

ARKANSAS SUPREME COURT

No. CR 06-1304

TERRANCE JOHNSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 24, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF JEFFERSON COUNTY, CR
2003-1021, HON. ROBERT H. WYATT,
JR., JUDGE

AFFIRMED.

PER CURIAM

In 2004, appellant Terrance Johnson was found guilty by a jury of first-degree murder, committing a terroristic act, and first-degree discharge of a firearm from a car.¹ He was sentenced to an aggregate term of 528 months' imprisonment. The Arkansas Court of Appeals affirmed. *Johnson v. State*, CACR 04-1275 (Ark. App. Sept. 28, 2005). Subsequently, appellant timely filed in the trial court a pro se petition pursuant to Ark. R. Crim. P. 37.1. The trial court conducted a hearing at which appellant was represented by counsel. The trial court denied the petition and appellant, proceeding pro se, has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 64, 146 S.W.3d 871, 876 (2004). A finding is clearly erroneous when, although there was 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).

¹A fourth charge for being a felon in possession of a firearm was severed from the present matter and is not at issue here.

We initially note a procedural matter. Appellant filed in the trial court a motion for leave to amend the Rule 37.1 petition. The motion itself appears to be the actual amended petition despite the caption. Issues raised in the amended petition will not be considered on appeal as appellant failed to obtain the trial court's permission to amend the petition, and the amended petition was filed in the trial court outside of the sixty-day time limitation set forth in Ark. R. Crim. P. 37.2(c).

In his original Rule 37.1 petition, appellant contended that trial counsel was ineffective in his representation of appellant. Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). 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). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Here, appellant argues that due to his past antagonistic encounters with the victim, appellant would have been justified in shooting the victim. He points to specific evidence regarding cocaine in the victim's urine at the time of his death, as well as evidence of past wounds found on the victim during the autopsy to support that theory. He complains that trial counsel was ineffective as he was aware of the evidence but failed to discuss a justification defense with appellant and was ineffective for failing to advance this defense to the jury.

At the hearing on appellant's Rule 37.1 petition, trial counsel explained that at the beginning of his representation of appellant, a number of defense theories were explored. Over the course of his investigation, he became aware that the evidence possessed by the prosecution would show that

appellant was involved in the victim's death. For this reason, counsel discussed the defense of justification with appellant, as well as whether appellant would take the stand in his own defense. However, according to counsel, even after discussing these matters extensively, appellant refused to consider any defense other than a general denial to committing the crime and refused to testify in his own defense. In addition, trial counsel noted that presenting alternative defenses to the jury, such as denial and justification, often does not achieve positive results for criminal defendants. Appellant did not testify at the Rule 37.1 hearing,

Regarding a justification defense, the trial court found counsel's testimony to be persuasive, and that the decision was one of trial strategy. The trial court also found that counsel's tactical decision in not presenting both defenses of denial and justification was not unreasonable considering that the alternative defenses may have resulted in a more severe punishment. Tactical decisions cannot be the basis for a claim of ineffective assistance of counsel. *Noel, supra*. The trial court's findings were not clearly erroneous on these points, and appellant failed to show that trial counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by counsel's actions.

Affirmed.