

Cite as 2011 Ark. 105

SUPREME COURT OF ARKANSAS

No. CR 09-123

TALIDEEN TRAMAL DAVENPORT
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 10, 2011

PRO SE APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, CR 2006-
256, HON. BARRY A. SIMS, JUDGE

REVERSED AND REMANDED.

PER CURIAM

In 2007, a jury convicted appellant Talideen Tramal Davenport on charges of capital murder and three counts of unlawful discharge of a firearm from a vehicle. The court sentenced appellant to an aggregate term of life without parole plus fifteen years that included an enhancement under Arkansas Code Annotated § 16-90-120 (Repl. 2006). The judgment notes that the term of 360 months' imprisonment imposed on each of the unlawful discharge charges would run concurrently with the sentence for the capital murder charge and that only the fifteen-year term under section 16-90-120 was to run consecutively. This court affirmed the judgment. *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008).

In 2008, appellant timely filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010) and an amended petition that included additional claims for relief. The trial court denied the petition without a hearing, and this appeal followed. Because we hold that the trial court's order did not provide the requisite findings of fact and conclusions of law, and the record is not one that clearly supports affirmation, we

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remand for proceedings in compliance with our rules of procedure.

Appellant advances the following three points for reversal: (1) that the trial court erred in limiting its scope of review to questions of ineffective assistance of counsel; (2) that the trial court erred in failing to conduct an evidentiary hearing; (3) that the sentence of fifteen years imposed by the court under section 16-90-120 was illegal in that it took from the jury the discretion to set the period of punishment under the statute. In appellant's first point, he asserts that the trial court erred in failing to address claims of fundamental error and in not fully addressing his claims concerning the court sentencing appellant on the two enhancement statutes. The State contends that appellant is barred from raising the issue because the trial court did not provide a ruling on it. The resolution of all three of appellant's points on appeal, however, are to some extent related.

In cases where the trial court fails to enter any written findings following a hearing, we have consistently remanded the case to the trial court for fact-finding on all of the issues raised in the petition. *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). Where the trial court provides written findings on at least one, but less than all, of the petitioner's claims, we have held that an appellant has an obligation to obtain a ruling on any omitted issues if they are to be considered on appeal. *Id.* This is not, however, like the situation in *Watkins*, where a hearing was held on the Rule 37.1 petition. In this case, because no hearing was held, the trial court had an obligation to provide written findings that conclusively show that the petitioner is entitled to no relief. Ark. R. Crim. P. 37.3(a); *see also Rackley v. State*, 2010 Ark. 469 (per curiam).

Here, the order denying relief without a hearing provided some findings, although not

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all were adequate for purposes of the rule. The resolution of both appellant's first and second points on appeal therefore turn upon the adequacy of the order under Rule 37.3. In addition, the issues raised by appellant's third point are addressed in that analysis.

The petition and amended petition listed ten claims for relief. In the first claim, appellant asserted both fundamental error and ineffective assistance of counsel because the court sentenced appellant under section 16-90-120, and counsel did not object. Appellant next asserted a lack of jurisdiction by the trial court to sentence appellant as a habitual offender and ineffective assistance of counsel for failure to object. This claim included allegations that the court did not indicate a separate sentence for the habitual criminal enhancement and the murder sentence.

Appellant's third claim alleged ineffective assistance because trial counsel told the jury that appellant was a felon during voir dire. The fourth claim in the petition appeared to repeat the allegations in the first claim, alleging that the court erred in releasing the jury, and counsel was ineffective for not objecting. This claim referred to the instruction to the jury that it would determine punishment separately and not while deliberating as to the conviction, and appeared to reference enhancement under Arkansas Code Annotated § 5-4-501 (Repl. 2006) to the sentences for the three counts of unlawful discharge of a firearm, as well as the enhancement under section 16-90-120.

Appellant's fifth claim asserted ineffective assistance for failure to investigate two witnesses and present their testimony. The sixth claim alleged ineffective assistance for failure to present a self-defense argument. The seventh claim appeared in the amendment to the original petition, and it more specifically asserted that the trial court lacked jurisdiction to sentence

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appellant as a habitual offender on the unlawful discharge charges and that counsel was ineffective for failure to object. The claim also added allegations that the habitual offender's enhancement was cruel and unusual punishment and that the trial court could not constitutionally impose a sentence longer than life.

Appellant's eighth claim alleged ineffective assistance for counsel's failure to raise a speedy trial violation and move for dismissal. Appellant further alleged counsel was ineffective for requesting delays on his behalf. Appellant's ninth claim alleged that the trial court should have sua sponte ordered an evaluation of appellant's competency and that counsel was ineffective for not requesting a mental evaluation. Appellant's final claim alleged a double-jeopardy violation for convictions on the murder charge and the three counts of unlawful discharge. He also alleged ineffective assistance for counsel's failure to raise the double-jeopardy violation.

