

ARKANSAS SUPREME COURT

No. CR 88-05

MILTON JASPER JONES
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered May 21, 2009

PRO SE PETITION TO REINVEST
JURISDICTION IN THE TRIAL
COURT TO CONSIDER A PETITION
UNDER RULE 37.1 [CIRCUIT COURT
OF JEFFERSON COUNTY, CR 86-396]

PETITION DENIED.

PER CURIAM

In 1986, petitioner Milton Jasper Jones was jointly charged by felony information, along with Roosevelt Ferguson, with capital murder while committing burglary. The charge was brought pursuant to Arkansas Statutes Annotated § 41-1501 (Repl. 1977 & Supp. 1985) (currently codified as Arkansas Code Annotated § 5-10-101 (Repl. 2006)). Petitioner was tried separately from Ferguson in 1987 and found guilty by a jury. The trial court sentenced petitioner to life imprisonment without parole as the State had waived the death penalty as a possible sentence. This court affirmed. *Jones v. State*, 296 Ark. 135, 752 S.W.2d 274 (1988).

Petitioner now seeks leave from this court to proceed in the trial court with a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1.¹ Ark. R. Crim. P. 37.1 (1985). The petition is properly filed here. The version of Rule 37.1 in effect when petitioner's criminal judgment was entered in 1987 applied to petitioners with judgments entered before July 1,

¹For clerical purposes, the petition has been filed under the docket number assigned to the direct appeal of the judgment when it was lodged in the this court in 1988.

1989, that have been affirmed on appeal, as is the case here. Petitioner is thus required to obtain leave from this court before filing a postconviction petition in the trial court. Under the applicable version of Rule 37.1, timely petitions must have been filed within three years from the date the judgment was entered.² Ark. R. Crim. P. 37.2(c) (1985).

An exception to the time limitation is applicable when a petition states grounds sufficient to render the judgment of conviction absolutely void. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985). An allegation upon which a judgment can be voided must present a question of such fundamental and basic nature that the judgment is a complete nullity, such as a conviction obtained in a court without jurisdiction to try the accused or a judgment obtained in violation of double-jeopardy principles. *Id.*

Even questions of a constitutional dimension are not preserved beyond the direct appeal or available for collateral attack unless the issue renders the judgment void. *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). It is thus apparent that review of mere trial error is not sufficient to warrant granting relief under Rule 37.1, and the petition cannot be used as a substitute for raising an issue at trial and on appeal. *Id.*

If a defendant's argument fails to present a claim of constitutional deprivation of rights sufficient to render the judgment void, the Rule 37.1 petition is deemed to be untimely filed. *Mackey v. State*, 286 Ark. 188, 690 S.W.2d 353 (1985) (citing *Moore v. Illinois*, 408 U.S. 786 (1972)). The burden is on the defendant to establish grounds to void the judgment of conviction. *Travis v. State*,

²Rule 37 was abolished by this court effective July 1, 1989. *In the Matter of the Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. 573, 770 S.W.2d 148 (1989) (per curiam). Rule 37 was reinstated in a revised form on January 1, 1991. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. 746, 797 S.W.2d 458 (1990) (per curiam). The revised rule does not require petitioners to gain leave of this court before proceeding in the trial court.

supra.

Evidence adduced at trial showed that petitioner and Ferguson killed Ferguson's landlady, Annie Bell Hall Killingsworth. The details of the case are fully set forth in the direct appeal, *Jones v. State, supra*, and need not be reiterated.

Petitioner lists six points for relief in the petition, each having multiple sub-points. The allegations can be summarized as judicial bias and misconduct, police and prosecutorial misconduct, ineffective assistance of counsel, and errors made by the jury. Petitioner maintains that these actions and errors resulted in denial of various constitutional rights including fundamental due process and equal protection of the laws, the fundamental right to a fair trial by jury, "constitutional structural error,"³ the right to mercy and nullification by the jury, and the fundamental right to fair notice.

First, we consider petitioner's claims based upon allegations of judicial bias and misconduct. Petitioner maintains throughout the petition that the trial judge showed an obvious bias against criminal defendants from other states who commit crimes in Arkansas and took improper actions to petitioner's detriment based on petitioner's "out of state pedigree." According to petitioner, the trial court improperly denied a defense motion to suppress petitioner's in-custody confession, refused to allow the record in the direct appeal to contain certain portions the record, refused to give jury instructions on lesser-included offenses and "mechanically" imposed a sentence of life imprisonment without parole after petitioner had been found guilty. Petitioner concludes that the trial court's actions resulted in the deprivation of fundamental due-process rights and structural constitutional error.

³Petitioner filed here a pro se motion to amend the petition to cite constitutional structural error as grounds for relief under a particular point in the petition, but had already cited the argument in the original petition under that point. Thus, the motion is moot.

