ARKANSAS SUPREME COURT

No. CR 08-547

	Opinion Delivered **June 4, 2009**
SHAHID OMAR Appellant	PRO SE APPEAL FROM THE CIRCUIT COURT OF CRAWFORD COUNTY, CR 2005-491, HON. GARY R. COTTRELL, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

In 2006, appellant Shahid Omar was found guilty by a jury of possession of cocaine with intent to deliver and possession of drug paraphernalia. He was sentenced to an aggregate term of 720 months' imprisonment. The Arkansas Court of Appeals affirmed. *Omar v. State*, CACR 06-1321 (Ark. App. Sept. 12, 2007).

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. After a hearing, the trial court denied the petition, and appellant has lodged a pro se 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).

On appeal, appellant submits two grounds for reversal.[1] In each point, he maintains that the trial court erred in finding that trial counsel was not ineffective in a particular instance. 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 failed to object when appellant was sentenced. Appellant posits that counsel was ineffective because appellant's term of imprisonment exceeded the maximum for the charge of possession of cocaine with intent to deliver.

The range of sentences that could be imposed was based upon the amount of cocaine that was found in appellant's possession. Pursuant to Arkansas Code Annotated § 5-64-401(a)(1)(D) (Repl. 2005), a defendant who has more than 400 grams of a controlled substance in his possession "shall be imprisoned for not less than forty (40) years, or life[.]" At trial, a report from the Arkansas State Crime Laboratory was introduced into evidence. Therein, the forensic chemist determined that more than two kilograms of cocaine had been seized from appellant's car.

Appellant argues here that his sentence of 720 months', or 60 years', imprisonment was not authorized. He focuses on the "or life" language of the statute and maintains that the jury had only two choices in imposing a sentence, i.e., only forty years' imprisonment or only life imprisonment. He thus reasons that trial counsel was ineffective for failing to object to his 60 year sentence for this

[1]Appellant raised several additional issues in the original petition filed in the trial court but did not raise 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).

charge.

Appellant's interpretation of the sentencing portion of the statute is incorrect. A sentence of "not less than forty (40) years" needs only to exceed a thirty-nine-year sentence. The upper end of a valid sentence based on this language is open for all intents and purposes. We have affirmed a sentence of forty-one years, *Strong v. State*, 368 Ark. 23, 242 S.W.3d 620 (2006), one hundred years, *Luckey v. State*, 302 Ark. 116, 787 S.W.2d 244 (1990) and more than three hundred years, *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987). Under this language, we found "no provision under Arkansas law or the United States Constitution which prohibits a sentence of a term of years which exceeds the usual life span of human beings." *Malone v. State*, 294 Ark. at 130, 741 S.W.2d at 248.

Appellant does not present a legitimate basis to find that his sentence of sixty years was incorrect under the applicable language or prohibited from being imposed. Without such a showing, trial counsel was not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene v. State*, *supra*. Because appellant fails to establish that counsel was ineffective under *Strickland*, the trial court did not err in finding that counsel was not ineffective.

Next, appellant contends that counsel was ineffective for failing to object when the trial court, in denying appellant's motion to suppress, relied upon allegedly improper evidence. Prior to trial, counsel filed a motion to suppress the cocaine found in appellant's car. As the basis for suppression, counsel argued that the police stop exceeded the amount of time the police officer was allowed to detain appellant without making an arrest, as set out in Arkansas Rule of Criminal Procedure 3.1. The trial court denied the motion, and the court of appeals affirmed the court's ruling in the direct appeal.

Appellant is not entitled to relief under Rule 37.1 based on this argument. In claiming that counsel was ineffective, appellant here minutely parses the time line of the police officer's search to demonstrate that the *trial court* improperly relied upon information developed by the officer past the outside time limit of 7:00 p.m. However, appellant's bootstrap argument merely attempts to reargue a settled evidentiary issue through the guise of ineffective assistance of counsel. Arguments regarding evidentiary issues are not the proper basis for a Rule 37.1 petition. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005). Moreover, Rule 37.1 does not provide a postconviction remedy when an issue could have been, or was, raised at trial and argued on appeal. *Camargo v. State,* 346 Ark. 118, 55 S.W.3d 255 (2001) (citing *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001)).

Affirmed.