

ARKANSAS SUPREME COURT

No. CR 06-1222

MICHAEL JAY VENIS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered June 14, 2007

APPEAL FROM THE CIRCUIT COURT
OF BENTON COUNTY, CR 2000-1401,
HON. TOM KEITH, JUDGE

AFFIRMED.

PER CURIAM

In 2002, appellant Michael Jay Venis was found guilty by a jury of manufacturing a controlled substance, methamphetamine, and possession of pseudoephedrine with intent to manufacture methamphetamine. An aggregate sentence of thirty-one years' imprisonment was imposed. Prior to sentencing, appellant moved for a new trial on the ground that his attorney had not afforded him effective assistance at trial. Following a hearing, the motion was denied. Appellant appealed to the Arkansas Court of Appeals from the judgment and the denial of the motion for new trial. The court affirmed. *Venis v. State*, CACR 02-920 (Ark. App. Jan. 28, 2004).

Subsequently, appellant timely filed in the trial court a pro se petition for postconviction relief under Ark. R. Crim. P. 37.1. The court denied the relief sought, and appellant appealed to this court. The sole argument on appeal was that the trial court erred in denying the petition without a hearing. We found that the trial court had failed to reach appellant's claim that his trial counsel was ineffective for failure to raise the issue of his competence to stand trial and thus we could not determine conclusively whether a hearing was required on that issue. We remanded for the trial court to consider

that single point and determine the appropriate disposition, including whether a hearing would be appropriate. *Venis v. State*, CR 05-151 (Ark. Jan. 19, 2006) (per curiam).

On remand, the court denied the petition, determining that an evidentiary hearing on the competency issue was not necessary. Appellant brings this appeal in which he argues that the trial court erred in ruling on the issue without a hearing.

In an appeal from a trial court's denial of a petition under Rule 37.1, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). 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. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The *Strickland* standard is a two-part test. When a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam).

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). The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not

have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006). The petitioner must show that, but for counsel’s errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Arkansas Rule of Criminal Procedure 37.3(a) provides, “If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court’s findings.” The trial court has discretion pursuant to Ark. R. Cr. P. 37.3(a) to decide whether the files or records are sufficient to sustain the court’s findings without a hearing. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). If the trial court fails to make findings as required by Ark. R. Cr. P. 37.3(a), it is reversible error, unless the record before this court conclusively shows that the petition was without merit. *Carter v. State*, 342 Ark. 535, 538, 29 S.W.3d 716, 718 (2000). Here, we cannot say that the trial court erred when it concluded without an evidentiary hearing that counsel’s representation of appellant with respect to the issue of his competency to stand trial was adequate.

A petitioner who asserts his incompetence for the first time in a petition for postconviction relief has the heavy burden of demonstrating with facts that he was not competent at the time of trial. *Matthews v. State*, 332 Ark. 661, 966 S.W.2d 888 (1998) (per curiam), citing *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986). Appellant contended in the Rule 37.1 petition that he asked his attorney to file a motion for a mental evaluation and that counsel’s failure to obtain the evaluation in itself amounted to ineffective assistance of counsel. He further alleged that counsel knew that he was mentally ill and had taken medication in the past for depression and other mental illnesses. Appellant, however, offered no factual substantiation for the entirely conclusory assertion that he had a history of mental illness or the conclusory claim that he was not competent to stand trial. In short, he failed to

meet his burden of establishing that he suffered any prejudice as the result of counsel's failure to pursue the competency issue.

Even if a petitioner under our postconviction rule can document a history of mental illnesses or show that counsel could have argued incompetence, a history of mental illness does not in itself entitle the petitioner to relief under the rule. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986). Appellant in the instant case did not document in any way his claim of a history of mental illness. His complete failure to support his claim with proof rendered his claim of ineffective assistance of counsel meritless. The strong presumption in favor of counsel's effectiveness cannot be overcome by a mere possibility that an evidentiary hearing might produce evidence to bolster an allegation contained in a petition for postconviction relief. *See Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989); *see also Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999).

As appellant failed to offer any evidence that his counsel was ineffective for not developing a defense based upon his alleged mental illness and failed to establish that a reasonable probability existed that the outcome of his trial would have been different had his counsel pursued the issue, he did not meet the standard under *Strickland* for a showing of ineffective assistance of counsel. Accordingly, the trial court properly denied relief on the claim without a hearing. *See Scott v. State*, 303 Ark. 197, 795 S.W.2d 353 (1990); *Whitmore, supra*; *Rheurark v. State*, 299 Ark. 243, 771 S.W.2d 777 (1989).

Affirmed.