Petitioner's Rule 37.1 petition provides no relief based upon the trial judge's alleged bias. Allegations of bias must be raised at trial and addressed on direct appeal. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). What's more, judicial bias, in itself, does not present grounds so fundamental as to render the judgment of conviction absolutely void. *White v. State*, 290 Ark. 77, 716 S.W.2d 203 (1986) (per curiam). Further, the actions taken by the judge that petitioner alleges were based upon bias present issues of trial error, including evidentiary matters, and are conclusory and unsupported by the law or the facts. Review of mere trial error is not sufficient to warrant granting relief under Rule 37.1. *Taylor v. State, supra*. Also, conclusory arguments provide no basis for postconviction relief. *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988).

The burden is on petitioner to establish grounds to void the judgment of conviction. *Travis v. State, supra*. Here, petitioner's allegations of judicial bias and misconduct fail to demonstrate such grounds. *Id.*

Petitioner next weaves an intricate basis for allegations of unconstitutional actions by the police and prosecutor at various stages of petitioner's arrest and trial. As to the police, petitioner alleges that his arrest was unlawful and not based upon probable cause, his in-custody confession was coerced by the detectives, and his pretextual arrest afforded the detectives an opportunity to wrongfully take his fingerprints in order to falsely place him inside the victim's house and to wrongfully obtain his taped interviews and ultimate confession. Petitioner also alleges that the prosecutor unconstitutionally charged petitioner with capital murder because no probable cause existed for filing the charge and incorrectly informed the jury "at various stages of the trial proceedings" that petitioner's sentence would be life without parole if he was found guilty. Petitioner contends that these actions violated his due-process and equal-protection rights and that

he was improperly sentenced to life imprisonment without parole.

None of these allegations is sufficient to provide relief under Rule 37.1. An illegal arrest in itself is not cause to void a judgment even if no probable cause had existed to support the arrest. *Chambers v. State*, 304 Ark. 663, 803 S.W.2d 932 (1991) (per curiam). Similarly, the insufficiency of an indictment or information must be challenged prior to trial or any constitutional basis for appellate review will be waived. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994). Petitioner raised the coerced-confession argument in the direct appeal, and he is thus precluded from raising this issue again in a postconviction petition. *Taylor v. State, supra*. Also, mere trial error, including evidentiary matters, provides no Rule 37.1 relief. *Id.*

Petitioner presents no valid argument that the police or prosecutor violated any constitutional rights and fails to cite any legal basis for his position. These arguments do not warrant Rule 37.1 relief as they are merely conclusory and unsupported by convincing argument or authority. *Long v. State, supra; Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989). Petitioner did not meet his burden of establishing grounds to void the judgment of conviction. *Travis v. State, supra*.

In the next point, the instant petition contains numerous claims of ineffective assistance of counsel. Standing alone, a claim of ineffectiveness is not sufficient to void a judgment. *Maxwell v. State, supra*. Even if proven, the ineffective assistance of counsel must be of such magnitude that counsel's conduct rendered the judgment a complete nullity. *Martin v. State*, 277 Ark. 175, 639 S.W.2d 738 (1982) (per curiam). Also, demonstrations of mere trial error are not sufficient to warrant granting relief under Rule 37.1; the petition cannot be used as a substitute for raising issues that should have been raised at trial or on appeal. *Taylor v. State, supra*. And conclusory arguments provide no basis for postconviction relief. *Long v. State, supra*.

Here, petitioner contends that trial counsel failed to seek the judge's recusal from the case, raise the judge's alleged bias on direct appeal or file a complaint against the judge for violations of judicial conduct canons, fully investigate the time of the victim's death, argue that petitioner's arrest was unlawful, arbitrary and unconstitutional and done only to improperly obtain petitioner's confession and fingerprints, argue that the felony information filed by the prosecutor was unconstitutional, object to the questions the prosecutor posed to the jurors about their potential ability to sentence petitioner to life imprisonment without parole, and object to the trial court's "mechanical" imposition of petitioner's sentence and to petitioner's sentence.

These arguments are factually and legally unsupported and conclusory, attack the sufficiency of the evidence, and concern mere trial error. They are insufficient to render the judgment void. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989) (per curiam); *Taylor v. State*, *supra*; *Long v. State*, *supra*; *Martin v. State*, *supra*.

Petitioner also contends that counsel was ineffective for failing to object when the jury was not instructed on lesser-included offenses. Stated affirmatively, petitioner contends that counsel failed to request that the jury be instructed on lesser-included offenses. Petitioner concludes that counsel's alleged ineffective assistance on this point resulted in a fundamental error of constitutional proportion that voided the underlying criminal judgment. Petitioner cites *Beck v. Alabama*, 447 U.S. 625 (1980), in support of this ineffective-assistance and fundamental-error argument.

