ARKANSAS SUPREME COURT

No. CR 05-649

NOT DESIGNATED FOR PUBLICATION

IAN JAY SMITH
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered June 22, 2006

PRO SE APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY, CR 2002-289-1, HON. TOM J. KEITH, JUDGE

AFFIRMED

PER CURIAM

A judgment and commitment order entered February 5, 2004, reflects that appellant Ian Jay Smith entered a guilty plea to three counts of rape and was sentenced as a habitual offender to an aggregate of thirty years' imprisonment in the Arkansas Department of Correction. Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1 that was denied without a hearing by order entered March 9, 2005. Appellant now brings this appeal of that order.

The trial court's order addressed a number of claims raised by appellant that his trial counsel was ineffective, and found that counsel was not ineffective and that appellant's plea was entered voluntarily and intelligently. On appeal, appellant contends that the trial court erred (1) in failing to conduct a hearing; (2) in finding his plea was voluntarily, intelligently and knowingly entered; (3) by failing to find trial counsel was ineffective; (4) in imposing an enhanced sentences under the Arkansas habitual offender statute even though some of the convictions arose from the same criminal episode. We do not reach the merits of any of appellant's points on appeal.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). 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).

When a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to a Rule 37.1 petition are those that allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). Arkansas Rule of Criminal Procedure 37.3(a) requires a trial court to make written findings that the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, 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 Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Greene*, 356 Ark. at 66, 146 S.W.3d at 877. If the trial court fails to make findings as required by Rule 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, 29 S.W.3d 716 (2000).

Here, the trial court did make written findings as required by the Rule, and referenced portions of the record that can only have been the transcript of appellant's plea hearing. That transcript is not included in the record before us. It is the appellant's burden to bring up a sufficient record. *See Robertson v. Norris*, ___ Ark. ___, ___ S.W.3d ___ (February 10, 2005); *Dirickson v. State*, 329 Ark. 572, 953 S.W.2d 55 (1997). We cannot address appellant's first three points on appeal because appellant has failed to provide an adequate record for us to do so. Without the transcript of the plea hearing, we cannot say that the trial court's determinations were clearly erroneous as to whether the record supported its findings, whether trial counsel was ineffective, or whether the plea was voluntarily made. The trial court's order references that portion of the record in support of its findings.

As to appellant's last point on appeal, we also must affirm because the issue is not one that we may address in this appeal. Appellant did not raise the issue of the basis for enhancement of his sentence as a habitual offender in his petition, nor did the trial court make any ruling on the issue in

its order denying postconviction relief. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, ___ Ark. ___, ___ S.W.3d ___ (June 23, 2005); *see also*, *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Appellant urges that we may still consider his argument, as the sentence is illegal and void. We cannot agree. Had the prosecution failed to meet its burden to show the necessary prior convictions as a factual basis for the enhancement, appellant has not shown his sentence was outside of the statutory range or that there was the type of fundamental error that voids the judgment and is cognizable in a postconviction relief proceeding. *See Pardue v. State*, ___ Ark. ___, ___ S.W.3d ___ (October 13, 2005). Accordingly, we affirm the order denying postconviction relief.

Affirmed.