ARKANSAS SUPREME COURT

No. CR 05-787

NOT DESIGNATED FOR PUBLICATION

MacARTHUR BRANTLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **April 20, 2006**

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, CR 2002-48-2, HON. JAMES SCOTT HUDSON, JR., JUDGE

AFFIRMED

PER CURIAM

A judgment and commitment order entered November 19, 2003, indicates that appellant MacArthur Brantley entered a plea of guilty to theft of property in Lafayette County Circuit Court on September 8, 2003. Appellant was sentenced to 240 months' imprisonment in the Arkansas Department of Correction, with the sentence to run concurrently to a 360-month sentence on another charge that appellant was then serving. Appellant, through counsel, filed what was styled a "Motion To Set Aside Judgment Of Conviction." The motion requested that appellant's judgment of conviction be set aside or other appropriate relief be granted under "Rule 37 of the Arkansas Rules of Criminal Procedure." The trial court initially denied the petition under Ark. R. Crim. P. 37.1 in an order entered December 31, 2003, without a hearing on the matter. Appellant filed a motion to reconsider on January 5, 2004, in which he argued that while no hearing was required under a motion for relief pursuant to Ark. R. Crim. P. 33.3, his motion required a hearing pursuant to Ark. R. Crim. P. 37.3. The trial court granted the motion for a hearing, and following the hearing, the petition was again denied. From that order, appellant now brings this appeal.

Appellant's sole point on appeal is that the trial court erred in determining that appellant's plea was knowingly, voluntarily, or intelligently entered, and that the court further erred in determining that counsel was not ineffective. While appellant attempts to separate his point into two

issues, and the discussions in the postconviction-relief hearing seem to vacillate between addressing the voluntariness of the plea and the claim of ineffective assistance of counsel, as if those were separate issues, the appellant ultimately brings but a single claim. The only challenge appellant raises as to whether the plea was voluntary is, in turn, based upon the question of whether or not counsel failed to provide effective assistance.

At the pretrial hearing conducted the morning of September 8, 2003, the trial court ruled that it would allow Byron Thomason, who had been appellant's counsel, to withdraw. Mr. Thomason's motion to withdraw had indicated he had not been paid, and upon the court's inquiry, appellant responded that, while he was attempting to retain other counsel for the case, he was not able to do so at that time. The court appointed a public defender, Shannon Tuckett, to assist appellant, commenting that the trial was set for one week later. Both Ms. Tuckett and appellant testified that they recalled that she requested a continuance and was denied the request. However, the record only indicates that the prosecutor commented that he assumed new counsel for the defense would need a continuance, and the trial court instructed Ms. Tuckett that he was inclined to keep the trial date as he appointed her to represent appellant.

Ms. Tuckett conferred with appellant, at first alone, and then with his wife, going over the prosecutor's file with them and the plea offer. Ms. Tuckett asked appellant to provide her with a list of potential witnesses on his behalf and requested that Mrs. Brantley leave at that time in order to gather information on those potential witnesses. Following that meeting, Ms. Tuckett returned to the courtroom for other proceedings, and some time later that same day, appellant sought her out in order to inform her that he had decided to take the plea offer. Appellant signed a plea and waiver form and appeared before the court for a plea hearing at which he admitted that he was guilty of the charge. The trial court accepted his plea at the conclusion of the hearing.

In his petition, appellant alleged ineffective assistance of counsel, both on the part of Ms. Tuckett and Mr. Thomason. Both claims, in essence, further assert that, regardless of the competency of either attorney, appellant was placed in a situation where a Hobson's choice was

forced upon him. Appellant contends that he was forced to choose between accepting the plea, or proceeding to trial with an attorney who could not be adequately prepared to defend him. The trial court found that there was no due-process violation, if that issue was before the court, and further found that neither Mr. Thomason nor Ms. Tuckett was ineffective.

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 which 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). Here, appellant argues that the plea should not be considered voluntary because the circumstances were such that Ms. Tuckett was in no position to make a recommendation on the plea, and appellant was effectively, if not literally, without counsel.[1] Appellant's arguments as to Mr. Thomason's ineffectiveness center upon Mr. Thomason's conduct causing what appellant asserts was Ms. Tuckett's ineffectiveness through Mr. Thomason's failure to provide his defense file to her and, more generally, the resulting short time to trial. Appellant contends that he agreed to the plea because he believed Ms. Tuckett could not be prepared for trial and that he had no choice but to accept the plea agreement.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the

[1] The State asserts that appellant misrepresents the fact that Ms. Tuckett made any recommendation on the plea. However, Ms. Tuckett's testimony at the postconviction relief hearing, as it appears in the record before us, clearly was that she did, in fact, recommend that appellant take the plea. The State did correctly note a different error in the abstract, that appellant did not testify that he instructed Ms. Tuckett to file for a continuance. As indicated, appellant testified only that he recalled, as did Ms. Tuckett, that she requested the continuance.

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). Under the criteria for assessing the effectiveness of counsel as set out in *Strickland*, 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). Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). Appellant, however, would have us hold that the circumstances of this case are equivalent to a complete denial of counsel, and, as such, that appellant is not required to show prejudice. The cases appellant cites in support of this proposition discuss application of the standard in *United States v. Cronic*, 466 U.S. 648 (1984), to find counsel's performance was *per se* ineffective. Although the trial court appeared to find that this issue was not before it, appellant's arguments below did question whether counsel should be deemed ineffective, and we must, accordingly, determine the standard that is applicable.