Petitioner's reliance is misplaced as *Beck* is distinguishable on its facts. First, petitioner relied upon a different defense than did Beck. Petitioner argued at trial, and reiterates in the Rule 37.1 petition, that he had absolutely no involvement in the victim's murder and was not present when it occurred. He continues to accuse Ferguson and McCoy of being the actual perpetrators of the

crime and to proclaim his complete innocence. It would have therefore made no sense to instruct the jury on first-degree murder, second-degree murder or any lesser-included offense, because a lesser-included offense was inconsistent with petitioner's trial defense. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996). Also, petitioner's jury was not faced with the possibility of imposing a sentence of the death penalty as was the jury in *Beck*.

Moreover, in petitioner's case, not requesting a lesser-included-offense instruction was likely a tactical decision. Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Vickers v. State*, 320 Ark. 437, 898 S.W.2d 26 (1995).

Petitioner fails to establish that he was entitled to present lesser-included-offense instructions to the jury. Trial counsel was not ineffective for failing to make a meritless argument with regard to the jury instructions. *Stanley v. State*, 297 Ark. 586, 764 S.W.2d 426 (1989). As petitioner fails to demonstrate that trial counsel was ineffective, he also fails to demonstrate that a fundamental error occurred at trial or that the underlying criminal judgment is absolutely void. *Travis v. State, supra*; *Martin v. State, supra*.

Next, in a series of allegations throughout the petition, petitioner maintains that fundamental errors occurred when the jury found him guilty of capital murder, and these errors deprived him of the fundamental right to fairness in his jury trial. In sum, petitioner contends that the jury verdict was unreliable as it was based upon bias, passion and prejudice, the jury was confused by evidence of other crimes for which petitioner was not being tried, the jury did not consider all elements of capital murder before finding him guilty, the "reasonable doubt" burden of proof was not applied by

the jury in his criminal trial, the facts introduced at trial proved that he was actually innocent of the crime, and the jury was impermissibly left with an “all-or-nothing” option in petitioner’s sentencing as they were not instructed on lesser-included offenses.

It is clear that petitioner’s arguments pertaining to the jury’s actions have no factual basis and are comprised of pure speculation and conjecture on the part of petitioner. Such conclusory arguments provide no basis for postconviction relief. *Long v. State, supra*. Moreover, these arguments present no more than direct attacks on the judgment by challenging the weight and sufficiency of the evidence supporting the capital murder conviction. Sufficiency of the evidence must be challenged in a direct appeal and not in a postconviction collateral attack on the judgment. *O’Rourke v. State, supra*. Petitioner does not show that he was denied fundamental fairness at his trial based upon these averments of juror error. *Travis v. State, supra*. Therefore, no basis exists to void the judgment. *Id.*

In the last point in the Rule 37.1 petition, designated as Ground Five, petitioner alleges that he was denied his fundamental constitutional right to fair notice and due process in two instances. As both allegations are premised upon factual error, neither claim of constitutional deprivation provides postconviction relief to petitioner.

Petitioner first claims that the jury was improperly instructed on accomplice liability although he was not charged as an accomplice to the crime. However, petitioner was given fair notice that he was an accomplice to capital murder because he and Ferguson were jointly charged with capital murder and burglary as the underlying felony. The trial court did not deprive petitioner of any fundamental due-process rights by giving the jury an instruction on accomplice liability, and petitioner makes no showing that he was actually prejudiced by the court’s action. *Martin v. State,*

272 Ark. 376, 614 S.W.2d 512 (1981). Petitioner therefore fails to establish that the underlying criminal judgment is void.

Petitioner next alleges that he was convicted of theft of property but that the felony information failed to give him notice that he had been charged with theft of property when he entered the victim's home. In fact, petitioner was charged with, and convicted of, burglary. The jury instruction properly defined burglary as "entering or remaining unlawfully in an occupiable structure of another person with the purpose of committing theft of property." Ark. Stat. Ann. § 41-2002 (Repl. 1977) (currently codified as Arkansas Code Annotated § 5-39-201 (Repl. 2006)). Petitioner cites no authority for the proposition that he was actually charged with theft of property or deprived of his right to fundamental due process or fair notice. This argument is factually incorrect, merely conclusory and does not provide any basis for Rule 37.1 relief. *Long v. State, supra*.

Overall, the allegations raised in petitioner's Rule 37.1 petition do not present questions of such fundamental or basic nature that the underlying criminal conviction is a complete nullity. *Travis v. State, supra*. As petitioner's arguments fail to present constitutional deprivation of rights sufficient to render the judgment void, the Rule 37.1 petition is untimely filed. *Mackey v. State, supra*.

Petition denied.