

SUPREME COURT OF ARKANSAS

No. CR 09-625

WARDELL NEWSOME II

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 3, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, CR 2005-
2702, HON. HERBERT WRIGHT JR.,
JUDGEAFFIRMED.**PER CURIAM**

Appellant Wardell Newsome II appeals the denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007). For reversal, appellant argues that the circuit court erred in making two specific findings of fact and conclusions of law in its order. We affirm.

A Pulaski County jury found appellant and his codefendant guilty of first-degree murder in the shooting death of Melvin Lunnie. Appellant was sentenced to a term of 420 months' imprisonment. The Arkansas Court of Appeals affirmed his conviction and sentence in *Houston v. State*, CACR 06-1043 (Ark. App. June 13, 2007) (unpublished). Appellant filed a timely Rule 37.1 petition in circuit court. After an evidentiary hearing, the circuit court entered an order denying appellant's petition for postconviction relief. From that order, appellant brings his appeal.

For his first point on appeal, appellant argues that trial counsel was ineffective for failing

to retain and call a firearms expert who could have tested and compared .40-caliber shell casings found at the crime scene following Lunnie's murder with a Glock semi-automatic handgun that was recovered six months later in a vehicle driven by an individual named Corey Bealer. Appellant contends that this evidence would have changed the outcome of the trial by showing a connection between Bealer and the murder weapon.

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. 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. *Id.* In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *Id.*

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 ___; *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___; see *Jammett v. State*, 2010 Ark. 28, ___ 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.

Here, an expert in firearms testified at trial that he compared Bealer's weapon with the shell casings recovered from the murder scene and concluded that the shell casings had markings that appeared to match the breech face of the handgun. Thus, the murder weapon in Bealer's possession raised an inference of third-party guilt. According to trial counsel, she chose not to have Bealer's weapon tested because the tests might have excluded the gun as the murder weapon. In that instance, she could not have continued to suggest that Bealer was the perpetrator. Clearly, this evidence supports the circuit court's determination that defense counsel's decision was a strategic one and not an omission resulting in ineffective assistance of counsel. We have recognized that trial counsel must use his or her best judgment to determine which witness will be beneficial to the client. *See Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005) (per curiam). Because of the subjective nature of professional judgment, questions of trial strategy are not grounds for relief under Rule 37.1. *Knappenberger v. State*, 283 Ark. 210, 672 S.W.2d 54 (1984) (per curiam).

For his second point on appeal, appellant argues that trial counsel was ineffective for

failing to pursue information regarding a potential eyewitness who could have provided exculpatory testimony. Specifically, appellant asserts that an individual named Anthony Salley was present during the Lunnie murder and that, if Salley had been discovered through the normal course of investigation, he could have provided testimony including an identification of the person who committed the murder.

With the foregoing Rule 37.1 principles in mind, we turn to the testimony of Salley, an admitted cocaine addict, who testified that he was in the vicinity of the crime scene with Corey Bealer. Salley further testified that Lunnie approached them, and Bealer shot Lunnie in the chest and again in the chest or head. However, the medical examiner testified that Lunnie was not shot in the head but sustained a wound to the left mid-back and the posterior lateral left mid-thigh. These wounds were consistent with Lunnie's having been shot as Lunnie walked *away* from the shooter, and the circuit court discounted Salley's testimony. We defer to the better position of the circuit court to gauge the credibility of the witness and to assess the impact of the testimony. *See State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Additionally, trial counsel testified that she had a notepad with the name "Sally" written on it, presumably a name given to her by appellant, but Salley's testimony about the matter went unrefuted because appellant did not testify at the hearing to explain what he provided to trial counsel or how trial counsel handled the investigation of the case. In any case, counsel's potential errors do not establish a reasonable probability that the outcome of the trial would have been different, particularly in light of the testimony that one eyewitness and appellant's girlfriend implicated appellant in Lunnie's murder. For these reasons, we hold that the circuit court properly denied appellant's petition for postconviction relief. Accordingly, we affirm.

Affirmed.