

SUPREME COURT OF ARKANSAS

No. CR-12-541

LEROY STEVENSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered July 25, 2013

APPELLANT'S PRO SE MOTIONS
FOR EXTENSION OF BRIEF TIME
AND FOR COPY OF RECORD
[CRAIGHEAD COUNTY CIRCUIT
COURT, WESTERN DISTRICT, 16CR-
08-702, HON. CINDY THYER, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

In a 2008 bench trial, appellant Leroy Stevenson was found guilty of rape. He was sentenced as a habitual offender to 600 months' imprisonment. After trial, appellant filed a motion for new trial alleging that he had not been afforded effective assistance of counsel. The motion was denied. On appeal, the Arkansas Court of Appeals remanded the matter for a hearing on the motion for new trial. After the hearing was held and the remand was returned, the court of appeals affirmed. *Stevenson v. State*, 2011 Ark. App. 547.

Subsequently, appellant timely filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2008). The trial court dismissed the petition, and appellant has lodged an appeal in this court from the order.¹ Now before us are appellant's motions for an extension of time to file his brief-in-chief and for a copy of the

¹On February 7, 2013, this court granted a pro se motion filed by appellant to proceed with an appeal from the order. *Stevenson v. State*, CR-12-541 (Ark. Feb. 7, 2013) (order granting motion for belated appeal—treated as motion for rule on clerk.)

record on appeal.

As it is clear from the record that appellant could not prevail if the appeal were permitted to go forward, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Davis v. State*, 2013 Ark. 189 (per curiam); *Holliday v. State*, 2013 Ark. 47 (per curiam); *Crain v. State*, 2012 Ark. 412 (per curiam); *Thacker v. State*, 2012 Ark. 205 (per curiam).

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 ___.

In his Rule 37.1 petition, appellant contended that he was not afforded effective assistance of counsel at trial. 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*, the effectiveness of counsel is accessed under a two-prong standard. First, 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. *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. *State v. Harrison*, 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.

In his petition, appellant first contended in one lengthy allegation that he was entitled to a new trial because his trial attorney failed to find and confer with certain defense witnesses. He further complained in the allegation that, at the hearing mandated by the court of appeals on the motion for new trial, his attorney failed to find and confer with witnesses for the hearing. He concluded the allegation by asserting that his attorney on appeal failed to hold his two prior attorneys responsible for failing to render effective assistance of counsel.

The allegation was conclusory in nature. Appellant did not name the witnesses that his trial attorney should have located, and he did not name the witnesses that the attorney at the hearing should have located. Where a petitioner alleges ineffective assistance of counsel concerning the failure to call witnesses, it is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Hogan v. State*, 2013 Ark. 223 (per curiam) (citing *Adams v. State*, 2013 Ark. 174, ___ S.W.3d ___).

Appellant next alleged that he was denied a jury trial because his attorney advised him to request a trial to the bench even though counsel was not prepared for the trial. The only support for the suggestion that the lack of preparation prejudiced him was appellant's statement that there was a lack of investigation and a failure to subpoena witnesses. As with the prior claim, appellant did not offer facts to show what further investigation would have produced or what witnesses would have been available.

A trial court does not err in denying relief on an allegation that is entirely devoid of

factual substantiation to show what counsel could have found had he further researched the case, consulted with appellant, or consulted with any other person. *Norris v. State*, 2013 Ark. 205, ___ S.W.3d ___ (per curiam). To be entitled to relief, a petitioner who claims ineffective assistance based on a failure to research and adequately prepare for trial must describe how a more searching pretrial investigation would have changed the results of his trial. *Id.*

Appellant next argued that the trial court and his posttrial attorneys had constructively denied him effective assistance of counsel in violation of his right to due process. As there was no development of the claim to demonstrate what specific conduct had prejudiced the defense, there was no basis to grant postconviction relief. Simple statements without support do not make a showing of prejudice. *See Crain*, 2012 Ark. 412.

Finally, appellant contended that the appellate court's failure to hold his attorneys responsible for their ineffectiveness established that his attorney on appeal was ineffective. Assuming that appellant is arguing that the affirmance of the order denying his motion for new trial was in itself proof that his attorney did not represent him adequately on appeal, the claim must also fail for lack of factual support. Appellant did not specify what appellate counsel did not do that he should have done. Neither the trial court when considering a Rule 37.1 petition nor this court when considering the appeal from the denial of such a petition is required to guess or assume the basis of an allegation of ineffective assistance of counsel. Even when a petitioner under the Rule is alleging a fundamental claim that would render the judgment in his or her criminal case void, the claims must be supported by facts to demonstrate that a fundamental right was denied to the particular petitioner under the facts of his or her case. *Crain*, 2012 Ark.

412; *Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984).

Appellant did not meet his burden of demonstrating that the judgment in his case should be vacated under Rule 37.1. For that reason, the trial court did not err in denying the petition for postconviction relief. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims that counsel's conduct prejudiced him under the standards set out in *Strickland*. *Nickelson v. State*, 2013 Ark. 252 (per curiam); *Thacker*, 2012 Ark. 205.

Appeal dismissed; motions moot.