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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-16-712

	Opinion Delivered February 7, 2018
KENNETH RAY OSBURN APPELLANT	APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. 02CR-07-177]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Judge

In 2008, an Ashley County jury convicted Kenneth Ray Osburn of capital murder and kidnapping of Casey Crowder. He was sentenced by the circuit court to life imprisonment without parole and life, respectively. His convictions were reversed and remanded for a new trial on direct appeal by the Arkansas Supreme Court. *Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771. On June 18, 2014, Osburn pled guilty to kidnapping and the reduced charge of second-degree murder in exchange for ten-and thirty-year sentences, respectively, for a total sentence of forty years' imprisonment.

On September 16, 2014, Osburn filed a petition for postconviction relief in the circuit court pursuant to Arkansas Rule of Criminal Procedure 37. After an evidentiary hearing, the circuit court entered an order on June 15, 2016, denying Osburn's petition. Osburn filed a timely notice of appeal. We affirm.

Osburn argues on appeal that his counsel, Jim Wyatt, was ineffective; specifically, Osburn contends that Wyatt failed to properly advise him in connection with his guilty plea, failed to share with him or challenge the validity of inmate statements; and failed to move to dismiss based on a speedy-trial violation.[1] We do not reverse the denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Johnson v. State*, 2018 Ark. 6, at 2, 534 S.W.3d 143, 146. A finding is clearly erroneous when the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that the circuit court made a mistake. *Id.*

"The benchmark for judging a claim of ineffective assistance of counsel must be 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." *Mancia v. State*, 2015 Ark. 115, at 4, 459 S.W.3d 259, 264 (citing *Henington v. State*, 2012 Ark. 181, at 3–4, 403 S.W.3d 55, 58). Pursuant to *Strickland*, we assess the effectiveness of counsel under a two-prong standard. First, a petitioner raising a claim of ineffective-assistance-of-counsel must show that his counsel's performance fell below an objective standard of reasonableness. *Id.*, 459 S.W.3d at 264. A court must indulge in a

[1]Osburn's Rule 37 petition also alleged that his trial counsel was ineffective because he refused to provide discovery or to permit Osburn to inspect discovery; refused to resign after Osburn submitted a conflict-of-interest issue to the Office of Professional Conduct; failed to sever charges; failed to interview witnesses; failed to file a motion to suppress; failed to object to inadmissible testimony; and failed to prepare him for trial. Of these seven allegations, Osburn presented evidence at the Rule 37 hearing on only one of them—the conflict-of-interest issue. Significantly, the circuit court did not rule on any of these seven issues; therefore, they are not preserved for appeal. *Smith v. State*, 2010 Ark. 137, at 10, 361 S.W.3d 840, 847–48 (holding that when the petitioner fails to obtain a ruling in the circuit court on issues in a petition for postconviction relief, the appellate court is barred from addressing them).

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*, 459 S.W.3d at 264.

Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* at 4–5, 459 S.W.3d at 264. The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Id.* at 5, 459 S.W.3d at 264. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*, 459 S.W.3d at 264. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*, 459 S.W.3d at 264. Additionally, conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. *Id.*, 459 S.W.3d at 264.

Osburn's first ineffective-assistance-of-counsel argument is that his guilty plea was not intelligently and voluntarily entered because he did not receive the sentence for which he bargained. He argues that he was told by Wyatt that he would have to serve only seven years of the thirty-year sentence for the second-degree-murder conviction. He also claims that the circuit court should not have accepted his plea because he never said that he pled guilty. Rather, he argues that he only stated that he accepted the plea "because of my family."

The *Strickland* standard applies to allegations of ineffective assistance of counsel pertaining to possible prejudice in guilty-plea and sentencing proceedings. *Mancia*, 2015 Ark. 115, at 5, 459 S.W.3d at 264. To establish prejudice and prove that he or she was deprived of a fair trial due to ineffective assistance of counsel, a petitioner who has pled guilty must

demonstrate a reasonable probability that, but for counsel's errors, the petitioner would not have so pled and would have insisted on going to trial. *Jones v. State*, 2015 Ark. 119, at 5 (citing *Buchheit v. State*, 339 Ark. 481, 483, 6 S.W.3d 109, 111 (1999) (per curiam) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Further, "on appeal from the denial of a Rule 37 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, were the pleas made on the advice of competent counsel." *Mancia*, 2015 Ark. 115, at 11, 459 S.W.3d at 267 (citing *Branham v. State*, 292 Ark. 355, 356, 730 S.W.2d 226, 227 (1987)).