Appellant's petition included a number of claims concerning the court's sentencing and dismissal of the jury. In these scattered claims, appellant asserted both fundamental error and ineffective assistance of counsel for failure to object to the court sentencing him on the habitual offender charges and on the felony-with-a-firearm charge. The trial court did address one of appellant's claims of fundamental error regarding these claims, but limited its basis for the decision to an explanation that only one sentence was available for capital murder because the death penalty had been waived. The court apparently misunderstood the reference to the jury instruction as an issue with the instruction rather than an issue with sentencing. The order did not address sentencing under section 5-4-501 and merely stated that the allegations regarding

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the habitual offender statute were without merit. The remaining claims addressed by the court were simply labeled as trial strategy and denied without further analysis or recitation of factual findings in support of that conclusion. The order therefore did not contain adequate findings on the claims.

This court has affirmed the denial of a Rule 37.1 petition notwithstanding the circuit judge's failure to make written findings under Rule 37.3(a) only in two circumstances: (1) where it can be determined from the record that the petition is wholly without merit, or (2) where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). We do not scour the record to affirm under such circumstances, and we will affirm without sufficient findings only where the points on appeal are conclusive on the face of the petition or on the face of the record to demonstrate that no relief is warranted. *See id.*

It is not conclusive from the face of the petition or the face of the record that relief is not warranted on appellant's claims concerning illegal sentencing. Section 16-90-120 permits the sentencing court to subject a defendant to a consecutive period of additional confinement up to fifteen years for felony convictions. Ark. Code Ann. § 16-90-120(a) & (b). Punishment under the statute should be set by the jury and not by the court where the defendant was tried by a jury. *See Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975) (analysis of application of Ark. Stat. Ann. § 43-2336 (Supp. 1973)); *see also Watson v. State*, 71 Ark. App. 52, 26 S.W.3d 588 (2000). Although the claim is not one cognizable as fundamental error, a claim of ineffective assistance of counsel for failure to object to sentencing by the court may be cognizable. *See Haynie*, 257

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Ark. 542, 518 S.W.2d 492.

In its brief, the State contends that the record demonstrates that appellant waived his right to sentencing by the jury. Our examination of the record, however, does not disclose adequate support for that assertion. This court has held that a defendant may be bound by his attorney's action in waiving a jury trial. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993). Under Arkansas Rule of Criminal Procedure 31.2 (2010), waiver of a defendant's right to a trial by jury may be accomplished through a personal waiver in open court, and, where the record shows that the defendant's attorney, in open court and in his client's presence, formally waived that right, the requirements of the rule are satisfied. *Id.* The record here does not clearly demonstrate that there was a waiver by defense counsel in open court or that the defendant was present.

After the jury returned its verdict, the record indicates that counsel for the State and the defense approached the bench for a conference. Defense counsel made the statement that "If all run concurrent, we'll let the judge [sentence the defendant]." There was then a discussion in which the prosecution pointed out that the gun enhancement by statute was required to run consecutively and that it could be fifteen years or less. The court indicated that, regardless, it would impose the maximum fifteen years. The prosecution concluded by requesting that the court "[J]ust go ahead and tell them it's life without. You'll sentence on the other ones." Following this discussion between the prosecution and the court, trial counsel's only comment was "That's going to be concurrent, too."

The only waiver that appeared to have been given here was for sentencing by the court

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on concurrent sentences. There is no evidence in the record that counsel agreed to allow the court to sentence on the gun enhancement charge. Moreover, counsel's offer to waive the jury for sentencing occurred at the bench rather than in open court. There is no indication in the record that the defendant was present during the exchange or otherwise had any opportunity to object to the waiver that was given.

There could not be a violation of the defendant's due process rights where the same sentence would have been handed down whether the court or the jury made the ruling. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001). The court could therefore impose sentence on the capital murder charge because the State had waived the death penalty and only one sentence, life without parole, was available under the statute. The same is not true for the three unlawful discharge counts; a range of sentences was available on those charges. Appellant's claims concerning ineffective assistance of counsel for failure to object to sentencing by the court for the unlawful discharge counts and for the firearm enhancement charge, based upon what can be determined from the record, are not clearly without merit.

We cannot therefore affirm the order denying postconviction relief despite the deficient order. We reverse for the trial court to provide an order that complies with Rule 37.3 for appellant's petition for postconviction relief.

Reversed and remanded.