

**SUPREME COURT OF ARKANSAS**

No. CR-13-381

WALTER LEE WALTON  
PETITIONER

V.

STATE OF ARKANSAS  
RESPONDENT

Opinion Delivered June 6, 2013

PETITIONER'S PRO SE MOTION  
FOR BELATED APPEAL OF ORDER  
[SEBASTIAN COUNTY CIRCUIT  
COURT, FORT SMITH DISTRICT,  
66CR-10-951, HON. JAMES O. COX,  
JUDGE]MOTION DENIED.**PER CURIAM**

In 2011, petitioner Walter Lee Walton was found guilty by a jury of murder in the first degree. He was sentenced as a habitual offender to a term of life imprisonment without parole. We affirmed. *Walton v. State*, 2013 Ark. 336, \_\_\_ S.W.3d \_\_\_.

Subsequently, petitioner timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The trial court denied the petition. No appeal was taken, and petitioner now seeks leave to proceed with a belated appeal of the order.

As it is clear from the record that petitioner could not prevail on appeal if the appeal were permitted to go forward, the motion is denied. *Crain v. State*, 2012 Ark. 412 (per curiam); *Bates v. State*, 2012 Ark. 394 (per curiam). 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); *Purifoy v. State*, 2013 Ark. 26 (per curiam); *Watkins v. State*, 2010 Ark.

156, 362 S.W.3d 910 (per curiam).

An attorney was appointed by the trial court to represent petitioner at trial, but appellant sought and was allowed to proceed pro se at trial with the attorney functioning as stand-by counsel. Petitioner, who was represented on appeal by a different appointed attorney than the one who served as stand-by counsel at trial, raised one point for reversal on direct appeal. Counsel argued that appellant did not knowingly and intelligently waive his right to counsel. This court found no merit to the argument.

The grounds advanced by petitioner in the Rule 37.1 petition were divided into two parts—his experience proceeding without counsel at trial and his claim that his attorney on direct appeal was not effective. A review of the Rule 37.1 petition and the order reveals no error in the trial court's decision to deny the petition.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Adams v. State*, 2013 Ark. 174, \_\_\_ S.W.3d \_\_\_\_. 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. *White v. State*, 2013 Ark. 171, \_\_\_ S.W.3d \_\_\_; *Sartin v. State*, 2012 Ark. 155, \_\_\_ S.W.3d \_\_\_; *Watkins*, 2010 Ark. 156, 362 S.W.3d 910.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on the 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. *Ewells v. State*, 2010 Ark. 407 (per curiam). Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first 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. *Adams*, 2013 Ark. 174, \_\_\_ S.W.3d \_\_\_\_. There is a strong presumption that trial counsel’s conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel’s perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Henington v. State*, 2012 Ark. 181, \_\_\_ S.W.3d \_\_\_\_; *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam).

With respect to the second prong of *Strickland*, the claimant must demonstrate that counsel’s deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *Thompson v. State*, 2013 Ark. 179 (per curiam). Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder’s decision would have been different absent counsel’s errors. *Ewells*, 2010 Ark. 407. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

We first address the claims arising from petitioner’s self-representation at trial. Petitioner’s allegations were not that his own performance acting pro se was ineffective but rather that his ability to represent himself was compromised by the prosecution and his stand-by counsel.

He first contended that the prosecution was aware in advance of his trial strategy and

the questions he intended to ask witnesses because there was a recording device in his jail cell. He also suggested that stand-by counsel was relaying information to the prosecution. Petitioner further contended that the jury was influenced unfairly by “outside information” and that the jurors have since acknowledged to him that they were aware of his prior felony charges during the guilt-phase of the trial.

The allegations did not merit postconviction relief. With the exception of the allegation that the jury received outside information, the allegations could have been raised at trial and on the record on direct appeal, and thus are not cognizable in Rule 37.1 proceedings. *Webb v. State*, 2013 Ark. 153 (per curiam); *Davis v. State*, 2013 Ark. 118 (per curiam); see also *Watson v. State*, 2012 Ark. 27 (per curiam) (assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal); *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam) (allegations of trial error that could have been raised at trial or on appeal may not be raised in Rule 37.1 proceedings). With respect to petitioner’s assertions of prosecutorial misconduct, the arguments could also have been raised and addressed at trial. It is well settled that a claim of prosecutorial misconduct, standing alone, is not a ground for postconviction relief. *Webb*, 2013 Ark. 153; see also *Murphy v. State*, 2013 Ark. 155 (per curiam).

As to the outside information alleged to have been obtained by jurors, petitioner did not meet his burden of showing that there was in fact juror misconduct. He named no juror who had information and offered no substantiation of any kind for the claim. An appellant must do more than allege prejudice, he must demonstrate it with facts. *Wedgeworth v. State*,

2013 Ark. 119 (per curiam); *Wallace v. State*, 2010 Ark. 485 (per curiam).

We now turn to petitioner's allegations in the Rule 37.1 petition that concerned petitioner's attorney on direct appeal. A convicted defendant has the right to effective assistance of counsel on appeal in accordance with the Sixth Amendment. *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987) (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988) (per curiam); see also *Sartin v. State*, 2010 Ark. 16, 362 S.W.3d 877 (per curiam). The petitioner claiming that appellate counsel was ineffective bears the burden of making a clear showing that counsel failed to raise some meritorious issue on appeal. *Moore v. State*, 2011 Ark. 269 (per curiam); *Howard*, 291 Ark. 633, 727 S.W.2d 830. Counsel's failure to raise a specific issue must have amounted to error of such magnitude that it rendered appellate counsel's performance constitutionally deficient under the *Strickland* criteria. Petitioner here did not show in his petition that counsel omitted a specific meritorious argument that could have been advanced on appeal. An attorney need not raise every argument, regardless of merit, urged by his client. *Howard*, 291 Ark. 633, 727 S.W.2d 830; see *Jones v. Barnes*, 463 U.S. 745 (1983); see also *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

In his petition, petitioner listed a number of issues that he alleged were omitted from the brief filed by counsel on appeal. He asserted that he had text messages on his phone that could have contradicted the story told by the key witnesses for the State and undermined their credibility. He also contended that he was prejudiced by a denial of continuances, improper testimony of witnesses, prejudicial character evidence that he carried a knife, and improper

references by the State in its closing argument to his failure to testify. Even if the issues were raised at trial and a ruling was obtained on each, appellant did not present facts in his Rule 37.1 petition to show that there could have been a specific issue raised on appeal that would have resulted in the appellate court's declaring reversible error. It was petitioner's responsibility to establish that the issue was raised at trial, that the trial court erred in its ruling on the issue, and that an argument concerning the issue could have been raised on appeal to merit appellate relief. Appellant did not make such a demonstration in his Rule 37.1 petition on any issue mentioned in the petition. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Thompson*, 2013 Ark. 179 (per curiam). Conclusory statements and allegations without factual substantiation are not sufficient to overcome the presumption that counsel was effective, whether the claims of ineffective assistance of counsel pertain to the trial of the petitioner or the appeal from the judgment of conviction. See *Wainright v. State*, 307 Ark. 539, 823 S.W.2d 449 (1992); see also *Dumond*, 294 Ark. 379, 743 S.W.2d 779.

Motion denied.

*Walter Lee Walton*, pro se petitioner.

No response.