

Cite as 2009 Ark. 413

ARKANSAS SUPREME COURT

No. CR 08-909

DAVID WOODY
Appellant

v.

STATE OF ARKANSAS
Appellee**Opinion Delivered** September 17, 2009PRO SE APPEAL FROM THE CIRCUIT
COURT OF POPE COUNTY, CR 2006-
192, HON. DENNIS C. SUTTERFIELD,
JUDGE

AFFIRMED.

PER CURIAM

In 2007, a jury found appellant David Woody guilty of retaliation against a witness and first-degree murder and sentenced him to an aggregate term of 552 months' imprisonment. The Arkansas Court of Appeals affirmed. *Woody v. State*, CACR 07-894 (Ark. App. Apr. 30, 2008). Appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 that was denied without a hearing. Appellant brings this appeal of the order. We affirm the denial of postconviction relief.

In his petition, appellant alleged ineffective assistance of counsel based upon trial counsel's failure to investigate and present certain witnesses, trial counsel's failure to move for a directed verdict, and trial counsel's failure to have a witness established as an accomplice or to request jury instructions to that effect. The trial court found that appellant failed to allege facts to show that the absence of witness testimony rendered counsel ineffective, that appellant failed to show a basis upon which counsel could have successfully challenged the sufficiency of the evidence, and that appellant

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did not plead facts as to a basis for any argument as to the accomplice status of the witness. The trial court also denied a motion filed by appellant for a copy of the trial transcript on the basis that trial counsel had furnished appellant with a copy of the transcript and appellant had demonstrated through citation to it that he had a copy of the transcript.

On appeal, appellant raises two points of error. In the first, he contends that the trial court erred in failing to find ineffective assistance of counsel. In his argument as to this point, appellant alleges error as to each of the three bases raised in his petition.¹ In the second point, appellant alleges error as to the trial court's finding that appellant did not need the trial transcript.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam). 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.* 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 petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

¹ Appellant rearranges the order of his claims in his points on appeal, presenting the third claim as a subpoint of the first claim. For convenience, we address the three claims in the order presented in his petition and as addressed by the trial court in its order.

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Appellant first alleges ineffective assistance for trial counsel's failure to investigate and present at trial four witnesses. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice that denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987). It is incumbent on a petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Weatherford v. State*, 363 Ark. 579, 586, 215 S.W.3d 642, 649 (2005) (per curiam).

Appellant asserts that counsel's failure to investigate was not trial strategy and that the failure to investigate the witnesses was not a reasonable decision by counsel. He contends that he was prejudiced by counsel's alleged error because the witnesses would have provided testimony that appellant did not intend to retaliate against the victim or assault him,² that counsel would have been able to make an assessment of the demeanor and credibility of the witnesses, and that counsel would have discovered additional evidence and been more effective in cross-examination of the witnesses. The trial court made no finding concerning trial strategy. Instead, the trial court found the petition had not stated facts sufficient to show that counsel was ineffective because the witnesses were not available to testify. We would agree that the petition did not set forth sufficient facts.

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,

² The State argues in its brief that appellant did not raise the precise claim that the witnesses would testify that he did not intend to retaliate against the victim and that its consideration is barred on appeal, citing *Mays v. State*, 303 Ark. 505, 798 S.W.2d 75 (1990). We need not determine whether the claim was raised through a liberal construction of appellant's claims in his pro se petition, however, because, to the extent that the claim was raised, appellant failed to demonstrate prejudice as noted below.

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263 S.W.3d 542 (2007). Appellant was required under the *Strickland* standard to demonstrate in his claim for relief that the alleged deficient behavior resulted in prejudice. Appellant did not present facts in his petition that were sufficient to support a claim that included the requisite showing of prejudice.

Appellant identified four witnesses in the petition as potential witnesses that counsel failed to investigate or call. He alleged, and reasserts on appeal, that those witnesses could have provided testimony that he was close friends with the victim and that he did not point a gun to the victim's head or assault the victim. Appellant did not identify in the petition any further testimony, evidence or information that counsel could have discovered through further investigation. As the State notes in its brief, two of the four named witnesses were codefendants.

The trial court had granted a motion to sever appellant's trial from the codefendants' trial on the basis that certain out-of-court statements by those codefendants implicated appellant in the crime. The trial record therefore demonstrates that the trial court did not clearly err in finding that any potential testimony from the codefendants could not support a showing of prejudice for failure to present those witnesses at trial.

The other two potential witnesses identified by appellant, based upon appellant's own admissions at trial, were not present at the murder and could not have provided testimony as to whether appellant assaulted the victim or held a gun to his head, even if that testimony were sufficient to demonstrate prejudice. Because there was testimony at trial that appellant was a friend of the victim, any testimony to that effect would have been cumulative and would not have been beneficial or demonstrated prejudice. The trial court did not err in finding that appellant had not

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stated a viable claim of ineffective assistance.

Next, appellant alleges trial counsel was ineffective for failure to move for a directed verdict. Appellant did not provide a basis upon which counsel could have presented a meritorious motion. 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). Appellant did not identify any element the State failed to prove or that counsel might have successfully challenged. Appellant's bare assertions as to prejudice were merely conclusory allegations. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The trial court did not err as to this point in finding appellant failed to set forth a claim sufficient under the *Strickland* standard.

Finally, appellant alleged that counsel was ineffective for failing to have a witness established as an accomplice or to request jury instructions concerning the testimony of that witness. The trial court was not clearly erroneous in finding that trial counsel was not ineffective. Even if the issue should have been submitted to the jury, appellant cannot demonstrate prejudice if the testimony of the accomplice was corroborated. *See McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002).

The necessary corroboration must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001)(per curiam). It is not necessary that an accomplice be corroborated on every fact or detail. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). The acts, conduct, and declarations of the accused before or after the crime may furnish the necessary corroboration. *Id.* Here, appellant's own statements established both the commission of the offenses and that appellant had participated

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in discussions concerning whether the victim provided information to the police and what action was necessary as a result, and that appellant then collected the victim and brought him to the location where he was murdered. The record clearly demonstrates that the asserted accomplice testimony was sufficiently corroborated.

Because we hold that the trial court did not err in denying postconviction relief on the allegations raised in the petition, appellant's arguments as to error in his second point on appeal also fail. Appellant alleged in his motion a need for the transcript to support his claims for various reasons, but none pertained to any possible cures for the deficiencies in the stated claims. A copy of the record would not have been beneficial concerning the issues that were in question. Appellant therefore did not demonstrate in the motion a specific compelling need for documentary evidence that would have supported his allegations. *See Moore v. State*, 324 Ark. 453, 921 S.W.2d 606 (1996) (per curiam); *see also Austin v. State*, 287 Ark. 256, 697 S.W.2d 914 (1985) (per curiam).

The trial court did not clearly err in finding that appellant's petition for postconviction relief failed to establish a factual basis sufficient to support relief. Accordingly, we affirm the denial of postconviction relief.

Affirmed.