

Cite as 2009 Ark. 80 (unpublished)

ARKANSAS SUPREME COURT

No. CR 07-891

KEELA McGAHEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **February 19,**
2009

APPEAL FROM THE CIRCUIT COURT
OF DESHA COUNTY, CR 2002-61,
HON. DON E. GLOVER, JUDGE

AFFIRMED.

PER CURIAM

In 2003, appellant Keela McGahey was found guilty by a jury of use of paraphernalia to manufacture methamphetamine and manufacture of methamphetamine, and sentenced to an aggregate term of 300 months' imprisonment. We affirmed. *McGahey v. State*, 362 Ark. 513, 210 S.W.3d 49 (2005).

Subsequently, appellant timely filed in the trial court a verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. After conducting a hearing, the trial court denied the petition. Appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was 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. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).



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On appeal, appellant contends that the trial court erred in finding that trial counsel was not ineffective in representing her below in five instances.¹ Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

Appellant first contends that trial counsel was ineffective because his representation of her conflicted with his representation of appellant's codefendant, James Hartwig, III. The record in appellant's direct appeal reveals that the State filed a pretrial motion to disqualify trial counsel from joint representation of both appellant and Hartwig.² The trial court questioned counsel, appellant and Hartwig on multiple occasions regarding counsel's dual representation. Each time, appellant unequivocally stated that the risks had been fully explained to her by counsel and she had no objection to the arrangement. Based on the responses given and written waivers by appellant and Hartwig, the trial court denied the State's motion. Appellant's sole issue in her direct appeal was that counsel's joint representation resulted in prejudice to her for

¹In the Rule 37.1 petition filed in the trial court, appellant alleged ten instances of ineffectiveness but did not address all of them on appeal. Claims raised below but not argued on appeal are considered abandoned. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007).

²The record lodged in appellant's direct appeal is a public record which need not be incorporated into the record on the second appeal which stems from the same judgment of conviction. *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998) (per curiam). We may go to the record to affirm. *See, e.g., Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).



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which she was entitled to reversal of the judgment.

As the basis for her ineffective assistance claim, appellant argues here that counsel never informed her that Hartwig gave a written statement to the police which was introduced into evidence at the trial, even though she was aware that Hartwig had been interviewed by the police.³ She maintains that she could not have intelligently or knowingly waived any objection to counsel's antagonistic representation because she was unaware that the statement existed and counsel assured her that everything was "under control." She also avers that the statement implicated her in the crimes, contrary to Hartwig's promises to her that he would take complete responsibility for the criminal charges filed against them.

As noted previously, the issue of counsel's alleged conflict of interest was raised and settled in the direct appeal. Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

Moreover, postconviction proceedings under Rule 37.1 do not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Appellant contends that the direct appeal ruling was made without having the complete record that has been lodged in the instant appeal. She points out that the record here includes the Rule 37.1 hearing transcript which demonstrates that she was unaware of

³Other supporting arguments made by appellant in this point on appeal are that counsel failed to have Hartwig's custodial statement suppressed, failed to prevent introduction of appellant's prior criminal history and failed to argue that, as Hartwig's accomplice, appellant could not have been convicted by Hartwig's testimony alone. These arguments were not contained in appellant's Rule 37.1 petition. On appeal, matters outside the scope of the verified petition will not be considered. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).



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Hartwig's statement to the police.

Appellant's argument is not well taken. She acknowledged at the Rule 37.1 hearing that, at the latest, she had actual knowledge of Hartwig's statement when it was introduced into evidence at trial. She also testified that she questioned counsel about the statement at that time. Her lack-of-knowledge argument therefore could have been included in her direct appeal as an additional basis for reversal and is precluded from being raised in a Rule 37.1 petition. *Davis v. State, supra*. Appellant fails to demonstrate that trial counsel was ineffective or that the trial court erred in denying relief on this point.

Next, appellant contends that trial counsel was ineffective as he failed to properly investigate potential mitigation factors in order to present such evidence on her behalf during the sentencing phase of the trial. As evidence of counsel's failure to investigate, appellant argues that he did not speak with potential witnesses who were attending the trial⁴ or call witnesses to present her background. She claims that as a direct result of counsel's actions, the jury imposed a twenty-five year sentence. She alleges that had counsel been competent and investigated potential mitigation evidence, counsel "likely could have convinced the jury" to sentence appellant to fewer years of imprisonment.

