

ARKANSAS SUPREME COURT

No. CR 06-612

DAVID CARROLL GOODWIN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 22, 2007

APPEAL FROM THE CIRCUIT COURT
OF SEBASTIAN COUNTY, CR 2003-
581, HON. NORMAN WILKINSON,
JUDGE

AFFIRMED.

PER CURIAM

In 2004, a jury convicted appellant David Carroll Goodwin on charges of manufacturing methamphetamine, possession of methamphetamine with intent to deliver, and felon in possession of a firearm, and sentenced him, as an habitual offender, to an aggregate term of 240 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Goodwin v. State*, CACR 04-851 (Ark. App. June 15, 2005). Appellant timely filed in the trial court a pro se petition for postconviction relief under Ark. R. Crim. P. 37.1. The trial court appointed counsel and, following a hearing, the petition was denied. Still represented by counsel, appellant now brings this appeal of that order.

Appellant raised issues in his petition that alleged trial counsel was ineffective for failing to request severance of the felon-in-possession charge, for failure to renew his motion for directed verdict at the conclusion of appellant's case, for failure to present certain witnesses, and for failure to collaterally attack the three prior convictions used to establish his habitual offender status. The

trial court found that trial counsel had made a tactical decision not to move to sever the felon-in-possession charge, that appellant's motion for directed verdict would not have been granted if renewed, that the decision not to call two witnesses was trial strategy, and that appellant could not attack his prior convictions as the validity of those convictions was final for purposes of determining habitual offender status.

Appellant's brief does not organize the individual arguments into separate points on appeal as required by Ark. Sup. Ct. R. 4-2, and is further deficient under Rule 4-2 in failing to provide an abstract of the trial transcript. In determining a claim of ineffective assistance of counsel, the totality of the evidence before the factfinder must be considered. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). The trial court specifically stated in its order that it considered the transcript of the trial. While appellant has not provided an abstract of the trial testimony, the record before this court is adequate under *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997), as a part of the public record already filed with the appellate court in the earlier appeal. Under other circumstances, we would order appellant to submit a compliant brief in accord with Rule 4-2(b)(3). We do not order rebriefing, however, as it is clear here that appellant cannot prevail on appeal.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, appellant's brief is adequate to reach the merits of his arguments and we may go to the record for additional reasons to affirm. *See Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

Although appellant's brief is not so organized, we will address his arguments as if presented

in separate points.¹ First, appellant argues that the trial court erred in failing to find ineffective assistance of counsel, that trial counsel did not consult with him concerning the decision not to file a motion for severance and that a unilateral decision was not properly considered trial strategy. Next, appellant alleges that trial counsel's failure to timely move for a directed verdict following the close of appellant's case denied him appellate review. In the third argument we address, appellant contends trial counsel was ineffective for failure to call two witnesses and that trial counsel did not contact these potential witnesses. Next, appellant argues that further research would have provided trial counsel with a basis to attack the convictions used to establish his habitual offender status. Finally, we address appellant's assertion that trial counsel's actions were shockingly deficient.

In an appeal from a trial court's denial of a petition under Rule 37.1, the question presented is whether, based on the totality of the evidence, the 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). 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). To prevail on a claim of ineffective assistance of counsel under this standard, a defendant must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth

¹ The State asserts that additional arguments were abandoned. Issues raised below but not argued on appeal are considered abandoned. *Jordon v. State*, 356 Ark. 248, 256, 147 S.W.3d 691, 696 (2004). Appellant filed a pro se motion requesting this court to allow him to file a supplemental pro se brief to supplement his attorney's brief, which was denied. *Goodwin v. State*, CR 06-612 (Ark. Oct. 26, 2006) (per curiam). We note that, as stated in our opinion, appellant did not provide cause to supplement for any such abandoned arguments.

Amendment, and second, the defendant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 38, 26 S.W.3d at 125. To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., that the decision reached would have been different absent the errors. *Id.* Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam).

At the postconviction relief hearing, trial counsel testified that he was aware that appellant wished to sever the felon-in-possession charge, and that he did not consult with appellant about that issue. The trial court found that counsel made this decision because the testimony of appellant's parole officer would reveal appellant's status as a convicted felon, whether or not the felon-in-possession charge was severed. The court cited counsel's testimony that trying the offenses together improved appellant's chances to receive a concurrent sentence on the felon-in-possession charge and eliminated the potential for a mandated longer sentence under the habitual offender statute following a conviction on the other charges.

Trial counsel's decision initially appears well-reasoned and prudent, although he did not discuss it with appellant. Appellant argues in his brief that trial counsel could have sought

suppression of the search or filed a motion in limine to restrict the parole officer's testimony. That argument was not raised below, however. While those possibilities might have some bearing upon whether appellant made a showing of prejudice and we consider it to that limited extent, the asserted error by trial counsel as presented to the court was simply that trial counsel failed to consult with his client on the matter. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005); *see also, Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). The question then, as presented by appellant to the trial court, is whether counsel's failure to consult with his client is such error so as to render the decision not to file a motion to sever unreasonable.