In its order denying Osburn's Rule 37 petition, the circuit court stated that it had reviewed the guilty-plea-hearing transcript, along with Osburn's plea statement and sentencing recommendation. At the guilty-plea hearing, Osburn was advised by the court that he was pleading guilty to kidnapping and second-degree murder in exchange for an aggregate sentence of forty years' imprisonment. Osburn said that he understood the plea and that the total maximum statutory penalty for these crimes was life imprisonment. He testified that he further understood the rights he was giving up by pleading guilty. He stated that he had seen, signed, and understood his plea statement that confirmed the State's sentencing recommendation of forty years' imprisonment. Osburn testified that he reviewed the plea statement with his attorney. He confirmed there were no forces, threats, or promises used to get him to enter his guilty plea. When asked what his plea was, Osburn stated that he was "pleading guilty to it."

Osburn's plea statement also clearly sets forth that he could receive a maximum sentence of life imprisonment. In his plea statement, Osburn answered yes when asked if he

understood the minimum and maximum possible sentences for his offenses; that he was waiving his right to a trial by jury and to an appeal; that his plea had not been induced by any force, threat, or promise, apart from the plea agreement; that the court was not required to carry out any understanding between Osburn, his attorney, and the prosecutor and that power of sentencing was with the court only; that no one had made him any promises regarding parole eligibility, meritorious good time earned, early release, or anything of that nature in order to get him to enter the plea; and that if his case went to trial, the State could meet its burden of proving his guilt beyond a reasonable doubt. The sentence recommendation attached to the plea statement reflects that the State recommended forty years' imprisonment.

Based on the transcript of the guilty-plea hearing, the plea statement, and the sentence recommendation, we hold that the circuit court did not clearly err in finding that Osburn's guilty plea was intelligently and voluntarily entered. On several occasions he stated that he was pleading guilty to the reduced charge of second-degree murder and to kidnapping. He stated that he understood the sentence recommendation of forty years. He confirmed that he signed the plea statement and reviewed it with his attorney before signing it. He stated that he was not forced or threatened to enter into the plea agreement. This evidence demonstrates that Osburn agreed to the exact sentence that he received. There was no evidence at the guilty-plea hearing or in the plea statement that Osburn would have to serve only seven years of the thirty-year sentence for the second-degree-murder conviction. Osburn testified at the Rule 37 hearing that he did not have anything in writing to support his claim that Wyatt said he would have to serve only seven years for the second-degree-

murder conviction. Wyatt was not at the Rule 37 hearing, and Osburn admitted that he did not subpoena Wyatt. And while Osburn testified at the Rule 37 hearing that he did not plead guilty but accepted the guilty plea "because of my family," this is contrary to his testimony at the guilty-plea hearing, wherein he, on more than one occasion, pled guilty to the charges.

Moreover, we must keep in mind the alternative that Osburn was facing had he not pled guilty—retrial for the capital murder and kidnapping of Casey Crowder. Capital murder is punishable by death or life imprisonment without parole. Ark. Code Ann. § 5-10-101(c)(1)(A)(i), (ii) (Supp. 2017). Osburn's plea that provided the possibility of eventual release is further evidence that he made an intelligent and voluntary choice given this alternative.

For these reasons, we hold that the circuit court's finding that Osburn's guilty plea was intelligently and voluntarily given after being fully advised of his rights was not clearly against the preponderance of the evidence. We further hold that Osburn failed to establish prejudice and prove that he was deprived of a fair trial due to ineffective assistance of counsel in connection with his guilty plea. We affirm on this point.

In his Rule 37 petition, Osburn also alleged that Wyatt failed to challenge the validity of the statements of Steve Moore and Danny Cromeans that Osburn claims Wyatt used to threaten him with the death penalty and coerce him to plead guilty. Osburn also alleged that his counsel refused to allow Osburn to read the statements.

The only evidence presented at the Rule 37 hearing on this issue was Osburn's testimony that "Wyatt threatened me with the death penalty on inmate statements from Louisiana" that were allegedly inculpatory. Based on this evidence, the circuit court ruled

that Osburn failed to meet his burden of proving that Wyatt's conduct fell below an objective standard of reasonableness on this issue. Specifically, the circuit court expressed that it knew of no way for counsel to have challenged the statements of the inmates without a trial and that counsel must have shared the statements with Osburn because he was aware of them.

We hold that the record fails to demonstrate that the circuit court clearly erred in finding that Wyatt's performance fell below an objective standard of reasonableness on this point. The statements of which Osburn complains were not introduced into evidence. The contents of the statements were not introduced either. Again, Wyatt was not at the Rule 37 hearing because Osburn admittedly did not subpoena him.

The only evidence presented on this issue was Osburn's conclusory accusation that Wyatt used the statements to threaten him with the death penalty. Conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. *Mancia*, 2015 Ark. 115, at 5, 459 S.W.3d at 264. Furthermore, nothing in the transcript of the plea hearing demonstrates that Osburn felt threatened or forced by his counsel, or any other party, to plead guilty. To the contrary, both the transcript of the guilty-plea hearing and Osburn's acknowledged and signed plea statement confirm that he was not threatened or forced into pleading guilty. Therefore, we hold that Osburn has failed to meet the *Strickland* standard, and we affirm the circuit court on this point.