In postconviction matters generally, conclusory statements cannot be the basis of a petitioner's relief, and the burden is on a petitioner to provide facts to support claims of prejudice. *Jackson v. State, supra; Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

⁴Appellant failed to identify the potential witnesses in her brief on appeal, see *Greene v. State, supra*, but testified at the Rule 37.1 hearing that her mother and aunt attended her trial.



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Moreover, a petitioner must demonstrate that actual prejudice resulted specifically from counsel's failure to call witnesses. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). An attorney's decision not to call a particular witness is largely a matter of professional judgment. *Strickland, supra*; *Wiggins v. Smith*, 539 U.S. 510 (2003). Even the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, in itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

Although appellant avers that counsel called no mitigation witnesses during the sentencing phase of the trial, in the instant matter, counsel called appellant who testified on her own behalf. She explained factually relevant parts of her personal history, e.g., that she never used drugs around her children and her children were always cared for by her parents while she was getting high. She asked the jury to give her the minimum sentence so that she could take care of her children and aging parents who were in poor health. Appellant's argument factually misrepresents what occurred during the sentencing phase of the trial. She cannot sustain a claim of ineffective assistance of counsel.

To the extent that appellant's argument concerns counsel's failure to call witnesses other than herself, she fails to demonstrate that her defense was prejudiced as required by *Strickland*. First, she claims in conclusory terms that her sentence of twenty-five years' incarceration was evidence of counsel's failure to investigate and call any sentencing mitigation witnesses. Appellant is required to provide facts showing evidence of actual prejudice concerning an allegation of failure of counsel to call particular witnesses. *Hill v. State, supra*. She fails here because prejudice cannot be presumed when a defendant receives a sentence that is less than the



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maximum allowed for that crime.⁵ *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002).

In addition, appellant contends that if counsel had been competent, i.e., investigated mitigating factors and called witnesses on her behalf, he would have convinced the jury to impose a sentence of less than twenty-five years' incarceration. Her argument presents a mere conclusory allegation, and conclusory averments cannot be the basis of appellant's postconviction relief. *Jackson v. State, supra; Nelson v. State, supra.*

Appellant fails to demonstrate actual prejudice which denied her a fair trial based on counsel's failure to call other witnesses or to conduct a competent investigation. *Hill v. State, supra; Jackson v. State, supra; Nelson v. State, supra.* Without a factual basis to demonstrate actual prejudice to appellant's defense, the trial court did not err when it denied relief on this point.

In her third point on appeal, appellant's entire argument is that counsel was ineffective for failing to sever her trial based on Hartwig's written statement and failing in general to seek a severance of her trial from Hartwig's trial. This conclusory argument sets forth no factual basis to show that severance would have changed the outcome of the trial under the prejudice prong of the test in *Strickland*. *Jackson v. State, supra; Nelson v. State, supra.* Therefore, the trial court did not err as appellant fails to establish a claim of ineffective assistance of counsel.

Appellant's fourth point on appeal concerns Hartwig's trial testimony. Hartwig testified on cross-examination about criminal charges filed in Pulaski County against him and appellant.

⁵The sentence range for manufacture of methamphetamine, a Class Y Felony, is ten to forty years', or life, imprisonment, pursuant to Arkansas Code Annotated § 5-4-401 (Repl. 1997).



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Here, appellant maintains that Hartwig's testimony about her prior bad acts would not have been placed into evidence had her trial been severed from Hartwig's, or if counsel had not jointly represented Hartwig and her. These arguments present a continuation of appellant's first and third points on appeal. Both conclusory allegations fail to show additional support for either point and fail to establish that appellant suffered prejudice under the test set out in *Strickland*. *Jackson v. State, supra*; *Nelson v. State, supra*. The trial court did not err in finding that counsel was not ineffective on this point.

In her final point on appeal, appellant maintains that the cumulative effect of the errors at trial supports her claim of ineffective assistance of counsel. However, the doctrine of cumulative error in allegations of ineffective assistance of counsel is not a valid basis for relief. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). The trial court's denial of relief on this basis was not in error.

Affirmed.

BROWN, J., not participating.