Appellant's argument is based upon the principle set out in *Strickland* and reaffirmed in *Florida v. Nixon*, 543 U.S. 175 (2004), that an attorney has a duty to consult with the client regarding important decisions including questions of overarching defense strategy. Appellant contends that the error of failure to consult with him lifted this error from the realm of trial strategy and, therefore, the trial court erred in finding the alleged error was a tactical decision. We do not need to reach that question, however, because, whether there was error by counsel or not, appellant did not make a showing of prejudice as required by the second prong in the *Strickland* standard. As was the case in *Nixon*, the alleged failure to consult here does not rank as a failure to function in any meaningful sense to oppose the State's case.

Despite the disadvantage inherent in the joinder of a felon-in-possession charge with other criminal charges, we have often noted that a joint trial of a felon-firearm charge with a second charge does not constitute prejudice in all instances. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006). The State's first witness at trial was appellant's parole officer, and the felony offense on which

appellant was paroled was presented in conjunction with that testimony. As previously indicated, appellant made no argument prior to appeal that the officer's testimony might successfully have been excluded if the results of the search could have been suppressed or that his testimony might have been restricted to avoid reference to any felony. In fact, had the search results been excluded, very little, if any, of the evidence admitted at trial, relating to any of the charges, would have been admissible. Those alleged errors were not presented below.

Even in his argument on appeal, however, appellant asserts no basis to challenge the authority for the search, which was the officer's authority, under the conditions of appellant's parole, to search appellant's residence. Appellant did not make any showing of a basis to exclude the parole officer's testimony about appellant's felony. In his brief, appellant contends that counsel could have elected not to challenge the search in order to exclude that testimony. That argument was not presented below, and, in any event, the nature of the parole officer's relationship to appellant was necessary to place his testimony in context, whether the search was contested or not. Without any basis for excluding what was otherwise relevant testimony about the parole officer's relationship to appellant, whether the felon-in-possession charge had been severed or not, the jury would have been advised of appellant's status as a felon on parole. For that reason, appellant did not carry his burden to show prejudice by error resulting from inadequate consultation on this issue.

Appellant's next argument concerns counsel's failure to renew his motion for directed verdict at the conclusion of appellant's case. The trial court found that the motion would not have been successful, if it had been timely made. Counsel did renew the motion, which the trial court denied, but did so following the submission of the case to the jury. This court has held that a motion made after the jury has been instructed is not timely. *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827

(2002).

The State contends that appellant fails to raise any argument as to the State's failure to prove any particular element of the charges. However, we believe that appellant has raised the argument presented below sufficiently so as to preserve the issue for review. The claim raised below was that the State did not show sufficient evidence of appellant's constructive possession, and had the question been preserved for review, the outcome of the direct appeal would have been different. The lack of organization and clarity in appellant's brief understandably may have contributed to the State's failure to discern any distinction of that argument from appellant's argument concerning counsel's failure to call witnesses who would have bolstered the same argument. While those arguments have been intertwined in the brief, we are satisfied that both are sufficiently preserved to address.²

While the argument was preserved, it does not have merit. We do not permit an appellant to rechallenge the sufficiency of the evidence at trial in a postconviction proceeding. *Weatherford v. State*, 363 Ark. 579, ___ S.W.3d ___ (2005) (per curiam). However, there was clearly error by trial counsel, and where we reach the second prong of the *Strickland* test, an appellant must demonstrate prejudice. Counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). We do not determine here whether the State may have met its burden of proof at appellant's trial, but we do

² In a pro se motion for reconsideration of our denial of Mr. Goodwin's motion to supplement his attorney's brief on appeal, Mr. Goodwin requested that we allow him to brief the sufficiency of the evidence issue in supplement to his attorney's brief. Mr. Goodwin's motion was denied because he failed to make clear in his motion that the claim was based upon a requirement to show merit for an ineffective assistance of counsel claim, rather than a free-standing, independent claim. *Goodwin v. State*, CR 06-612 (Ark. Dec. 14, 2006) (per curiam). As indicated, the claim was raised and we address the merits of the claim, regardless.

determine that appellant did not meet his burden to show a meritorious argument so as to demonstrate prejudice in his Rule 37.1 proceeding.

The trial court did provide an adverse ruling on appellant's untimely motion for a directed verdict, and appellant can only show prejudice to his defense and that he was deprived of a fair trial by a showing that he would have prevailed on appeal of that adverse decision. On review of an order denying a directed verdict, this court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005).

The basis for appellant's claim is that the State failed to show dominion and control by appellant to support constructive possession of the contraband. When seeking to prove constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. *Id.* This control can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Id.*

There is no dispute that the items were seized at appellant's residence. Appellant contends that because he was not the sole occupant of the residence, the State did not meet its burden of proof on this point. It is true that joint occupancy, in itself, is not sufficient to establish possession or joint possession. *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997). But, the record shows that the evidence at trial provided additional facts and circumstances indicating appellant's knowledge and control.

