Cite as 2013 Ark. 290

SUPREME COURT OF ARKANSAS

No. CR-11-728

ROBERT JAMES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** June 27, 2013 APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT, 42CR-08-52, HON. JERRY D. RAMEY, JUDGE AFFIRMED.

PER CURIAM

In 2009, appellant Robert James was found guilty by a jury of murder in the first degree and sentenced to life imprisonment. We affirmed. *James v. State*, 2010 Ark. 486, 372 S.W.3d 800 (per curiam).

Appellant subsequently filed in the trial court a timely, verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009).[1] The petition was denied, and appellant brings this appeal. Our jurisdiction is pursuant to Rule 37 and Arkansas Supreme Court Rule 1-2(a)(8) (2012).

This court has held that it will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous. *Pankau v. State*, 2013 Ark. 162; *Banks v. State*, 2013 Ark. 147. 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. *Sartin v. State*, 2012 Ark. 155, ___ S.W.3d ___.

[1]Appellant later filed a motion to amend the Rule 37.1 petition, which was denied.

On appeal, the only grounds for reversal of the order raised by appellant are a series of allegations that he was not afforded effective assistance of counsel at trial.[2] Most of the allegations raised in the appellant's brief were not raised in the Rule 37.1 petition below and will not be considered on appeal. *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam); *see also Tornavacca v. State*, 2012 Ark. 224, ___ S.W.3d ___. When an appellant seeks to have an order overturned, that appellant may not go outside the scope and nature of the petition considered by the trial court and raise new claims for relief or make new arguments for the first time. *Cowan v. State*, 2011 Ark. 537 (per curiam).

With respect to the two remaining allegations of ineffective assistance of counsel that were raised below, appellant has not established that the trial court erred in its decision to deny the Rule 37.1 petition. When considering an appeal from a trial court's denial of a Rule 37.1 petition, the sole question presented is whether, based on a totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Taylor v. State*, 2013 Ark. 146, ___ S.W.3d ___.

The benchmark for judging a claim of ineffective assistance of counsel must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Pursuant to *Strickland,* we assess the effectiveness of counsel under a two-prong standard. First, a petitioner

[2]Appellant alleged in his petition other claims that he does not raise on appeal. Issues raised below but not argued on appeal are abandoned. *Hayes v. State*, 2011 Ark. 327, 327 S.W.3d 824 (per curiam).

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. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007). A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Harrison v. State*, 2012 Ark. 198, ___ S.W.3d ___.

Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Holloway v. State*, 2013 Ark. 140, ___ S.W.3d ___. A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Abernathy v. State*, 2012 Ark. 59, 386 S.W.3d 477 (per curiam). The petitioner must show that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* The language "the outcome of the trial," refers not only to the finding of guilt or innocence, but also to possible prejudice in sentencing. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* "[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

Appellant's first point on appeal is that the trial court erred in not granting relief on the

claim that trial counsel should have investigated and presented mitigating evidence in the penalty phase of the trial. In the petition, appellant listed a number of facts that showed him to have been a good citizen and a good person, such as his army service, his devotion to his family and community, and his lack of prior bad conduct. All the information listed, however, could have been relayed to counsel by appellant himself without the need for investigation. Appellant failed to name a particular witness that counsel could have discovered who would have offered specific, admissible evidence that could have been presented in mitigation. When a petitioner under the Rule asserts that his attorney was ineffective for failure to call a witness or witnesses, it is incumbent on the petitioner to name the witness, provide a summary of that witness's testimony, and establish that the testimony would have been admissible. *Hogan v. State*, 2013 Ark. 223 (per curiam). Because appellant failed to name any possible witness for the defense, the allegation was conclusory and did not merit further consideration.

A conclusory claim is not a ground for postconviction relief. *Glaze v. State*, 2013 Ark. 141 (per curiam). The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Thacker v. State*, 2012 Ark. 205 (per curiam); *Jones v. State*, 2011 Ark. 523 (per curiam); *Payton v. State*, 2011 Ark. 217 (per curiam). Conclusory statements without factual substantiation are not sufficient to overcome the presumption that counsel was effective. *Crain v. State*, 2012 Ark. 412 (per curiam).

In the only other issue on appeal that was also addressed below, appellant contends that his attorney should have secured a change of venue. As support for the allegation, appellant said in the petition that some of the victim's family were on the police force in Logan County and

one of the victim's uncles was a bailiff for the court. He also alleged that "due to press, the whole community was inflamed and tainted in its belief." Appellant did not explain in what manner the victim's relatives adversely affected his right to a fair trial in the county.

The trial court denied the claim on the basis that it was conclusory in nature and not supported by any facts, such as affidavits, newspaper reports, or statements by residents, to support the assertion that he could not have received a fair trial without a change of venue. It cannot be said that the court erred in denying relief on the claim because it was merely a bare allegation. To prevail on a claim that the trial attorney was ineffective for failing to seek a change of venue, the petitioner must state a ground on which the motion could have been founded. *Hale v. State*, 2011 Ark. 476 (per curiam). That is, the petitioner must provide facts that affirmatively support the claim of prejudice arising from counsel's failure to file the motion. *See Wells v. State*, 2012 Ark. 308 (per curiam).

Having considered the arguments raised by appellant in this appeal, the record, and the order rendered by the trial court, there is no ground on which to reverse the trial court's ruling. Accordingly, the order is affirmed.

Affirmed.

Robert James, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.