

Cite as 2009 Ark. 548

SUPREME COURT OF ARKANSAS

No. CR 07-1229

EFRAIN VIVEROS
Appellant

v.

STATE OF ARKANSAS
Appellee**Opinion Delivered** November 5, 2009PRO SE APPEAL FROM THE CIRCUIT
COURT OF CRAWFORD COUNTY, CR
2003-379, HON. GARY R. COTTRELL,
JUDGE

AFFIRMED.

PER CURIAM

Appellant Efrain Viveros appealed his judgment of conviction, resulting from a jury trial, on charges of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and two counts of failure to appear. The Arkansas Court of Appeals affirmed the judgment. *Viveros v. State*, CACR 06-173 (Ark. App. Mar. 14, 2007). Appellant timely filed in the trial court a pro se petition for relief under Arkansas Rule of Criminal Procedure 37.1 that was denied, and he now appeals that decision. We affirm the denial of postconviction relief.

Appellant raises five points on appeal. In his first point, appellant asserts ineffective assistance of counsel on the bases that: (1) counsel did not perform an adequate investigation; (2) counsel failed to object to the traffic stop, appellant's detention, and appellant's consent to search through a pretrial suppression motion; (3) counsel failed to properly move for a directed verdict so as to preserve a sufficiency-of-the-evidence argument for appeal; (4) counsel failed to investigate or request appointment of a bilingual translator/investigator/co-counsel; (5) counsel failed to investigate or research treaties that

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would have provided a right to have the Mexican Consulate informed of his arrest and assist him. In his second point, appellant claims that the vehicular search was unconstitutional. In his third point, appellant asserts that the trial court abused its discretion and violated his due process rights by failing to ensure an interpreter was provided as needed. More specifically, appellant contends that an interpreter was needed before his trial and that the trial court erred in suppressing the evidence, when no interpreter was present at his arrest and the trial court required an interpreter to explain the Rule 37.1 petition proceedings to appellant. In his fourth point, appellant alleged that the trial court abused its discretion in failing to suppress the evidence at trial. In his final point, appellant asserts that the trial court abused its discretion and that his sentence was excessive.

In his first point on appeal, appellant asserts that trial counsel was ineffective. 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.*

Appellant first asserts that counsel failed to investigate, or challenge through a pretrial suppression motion, the traffic stop, appellant's detention, and appellant's consent to search. He contends that he could not have consented to the search because he could not speak English, that further investigation would have led to the discovery that certain information was not available to the arresting officer and that the detention exceeded fifteen minutes. The trial court found that counsel's

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pretrial investigation and research were not inadequate, noting that appellant had testified during the hearing on his Rule 37.1 petition that he thought his attorney did a good job up until he made a statement concerning certain jury instructions and that counsel had filed a motion to suppress.

Portions of appellant's arguments concerning ineffective assistance on appeal, including some aspects of his claims as to an inadequate motion for suppression and his claims as to counsel's failure to adequately move for a directed verdict, are not arguments presented to the trial court. Issues raised for the first time on appeal, even constitutional issues, will not be considered because the circuit court never had an opportunity to make a ruling. *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005). To the extent that appellant's argument may have been presented more generally to the court in the petition, he was obliged to obtain a ruling on any issue to be preserved for appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Besbears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

Moreover, even as to appellant's arguments for which the court did provide a ruling, the trial court did not clearly err in finding counsel was not ineffective. The trial record shows that trial counsel did file a motion to suppress, did assert that appellant could not have given consent to the search, and did assert that the stop and detention were unconstitutional. On direct appeal, the court of appeals agreed with the trial court's rulings that appellant did not have standing to object to the search, that the stop and detention were warranted, and that the driver provided consent for the search.

A petitioner carries the burden to prove his allegations for postconviction relief. *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990); *Porter v. State*, 264 Ark. 272, 570 S.W.2d 615 (1978) (holding under prior law). 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); *see also State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Here, appellant failed to present facts

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to show that counsel did not contest appellant's consent to the search or that the stop and detention were unlawful. Counsel, in fact, did so and was not successful.

Next, appellant alleges that trial counsel was deficient because he did not use a bilingual investigator or co-counsel or investigate the possibility of having the Mexican Consulate provide such services. As the trial court found, appellant did not demonstrate any facts to show that he was prejudiced by the alleged error.

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, 263 S.W.3d 542 (2007). 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, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, the trial court found that trial counsel had used interpreters in communicating with appellant before trial, either relatives or interpreters available through the Administrative Office of the Courts, and that appellant did not offer any evidence that might have been discovered and presented at trial, if an investigator had been retained. We agree that appellant did not demonstrate that he was prejudiced by any error in this regard.

Appellant's remaining arguments, to the extent those claims were raised below, do not raise claims of ineffective assistance of counsel. Rather, those claims are based upon allegations of trial error.

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Postconviction proceedings under Rule 37.1 do not permit a petitioner to raise questions that might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Of these last claims, only petitioner's final claim, that his sentence was excessive, is the type of error to fall within the exception.

As the State points out in its brief, appellant did not include this claim in his petition. To some extent, it was raised during the postconviction hearing, but the trial court did not provide a ruling on the issue. Accordingly, the issue is not preserved. *Johnson v. State*, 2009 Ark. 460, ___ S.W.3d ___ (per curiam).

Appellant failed to demonstrate error by the trial court. The denial of postconviction relief is therefore affirmed.

Affirmed.