

Cite as 2010 Ark. 485

SUPREME COURT OF ARKANSAS

No. CR 09-714

TIMOTHY WALLACE
Appellant

v.

STATE OF ARKANSAS
Appellee**Opinion Delivered** December 9, 2010PRO SE APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT, CR
2005-532, HON. GARY M. ARNOLD,
JUDGE

AFFIRMED.

PER CURIAM

Appellant Timothy Wallace appeals the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010). Appellant's petition alleged errors concerning the inadvertent passing to the jury of a transcript for a video of appellant's interview and confession that contained notes and marks by the prosecutor. In denying the petition without a hearing, the circuit court found that the transcript had no effect on the jury and that counsel was not ineffective for withdrawing his motion for mistrial on that basis. We hold that the denial of the petition was not error, and we affirm.

A jury found appellant guilty on two counts of capital murder and sentenced him to consecutive sentences of life imprisonment without parole. This court affirmed the judgment. *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580. Appellant filed a timely petition for relief under Rule 37.1 that presented claims that all centered upon the marked transcript and the court's and trial counsel's handling of that event, including claims of ineffective assistance of

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counsel. Appellant listed two claims of ineffective assistance and a due-process claim that appeared to include allegations of both ineffective assistance and an independent constitutional claim.¹

On appeal, the State asserts that the trial court did not provide a ruling as to the due-process claim. The order does not specifically reference that claim. We need not address whether the order does provide a more general ruling addressing the issue, however, because the claim was not one cognizable in a Rule 37.1 petition in any event. See *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006) (Juror misconduct may be challenged on direct appeal and is the type of direct attack that is not cognizable in postconviction proceedings.).

Appellant claimed ineffective assistance of counsel on two bases: counsel withdrew his motion for mistrial and failed to preserve that argument; counsel failed to make an undue influence argument or ask the court to “poll” or question the individual jurors about whether an excused juror had discussed the notes with them. The petition failed to set forth facts to support such a claim because appellant failed to demonstrate that counsel could have presented a meritorious argument. Counsel is not ineffective for failing to make an argument that is meritless. *Travis v. State*, 2010 Ark. 341 (per curiam).

This court assesses the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hampton v. State*, 2010 Ark. 330 (per curiam); *Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. Under

¹Appellant repeated all allegations within each separate claim, making it somewhat difficult to discern with precision the specific claim that he actually intended to make.

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the *Strickland* test, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Joiner v. State*, 2010 Ark. 309 (per curiam). In addition, the petitioner must show that counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel’s performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense. *Hampton*, 2010 Ark. 330.

In order to meet the second prong of the *Strickland* test and show prejudice, appellant must have demonstrated that the argument that counsel failed to preserve, or should have made, would have had merit. *See Eastin v. State*, 2010 Ark. 275. A defendant who raises a challenge to the qualifications of a juror to serve impartially must overcome a presumption that the juror is unbiased and qualified to serve. *See Adams v. State*, 2009 Ark. 375, ___ S.W.3d ___. Prejudice is not presumed. *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005). There must be some proof offered that the juror would be precluded from serving. *See Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008).

In appellant’s case, when the court was advised that the transcript with the prosecution’s notes had been passed to one of the jurors, it questioned the jury. One juror, Ms. Aldershof, indicated that she had been given the marked transcript. The court asked if any other jurors had seen any transcript with highlights or notations. The record reflects that

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none of the other jurors or the alternate responded to that question. After Ms. Aldershof was questioned apart from the other jurors, the court excused her.

Appellant contends that his attorney should have requested further questioning of the other jurors to determine if any had discussed the transcript with Ms. Aldershof. He cites Arkansas Rule of Evidence 606(b) (2010) as a basis for the allegation. However, Rule 606 does not require a hearing on the issue of juror misconduct. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002). Under the circumstances here, there was no valid reason to support a request for additional questioning of the jury.

In response to the court's questions, Ms. Aldershof indicated that she had not discussed the notes or transcript with anyone and that, to her knowledge, no other juror would have any knowledge of the marks on the transcript. The jury had been instructed at the beginning of the trial not to discuss the case among themselves or with anyone else, and jurors were reminded of those instructions before the breaks and recesses. There is simply no proof in the transcript, or offered by appellant, that even suggests that another juror had been compromised.

An appellant must do more than allege prejudice; he must actually demonstrate it. *Jones v. State*, 374 Ark. 475, 288 S.W.3d 633 (2008). This is not akin to the situation in *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977), where the court was aware of an investigator's file left in a room in which the jurors were placed, and the court failed to question the jury about their knowledge of the file. Here, the court did inquire about the

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juror's exposure to the potentially prejudicial material, and there was no basis to question any of the remaining juror's qualifications or impartiality.

If counsel had not withdrawn his motion for mistrial and the issue had been preserved for appeal, the appeal would have had no merit. The only potentially compromised juror had been excused. If counsel had objected with additional arguments and requested further questioning of the jurors, his objection would have been without merit. There was no basis for the request. Because appellant did not demonstrate prejudice on the underlying claim, he also failed to demonstrate prejudice in his claim of ineffective assistance of counsel. The trial court did not err in denying the petition for postconviction relief.

Affirmed.