansas Rule of Criminal Procedure 37.3(a). This court has held that Rule 37.3(a) is mandatory and requires written findings. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). However, this court has affirmed the denial of a Rule 37.1 petition notwithstanding the circuit court's failure to make written findings under Rule 37.3(a) in two circumstances: (1) where it can be determined from the record that the petition is wholly without merit; (2) where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Id.* As indicated in the previous discussion, the record and petition conclusively show that appellant's claim is without merit. Consequently, even assuming that the circuit court's findings were in some way inadequate, any deficiency in the court's findings would not cause this court to remand for further findings to be made.

Affirmed.