Finally, Osburn alleged in his Rule 37 petition that Wyatt failed to "push [the] speedy trial issue" and worked with the State to secure multiple continuances. At the Rule 37 hearing, Osburn testified that his case was continued because the prosecutor did not want to

go to trial. Osburn also stated that "Wyatt told me the continuance was for one thing; [the circuit court] told me it was for another."

The circuit court ruled that Osburn failed to meet his burden of proving that Wyatt's conduct fell below an objective standard of reasonableness on this issue. The circuit court found that Osburn's speedy-trial claim was waived because, generally, a guilty plea operates as a waiver of the argument. The circuit court also found that after the Arkansas Supreme Court's September 14, 2009 mandate, the record revealed numerous "defense motions and tactics" that delayed the case.

Generally, a defendant waives his or her right to a speedy trial when he or she later pleads guilty. *Hall v. State*, 281 Ark. 282, 284, 663 S.W.2d 926, 927 (1984) (citing Ark. R. Crim. P. 30.2). However, a waiver of the right to a speedy trial does not operate, as a matter of law, as a waiver of the right to effective assistance of counsel. *Id.*, 663 S.W.2d at 927. The constitutional right to effective assistance of counsel at the time of entering a plea of guilt is not vitiated by Rule 30.2. *Id.*, 663 S.W.2d at 927.

Pursuant to the Arkansas speedy-trial rule, any defendant charged with an offense and incarcerated pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3. Ark. R. Crim. P. 28.1(b) (2017).

The speedy-trial time in the instant case began to run on March 1, 2010, the date of the supreme court's mandate.[2] Ark. R. Crim. P. 28.2(e). Therefore, when Osburn pled guilty on June 18, 2014, he was well outside the twelve-month speedy-trial period, and he presented a prima facie case that his right to a speedy trial had been violated. Once an appellant presents a prima facie case of a speedy-trial violation, the burden shifts to the State to show that the delay is the result of the appellant's conduct or otherwise legally justified. *Clements v. State*, 312 Ark. 528, 532, 851 S.W.2d 422, 424 (1993).

The record reflects that the time period from March 1, 2010, to October 24, 2010—a total of 237 days—is included in the speedy-trial period. However, the record further reflects that the time from October 25, 2010, to August 7, 2014, was excluded from the speedy-trial calculation. Orders were entered granting defense-requested continuances and excluding the following time periods: October 25, 2010, to February 3, 2011; February 3, 2011, to December 2, 2011; December 2, 2011, to September 19, 2012; September 19, 2012, to April 9, 2013; April 9, 2013, to August 22, 2013; and August 22, 2013, to August 7, 2014.[3]

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[2]In the instant case, the circuit court found that the mandate was issued on September 14, 2009; however, that mandate was recalled. A subsequent mandate was issued on March 1, 2010.

[3]From October 25, 2010, to August 7, 2014, the defense filed motions for independent DNA testing, to prohibit the State from seeking the death penalty on retrial, to dismiss, and for mental evaluation, which resulted in many extended continuances. For example, the defense's motion to prohibit the death penalty on retrial for capital murder was filed on September 23, 2010, and was denied by the circuit court on January 4, 2011. The defense appealed the issue to the Arkansas Supreme Court, which affirmed on October 6, 2011. *Osburn v. State*, 2011 Ark. 406. The defense's petition for rehearing was denied by the Arkansas Supreme Court on December 1, 2011. *Osburn v. State*, 2011 Ark. 514. The defense filed a petition for a writ of certiorari with United States Supreme Court, which was denied on October 12, 2012. *Osburn v. State*, 568 U.S. 827 (2012).

Continuances requested by a defendant or his counsel are excluded from speedy-trial calculation. Ark. R. Crim. P. 28.3(c).

When Osburn pled guilty on June 18, 2014, only 237 days since the mandate had been applied to the speedy-trial period, and he was well within the 365-day speedy-trial time required by the rule. The rest of the time is attributable to requests for continuances by the defense, and orders were entered excluding that time from the speedy-trial calculation. Therefore, if Wyatt had moved for a dismissal, the circuit court would have used the above calculations and found that no speedy-trial violation occurred. Because a motion to dismiss would have been denied, Osburn has failed to show that Wyatt's conduct fell below an objective standard of reasonableness in not moving to dismiss on this basis. Accordingly, we affirm the circuit court's denial of relief on this point.

In sum, we hold that the circuit court's decision is affirmed. Osburn is entitled to no postconviction relief.

Affirmed.

ABRAMSON and HIXSON, JJ., agree.

Kenneth Ray Osburn, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.