Appellant was immediately outside of the residence at the time his parole officers approached and began the search. At the time of the search, other individuals were in the residence engaged in

a process that the investigating officers determined was the manufacture of methamphetamine. There was testimony that methamphetamine had previously been manufactured. There was evidence that the process of manufacturing the methamphetamine would take from three to ten hours to complete, and there was evidence showing that preparations had been made to begin another batch.

Under the circumstances presented at appellant's trial, a methamphetamine producing operation had been ongoing at appellant's residence for a substantial period of time and was planned to continue for a further period. The parole officer testified that, if others were living in the residence with appellant, appellant had not reported that fact as required under the terms of his parole. Appellant was standing just outside the residence when the parole officers approached. Despite the fact that the testifying officer observed, through the open door, other individuals inside the residence, appellant told the officer that there was no one in the residence. On entering the residence, the parole officer noticed a strong chemical odor and witnessed an individual in the kitchen in the midst of the manufacturing process.

From these circumstances, the jury could have inferred that appellant exercised control over the contraband. Appellant's failure to provide truthful, relevant information when asked, or as required by the terms of his parole, along with his proximity to the manufacturing process and its open conduct over an extended period of time, provided forceful evidence of knowledge and control. Substantial evidence is that which is forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *McKenzie*, 362 Ark. at 262, 208 S.W.3d at 174. Appellant did not meet his burden to show that this argument would have been persuasive on this point.

Appellant also contends that the trial court erred in finding trial counsel was not ineffective for failure to present two witnesses, Arty Williams and appellant's brother, John Goodwin. The

objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). An attorney's decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). Trial counsel must use his or her best judgment to determine which witnesses will be beneficial to his client and in assessing the attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). The decision of whether or not to call a witness is generally a matter of trial strategy that is outside the purview of relief under Ark. R. Crim. P. 37.1, but such strategic decisions must still be supported by reasonable professional judgment, so as not to fall beyond the scope of what a competent attorney would recommend. *State v. Goff*, 349 Ark. 532, 79 S.W.3d 320 (2002) (per curiam).

Here, the trial court determined that counsel's decision as to these witnesses was trial strategy and outside the purview of relief under Rule 37.1, and we do not find that ruling was clearly erroneous. Appellant's brother would have testified that one of the gentlemen arrested along with appellant was also living in appellant's residence. The parole officer and investigating officers testified that others were present in the residence, and that point was not contested. As discussed, further establishing joint occupancy of the residence would not have advanced appellant's defense. Counsel testified that, although the charges were dropped, appellant's brother had initially been

arrested as a co-defendant. Because the charges could be refiled, counsel did not believe he should interview John Goodwin, and that the same evidence would come in, without the brother's testimony, through the police officer's testimony. Counsel's testimony supported the trial court's determination that the decision not to call appellant's brother was a strategic decision supported by reasonable professional judgment.

Mr. Williams was alleged to have been able to provide testimony that he found in the residence a satchel that belonged to another co-defendant. Again, counsel demonstrated through cross-examination of one of the officers, how a number of the items seized as evidence could have fit into a small satchel, so as to suggest that the co-defendant could have brought the items into the residence. Counsel testified that he did make some effort to locate and interview Mr. Williams, but was unsuccessful. Again, we would agree that counsel appeared to have based the decision not to call, or further attempt to locate and interview Mr. Williams, on reasonable professional judgment. Moreover, as to Mr. Williams, appellant failed to carry his burden to demonstrate prejudice in that he did not show that Mr. Williams would have been available for trial, nor did appellant present an affidavit or other demonstration of his testimony.

Appellant's next argument is that the trial court erred by not finding trial counsel was ineffective for failure to challenge appellant's prior convictions. However, appellant failed to show that such a challenge was not without merit. Appellant argues that some of the convictions may be challenged through a federal habeas corpus proceeding. Yet, for purposes of sentence enhancement, a conviction is final when the judgment is pronounced. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987). Should appellant successfully challenge those sentences through a federal habeas proceeding or otherwise, appellant may then seek modification of his sentence. *See Halfacre v.*

State, 292 Ark. 331, 731 S.W.2d 179 (1987). Appellant has not shown that trial counsel could have successfully challenged those convictions in this case.

Finally, appellant makes a number of broad claims that trial counsel's conduct should "shock the conscience of the court" and that "every attorney who has looked at this case has felt that the performance of the defense counsel fell below the professional norms." To the extent these claims may have been raised below, they are without merit. We have addressed such claims before, and once again find the statements are conclusory. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). To the extent that appellant may be asserting cumulative error, the claim is also without merit. This court has consistently refused to recognize the doctrine of cumulative error in allegations of ineffective assistance of counsel. *Weatherford*, 363 Ark. at 587-588, ___ S.W.3d at ___. The trial court was not clearly erroneous in ruling that trial counsel was not ineffective, and we accordingly affirm the order denying postconviction relief.

Affirmed.