Cite as 2009 Ark. 443

ARKANSAS SUPREME COURT

No. CR 09-502

GEORGE E. FRENCH
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered September 24, 2009

PRO SE PETITION FOR WRIT OF MANDAMUS AND MOTIONS FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF AND FOR APPOINTMENT OF COUNSEL [CIRCUIT COURT OF SALINE COUNTY, CR 2007-659, HON. GRISHAM A. PHILLIPS, JR., JUDGE]

PETITION FOR WRIT OF MANDAMUS TREATED AS MOTION FOR WRIT OF CERTIORARI AND DENIED; APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 2008, appellant George E. French entered negotiated pleas of guilty to kidnapping, two counts of aggravated assault on a family or household member, intimidating a witness, possession of firearms by a felon, and two counts of first-degree terroristic threatening, with one count of third-degree domestic battery *nol prossed*. An amended judgment entered on February 20, 2008, reflects that the trial court imposed an aggregate sentence of 120 months' imprisonment in the Arkansas Department of Correction, with an additional suspended imposition of sentence for 120 months on the kidnapping charge, and imposed a no contact order as to the victim and an order limiting appellant's contact with his son to letters or under court order.

Appellant timely filed in the trial court a pro se petition for postconviction relief under

Arkansas Rule of Criminal Procedure 37.1 that was denied. Appellant has lodged an appeal of that order in this court and has filed pro se motions for an extension of time in which to file his brief and for appointment of counsel.

Appellant has additionally filed a pro se petition for writ of mandamus in which he requests that this court order the trial court to provide him with a portion of the transcript from the jury trial that was suspended after his attorneys negotiated a plea agreement with the prosecution while the jury deliberated. In the petition, appellant alleges that the transcript is needed for him to prepare his brief and to address the third ground for relief raised in his petition for postconviction relief. Because appellant desires access to a copy of the transcript, we treat the request as a motion for writ of certiorari to bring up the missing portion of the record. We deny the request, however, because a copy of the transcript is not needed to determine that appellant's claim and his petition for postconviction relief were clearly without merit. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam).

Here, appellant raised four grounds for postconviction relief in his petition, as follows: (1) ineffective assistance of counsel for pressing appellant to accept the plea offer; (2) prosecutorial misconduct; (3) denial of a fair and impartial trial as a result of incorrect evidentiary rulings; (4) a lack of due process in the trial proceedings based upon judicial bias and improper comments during opening statements. Only one of the four grounds stated a cognizable claim, and that claim did not support postconviction relief.

When a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to Rule

37.1 are those which allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). Because appellant entered pleas of guilty, the only cognizable claim in his petition was the initial claim that counsel was ineffective. That claim was also clearly without merit.

The question presented in an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based upon 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). 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 so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). As to the prejudice requirement, where the judgment was based upon a guilty plea, a petitioner must demonstrate that there was a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial, or, in this case, insisted that the trial continue. *Herred*, 332 Ark. at 251, 964 S.W.2d at 397; *see also Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

In appellant's first claim, he alleged that counsel had told him that he would get a life sentence if he did not take the plea agreement, that counsel stated that appellant could still raise his son if he took the plea, and that counsel neglected to mention a continuing possibility of a life sentence. Appellant was charged with kidnapping, a class Y felony, which carried a possible sentence range of ten years to forty years or life. Ark. Code Ann. § 5-11-102 (Repl. 2006); Ark.

Code Ann. § 5-4-401 (Repl. 2006). Appellant could have received a life sentence on the charge. Appellant did not demonstrate that he could have been prejudiced by statements by counsel concerning the possibility that he could receive a life sentence because appellant could in fact have received a life sentence.

Appellant's allegations concerning the alleged statement that he could raise his son if he took the plea and the failure to advise him concerning the continuing potential for a life sentence are in conflict with the discussion of those issues during his plea hearing. During the hearing, there was discussion of the no contact order concerning the victim and how that would impact contact with appellant's son. The prosecution indicated that appellant could have contact with his son through letters provided that there was no reference to the victim. Counsel advised appellant, on the record, that any visitation with his son after appellant's release would be an issue to be determined by court order and that a court would not likely permit visitation at the prison. Appellant indicated that he understood the discussion and agreed to the terms. Also on the record, counsel indicated, without exception from appellant, that he had specifically advised appellant that he could be subject to up to a life sentence should he violate the terms of the suspended imposition of sentence.

Because the sole cognizable claim in appellant's petition was clearly without merit, appellant could not prevail on appeal. We accordingly dismiss the appeal and the motions are therefore moot.

Petition for writ of mandamus treated as motion for writ of certiorari and denied; appeal dismissed; motions moot.