As the Eighth Circuit Court of Appeals has noted, the United States Supreme Court has applied the presumption-of-prejudice exception to *Strickland* in very few cases. *Freeman v. Graves*, 317 F.3d 898 (8th Cir. 2003). The exceptions recognized fall within one of three categories, and are as follows: (1) where assistance of counsel has been denied completely during a critical stage of the proceedings; (2) where counsel entirely fails to subject the prosecution's case to meaningful

adversarial testing; (3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *Bell v. Cone*, 535 U.S. 685 (2002). Appellant's arguments here appear to urge us to find that counsel was constructively denied under the second or third categories, although he does not clearly frame his arguments as falling within any one of the three. He does assert that counsel failed to test the prosecution's case; he alleges that neither attorney had performed an adequate investigation, and that the circumstances prevented counsel from rendering assistance in that the short time to trial after Ms. Tuckett's appointment would prevent adequate preparation.

Appellant alleges that Mr. Thomason had failed to conduct any preparatory work on the case prior to his withdrawal. There was no testimony from Mr. Thomason, but the record shows that he moved for discovery and that the State responded with an open file policy. Ms. Tuckett did have the prosecutor's file and testified that she went over it with appellant. While Ms. Tuckett did not appear to have the benefit of Mr. Thomason's case file, she appears to have had the equivalent, in that she had the prosecutor's file. She testified that she questioned appellant as to his side of events and asked for information on potential witnesses. She requested appellant's wife to try to locate additional information on the witnesses so that she could issue subpoenas. Appellant's allegations are far from the complete failure to test the prosecutor's case required by *Bell*. As the Supreme Court stated in *Bell*, the difference is not of degree, but kind. This is clearly not the kind of failure to which the *Cronic* standard applies, and the *Strickland* test is appropriate.

As to the short period of time for trial preparation, we cannot say that the circumstances are such in this case that counsel was prevented from rendering assistance. While Ms. Tuckett indicated that the time was not ideal, she did believe she could prepare within that time. Moreover, Ms. Tuckett testified that, while she stressed the need to act quickly, she never indicated to appellant that she could not be prepared for trial. The trial court found that appellant's testimony concerning his discussions with Ms. Tuckett were not credible, and that Ms. Tuckett's testimony was. The trial court is in the best position to resolve any conflicts in testimony. *Snelgrove v. State*, 292 Ark. 116,

728 S.W.2d 497 (1987). The judge at a postconviction-relief hearing is not required to believe the testimony of any witness. *Skeels v. State*, 300 Ark. 285, 779 S.W.2d 146 (1989).

The trial court appears to have determined that appellant was not faced with the hard choice between going to trial with an attorney who indicated that she would not be prepared and accepting the guilty plea. The choice was simply between the plea and what his attorney recommended was a difficult case to win, based upon the prosecution's file and appellant's potential defense witnesses. We cannot say that the trial court's findings were clearly erroneous or that appellant established that the circumstances were such that his counsel could not render assistance. The *Cronic* exception to the rule that a defendant must show probable effect upon the outcome only applies in circumstances of the same magnitude as those where the assistance of counsel has been denied entirely or during a critical stage of the proceeding. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). These circumstances are not of such magnitude. The *Strickland* standard must therefore apply.

While appellant contends that Ms. Tuckett should have investigated the case further prior to making her recommendation on the plea, he presented no evidence that further investigation would have changed that recommendation, or provided facts that could have changed his decision to enter a plea. Appellant speculates that counsel might have been able to determine that the value of the property was not that alleged, but he has made no showing that the value of the property was, in fact, less than that alleged or that counsel could have challenged the State's proof on the issue. Conclusory statements cannot be the basis of postconviction relief. *Jackson*, 352 Ark. at 371, 105 S.W.3d at 359.

Ms. Tuckett testified that she thought it unlikely that the potential witnesses identified would have testified as appellant believed they would because they were co-defendants who had already entered guilty pleas and were unlikely to testify against their own interest. Appellant argues that had he been questioned earlier regarding his part in the charged crimes, he might have been able to provide information to establish an alibi. We find this argument remarkable, in that it seems extraordinary that appellant, who does not contend he was not made aware of the charges against

him, would not have thought about and continued to recall, even if it were almost three years later, his whereabouts at the time that the crimes were alleged to have occurred. Nor would it appear that further advice concerning the possibility of a continuance would have potentially changed appellant's decision concerning the plea, because Ms. Tuckett testified that she had not indicated to appellant that she could not be adequately prepared in time, and had already begun her preparations for trial before appellant made his decision to enter the plea. The time that passed between Ms. Tuckett's recommendation and appellant's decision to accept the plea offer further indicates that appellant's decision was not the result of any misunderstanding that counsel could not adequately prepare for trial and that he then believed that he was left with no other option.

Appellant did not present evidence of prejudice sufficient to overcome the strong presumption of reasonable professional assistance. Appellant made no showing that, but for what were alleged as counsel's errors, there is a reasonable probability that he would not have entered a guilty plea and thereby waived his right to a trial.

Affirmed.