

ARKANSAS SUPREME COURT

No. CR 09-157

RANDOLPH MORRIS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered May 21, 2009

PRO SE MOTION FOR EXTENSION
OF TIME [CIRCUIT COURT OF
ASHLEY COUNTY, CR 2006-191,
HON. SAMUEL B. POPE, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

A jury found appellant Randolph Morris guilty of possession of cocaine with intent to deliver and fleeing and sentenced him to 480 months' incarceration in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Morris v. State*, CACR 08-298 (Ark. App. Nov. 5, 2008). Appellant timely filed in the trial court a 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 now brings the instant motion for extension of time in which he appears to seek an extension of time in order to file his brief. Because we determine that the allegations in the petition are such that it is clear that appellant cannot prevail, we dismiss the appeal and the motion is moot.

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. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, appellant raised in his petition, and the trial court ruled on, three grounds for relief. It is clear from the record before us that none of those

grounds had merit.

Appellant first asserted as a basis for postconviction relief that the trial court had erred in failing to grant a motion for suppression of evidence based upon an alleged pretextual traffic stop. Generally, a petition under Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). To fall within the very limited exception to that rule, the ground must be one so basic that it renders the judgment a complete nullity, such as a lack of jurisdiction, a violation of double jeopardy or the right to a twelve-member jury. *Id.* at 26-7, 238 S.W.3d at 32. Trial error in failure to suppress evidence does not fall within that exception. *See, e.g., Stokes v. State*, 375 Ark. 394, ___ S.W.3d ___ (2009).

Next, appellant alleged trial counsel was ineffective for failure to impeach a sheriff's deputy at the suppression hearing by pointing to inconsistent statements in the deputy's testimony concerning the direction the deputy was facing when he first observed appellant's car approach the intersection. The trial court found that the discrepancies, considering the court's familiarity with the intersection, were not significant.

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.*

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, ___ S.W.3d ___ (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, during the suppression hearing, the trial court indicated that a diagram of the intersection was not required, indicating familiarity with the intersection. The deputy testified as to where he was parked, describing the particular parking lot and what he could observe. We agree with the trial court's findings; any inconsistency in the deputy's testimony as to the direction he was facing would not have been a significant factor in determining his credibility or the accuracy of his observations. Appellant did not demonstrate a reasonable probability that the fact-finder's decision would have been different absent the alleged error by counsel in failing to cross-examine the officer on the inconsistencies. The trial court did not clearly err in finding appellant failed to affirmatively demonstrate prejudice on this claim.

Appellant's last claim asserted ineffective assistance of counsel based upon counsel's failure to make a motion for directed verdict at the close of the State's case. The trial court found that any motion for directed verdict would have been without merit. We agree that appellant's claim once again failed to demonstrate prejudice in that a motion would not have been meritorious. 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).

At trial, the testimony presented by the State was that appellant slowed down, but did not stop at a stop sign and made a turn without a signal. When the deputy followed appellant and turned on his blue lights, the car increased its speed. After a chase at speeds exceeding 100 miles per hour, the car left the road and crashed. Appellant exited from the driver's side and fled on foot, despite an order from the deputy, after identifying himself, to stop. After running about 150 feet, while still within the deputy's sight, appellant made a motion as if throwing an object over a fence before returning to the wrecked car to surrender. With another deputy's assistance, the sheriff's deputy located a plastic bag on the other side of the fence near where appellant made the throwing motion. Crime laboratory analysis identified the substance in the bag as cocaine.

Trial counsel made a motion for directed verdict at the close of the State's evidence as to the drug charge only and renewed the motion at the close of evidence in the case. Appellant's passenger testified in appellant's defense that appellant fled because he believed that they had more alcohol in the car than was legally permissible and supported the previous testimony concerning the chase and appellant's fleeing on foot after the crash. Counsel's motions were denied as to the drug charge and appellant did not identify in the petition any basis on which counsel could have successfully challenged the fleeing charge. Appellant failed to carry his burden to affirmatively demonstrate that any additional motion for directed verdict would have had merit.

Because the record shows that appellant's petition did not warrant relief, it is clear that appellant cannot prevail on appeal. We dismiss the appeal and appellant's motion is moot.

Appeal dismissed; motion moot.