Cite as 2019 Ark. App. 85

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-18-600

		OPINION DELIVERED: FEBRUARY 13, 2019
RICHARD SHRECK	APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CR-14-827]
V.		HONORABLE CHARLES E. CLAWSON, JR., JUDGE
STATE OF ARKANSAS	APPELLEE	REVERSED AND REMANDED

ROBERT J. GLADWIN, Judge

Appellant Richard Shreck, whose conviction by a Faulkner County Circuit Court jury of two counts of conspiracy to commit rape was affirmed on appeal, *see Shreck v. State*, 2017 Ark. 39, 510 S.W.3d 750[1], filed a petition for postconviction relief. The Faulkner County Circuit Court denied the petition and motion for reconsideration. Shreck appeals, arguing that the circuit court erred in denying his petition under Arkansas Rule of Criminal Procedure 37.1 (2018) without holding an evidentiary hearing and for failing to make findings of fact and conclusions of law as required by Rule 37.3. We agree; therefore,

[1]Shreck's direct appeal to this court was unsuccessful. *See Shreck v. State*, 2016 Ark. App. 374, 499 S.W.3d 677. The Arkansas Supreme Court granted Shreck's petition for review and ultimately also affirmed. The mandate was issued on March 7, 2017.

we reverse and remand for the circuit court to either hold a hearing or issue written findings in compliance with Rule 37.3(a).

I. *Facts and Procedural Background*

As set forth in the final underlying appeal before our supreme court, the relevant facts and procedural background are as follows:

> The appellant entered an online chatroom and began to chat with a police officer trained to investigate crimes against children. The chatroom, which they were both in, typically includes people who chat about sexually deviant behavior, including sexually exploiting children. The online profile of the officer was that of a single mother of a ten-year-old daughter and an eight-year-old son whom she was willing to make available for the sexual gratification of the chatroom participants. The conversation between appellant and the officer involved sexual acts with the officer's imaginary children. Appellant ultimately made arrangements to meet the officer and her imaginary children at a parking lot in Conway and take them to Hot Springs for sex. Upon meeting the officer, the appellant was placed in custody.
>
> During the online conversations, appellant admitted that he was interested in "snuff" and bondage sex. He also stated that he had thought about snuffing a child. Further, during one of the conversations, appellant sent a picture of a device he made for snuffing women. He also asked for pictures of the officer's imaginary children and stated that he was talking about snuff sex with others, including a sixteen-year-old girl. Testimony at circuit court described snuff sex as killing someone during or after sex and indicating that it may be done by impaling someone with a sharpened rod.
>
> Appellant was ultimately charged with two counts of conspiracy to commit rape and two counts of attempted internet stalking of a child. The internet-stalking charges were nolle prossed by the State. A jury subsequently convicted the appellant of two counts of conspiracy to commit rape and sentenced him to 30 years in prison on each count.
>
> During the sentencing phase, the officer testified regarding the conversations centered on "snuff" and bondage sex. Additionally, the State entered into evidence pictures that depicted women being impaled during sex, which were found on the defendant's computer, as well as the picture of the device the defendant made for impaling women.

Shreck, 2017 Ark. 39, at 1–2, 510 S.W.3d at 751.

Shreck then filed a timely petition for post-conviction relief in the circuit court. In that petition, he alleged that trial counsel was ineffective in a number of respects. In a three-paragraph order, the circuit court denied Shreck's Rule 37 petition on March 26, 2018:

> Comes now for consideration of the issues presented by the Petitioner in his Rule 37 Petition. Based on the said motion and the State's response, the Court makes the following findings of fact and conclusions of law:
>
> A petition for relief pursuant to Rule 37 was filed by the Petitioner on April 20, 2017. A subsequent order was entered allowing an amendment to that petition to be filed on October 27, 2017. No amended petition was ever filed[,] and the State responded on December 21, 2017.
>
> Having reviewed the petition and the response it is the Court's finding that the allegations raised by Mr. Shreck in his Rule 37 petition are conclusory and at this point would be [sic] require a hearing. Therefore, the petition for Rule 37 relief is hereby denied.

Shreck filed a motion on April 4, 2018, in which he requested reconsideration and the entry of adequate findings of fact and conclusions of law. The circuit court denied that motion in a three-sentence order filed on April 10, 2018:

> On this day comes on to be heard the Defendant's Motion for Reconsideration. IT IS HEREBY ORDERED that the Defendant's Motion for Reconsideration should be and is hereby denied.
> IT IS SO ORDERED.

Shreck filed a timely notice of appeal on April 17, 2018.

