

ARKANSAS SUPREME COURT

No. CR 07-710

STEVEN PINDER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 22, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF COLUMBIA COUNTY, CR
2002-30, HON. F. RUSSELL ROGERS,
JUDGE

AFFIRMED.

PER CURIAM

In 2002, a jury convicted appellant Steven Pinder of two counts of rape and sentenced him to life imprisonment on each count. Appellant appealed the judgment and this court affirmed. *Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1 that was denied by order entered April 11, 2007. Appellant now brings this appeal of that order.

The order denying the petition referenced an attached letter opinion. The letter set out the bases of the denial in a single paragraph that stated:

Having reviewed the voluminous testimony, briefs and arguments of Mr. Pinder and of the State, the Court finds as follows:

1. That Mr. Pinder has failed to state or to prove a case of ineffective assistance of counsel at his trial.
2. I could find no basis in fact or law for the relief sought by Mr. Pinder.
3. Mr. Pinder's version of the facts in the matter is incredulous and his application of the law is only that which he wishes it to be.

In his appeal of that order, appellant raises three points, as follows: (1) that the record has not been certified as a true, correct and complete record; (2) that the trial court's order failed to conform to

Ark. R. Crim. P. 37.3(c); (3) that the trial court erred in denying postconviction relief because there was “insufficient evidence.”

The State asserts in its brief that appellant’s brief is deficient in that he raises issues of ineffective assistance of counsel, because he contends that there were errors by the trial court in its findings on the claims in his petition, but fails to abstract any of the trial record. In determining a claim of ineffective assistance of counsel, the totality of the evidence before the factfinder must be considered. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). As a part of the public record already filed with the appellate court in the earlier appeal, the trial record is included as a part of the record before us. *See Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997). We need not address the issue of whether appellant’s brief was deficient under Ark. Sup. Ct. R. 4-7(c)(1)(A) or order rebriefing under Ark. Sup. Ct. R. 4-7(c)(3), however, because we go to the record, in any case, to resolve appellant’s second point. Any deficiency in the abstract does not prevent us from reaching the merits of this appeal. *See McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001) (acknowledging that this court will not examine the transcript of a trial to reverse but will do so to affirm).

Appellant contends in his first point that the record is not certified. Despite that contention, the record before us is clearly marked with a certification by the circuit clerk. Appellant alleges that the record is not complete in spite of two petitions for writ of certiorari that he had filed in this court. Appellant’s first petition was treated as a motion for access because appellant did not identify any missing portions of the record or request those missing parts be brought up to this court. *Pinder v. State*, CR 07-710 (Ark. Nov. 1, 2007) (per curiam). We ordered appellant’s Rule 37.1 petition brought up in response to appellant’s second petition, but determined that appellant had abandoned his argument as to any other documents when he filed his brief without having explained the

significance of those documents to our review. *Pinder v. State*, CR 07-710 (Ark. Jan. 17, 2008) (per curiam). It is the appellant's burden to bring up a sufficient record. *See Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005). The record before us, however, is now sufficient to resolve the issue in appellant's second point and dispose of the appeal.

Appellant asserts in his second point that the trial court's order was deficient. Arkansas Rule of Criminal Procedure 37.3(a) requires, "If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial 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." The trial court has discretion pursuant to Ark. R. Crim. P. 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). If the trial court fails to make findings as required by Rule 37.3(a), it is reversible error, unless the record before this court conclusively shows that the petition was without merit. *Carter v. State*, 342 Ark. 535, 538, 29 S.W.3d 716, 718 (2000).

The record does not indicate that there was a hearing on the Rule 37.1 petition. The trial court's order does not specify the parts of the file or record relied upon and is not adequate under Rule 37.3. We therefore examine the record to determine if it conclusively shows that the petition was without merit. Because we determine that the petition was without merit, we effectively address appellant's final point on appeal, in which he alleges error in the trial court's conclusion that he had not shown ineffective assistance of counsel, as well.

Appellant's Rule 37.1 petition set out three grounds for postconviction relief, as follows: (1) trial counsel was ineffective for failure to file a motion to suppress evidence seized from appellant's home; (2) trial counsel was ineffective for failure to request a jury instruction on third-degree carnal abuse; (3) trial counsel was ineffective for failure to request funding for DNA testing and expert

testimony.¹ The State contends that appellant failed to show the requisite prejudice as to any of the alleged bases of ineffective assistance.

Claims of ineffective assistance of counsel are subject to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that claimant was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006).

Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). The petitioner claiming ineffective assistance of counsel has the burden of overcoming the presumption that counsel's conduct falls within the wide range of reasonable professional assistance by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006).

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, ___ S.W.3d ___ (2007). The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Appellant's first claim of attorney error alleged a failure to seek to suppress bedding items

¹ Appellant asserts error by the trial court for failure to address his claims of ineffective assistance by counsel on appeal, but his petition did not identify any error in the appellate proceedings. Appellant also states that he set out some twenty-three "violations," but the three grounds identified are the only grounds listed in appellant's petition.

that were seized by the police. The testimony at trial established that appellant's wife took the police officers to their home and that a mattress that was seized at that time had a semen stain with appellant's DNA. Appellant's defense at trial was that he had not had sex with the victim as she claimed and he testified that he had masturbated while on the mattress at a later date after the victim was no longer in the home.

Because appellant admitted that the DNA was his at trial, the claim in his petition did not establish a basis to show that the jury's decision would have been different absent any error. Moreover, appellant failed to present any potential challenge to his wife's authority to consent to the search. Counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). In order to carry his burden and overcome the presumption of effectiveness, appellant's claim must have included a basis to support a successful challenge to appellant's wife's consent. The record therefore conclusively shows that this claim was without merit.

In appellant's second ground for relief, he alleged counsel was ineffective for failure to request an instruction on a charge appellant asserted was a lesser-included offense. But, because appellant based his defense on a complete denial of sexual contact with the victim, there was no rational basis for a lesser-included offense instruction. *See Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992). Appellant failed to show that counsel could have successfully argued for the instruction, given the circumstances of the case.

In his final ground for relief in his petition, appellant alleged ineffective assistance for counsel's failure to seek funding for additional testing and expert testimony in order to contest the DNA test results. As previously noted, appellant admitted that he had ejaculated on the bed. Under those circumstances, he cannot show that he was prejudiced by any failure on the part of his attorney

to contest the DNA results showing that the semen on the mattress was his.

Because the record conclusively shows that each of the claims in appellant's petition was without merit, the trial court did not err in denying postconviction relief. We need not further address the remainder of appellant's issues on appeal as raised in his third point because the trial court did not err by failing to find ineffective assistance of counsel where the petition was without merit. We affirm the trial court's decision to deny appellant's Rule 37.1 petition.

Affirmed.