II. *Standard of Review*

We do not reverse the denial of postconviction relief unless the circuit court's findings are clearly erroneous. *King v. State*, 2018 Ark. App. 605, at 3, __ S.W.3d __, __. 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.*

III. *Discussion*

Shreck first asserts to this court that this entire case should be reversed and remanded because the court below erroneously failed or refused to render findings of fact and conclusions of law in compliance with Ark. R. Crim. P. 37.3 in its order denying relief. Rule 37.3(a) provides: "If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the circuit court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings." Rule 37.3(c) also provides in relevant part that "[w]hen a petition is filed in the circuit court and the court does not dispose of the petition under subsection (a) hereof, . . . [t]he court shall determine the issues and make written findings of fact and conclusions of law with respect thereto."

Here, without holding an evidentiary hearing, the circuit court entered a one-page order denying relief that is not in compliance with Rule 37.3 or the supreme court's precedent interpreting that rule. The Arkansas Supreme Court has held that the provisions of Rule 37.3 requiring written findings are mandatory. *See Collins v. State*, 2018 Ark. 115, 542 S.W.3d 864; *Douglas v. State*, 2018 Ark. 89, 540 S.W.3d 685; *Turner v. State*, 2016 Ark.

96, 486 S.W.3d 757. When a circuit court concludes, without a hearing, that a petitioner is not entitled to postconviction relief from a criminal conviction, Rule 37.3(a) requires the circuit court to make written findings, specifying the parts of the record that form the basis of the circuit court's decision, and if the circuit court fails to make such findings, it is reversible error. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). The only exception is if the record on appeal conclusively shows that the petition is without merit. *Id.* In *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999), our supreme court held:

> Where the trial court concludes, without a hearing, that the petitioner is not entitled to relief, Rule 37.3(a) requires the trial court to make written findings specifying the parts of the record that form the basis of the trial court's decision. If the trial court fails to make such findings, it is reversible error, *unless* the record before this court conclusively shows that the petition is without merit. In short, while this court has affirmed the denial of Rule 37 petitions notwithstanding the trial court's failure to make written findings as required by Rule 37.3(a), we have done so only where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted.

Id. at 694–95, 1 S.W.3d at 10 (citations omitted).

We hold that the circuit court committed reversible error because the record does not "conclusively show" that Shreck is not entitled to any relief from his convictions. Shreck raised four primary claims of ineffective assistance of counsel in his Rule 37 petition: (A) a claim that counsel unreasonably failed to object to certain prejudicial evidence that had been stipulated, prior to trial, to be inadmissible; (B) a claim that counsel was ineffective for failing to object to inadmissible testimony and evidence regarding "bondage" sex that Shreck supposedly engaged in with other women; (C) a claim that

counsel unreasonably failed to investigate and present a complete defense (specifically, by failing to present proof that Shreck's intent was to meet with "Brooke Stumbaugh" without the children being present; by failing to investigate and present specific testimony to show the jury that Shreck had no intent to engage in any sexual acts with an eight-year-old girl or a ten-year-old boy; and by failing to present proof that Shreck knew that "Brooke Stumbaugh" did not have two children and that he believed he was "chatting" with a woman who had only one boy who was sixteen years old); and (D) a claim that counsel unreasonably failed to investigate and subpoena former officer Jassen Travis to demonstrate that both he and Shannon Cook had been untruthful.

For the circuit court to summarily say that all four of these claims for relief are "conclusory" is wrong as a matter of law and fact. Our review leaves this court with a "definite and firm conviction" that a mistake was committed by the circuit court. In its order, the circuit court offered no opinion or finding regarding whether it is "clear on the face of the circuit court record" that Shreck is entitled to no relief on any of his claims. In *Ross v. State*, 2017 Ark. App. 234, at 4, 518 S.W.3d 758, 763, we stated:

> Rule 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *See Wooten* [*supra*]. The circuit court, in its discretion, can deny postconviction relief without a hearing if it concludes that the petitioner is entitled to no relief. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259. Rule 37.3(a) states that
>
> > [i]f the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the circuit court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings.

> Without the specific findings, there can be no meaningful review in this court, because this court determines whether the findings are supported by a preponderance of the evidence. *Rackley v. State*, 2010 Ark. 469, 2010 WL 4922390 (per curiam). We are not required to scour the record in a Rule 37.1 appeal to determine if the petition is wholly without merit when there are no written findings. *Id.* When a hearing is not held, it is the function of the circuit court to make written findings. *Id.*

Further, on the merits of Shreck's claims for relief, he argues that this court should also find that the circuit court clearly erred in denying his Rule 37 petition in the absence of an evidentiary hearing. Because we are reversing and remanding, we decline to address Shreck's argument at this time. That said, unless the circuit court is able to issue sufficient written findings to support its denial of relief, it should consider holding an evidentiary hearing before issuing its order.

Reversed and remanded.

GLOVER and VAUGHT, JJ., agree.

Craig Lambert, for appellant.

Leslie Rutledge, Att'y Gen., by: *Pamela Rumpz*, Ass't Att'y Gen., for appellee.