

ARKANSAS SUPREME COURT

No. CR 07-1051

GARY STEVEN CRAWFORD
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 2, 2008

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, CR 2003-91,
HON. HAROLD S. ERWIN, JUDGE

AFFIRMED.

PER CURIAM

In 2004, a jury found appellant Gary Steven Crawford guilty of rape and kidnapping and sentenced him to consecutive sentences of 240 months' imprisonment on the rape charge and 96 months' imprisonment on the kidnapping charge, for an aggregate term of 336 months. The Arkansas Court of Appeals affirmed the judgment. *Crawford v. State*, CACR 04-1397 (Ark. App. Sept. 21, 2005). Appellant filed in the trial court a timely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was dismissed as untimely. On appeal of that order, this court reversed and remanded for the trial court to consider the petition. *Crawford v. State*, CR 06-692 (Ark. Jan. 25, 2007) (per curiam).

On remand, the trial court denied the petition without a hearing and entered a written order to that effect on September 4, 2007. Appellant now brings this appeal of the denial of postconviction relief, alleging error on the part of the trial court in finding that appellant was not held for seven days before a first judicial appearance, that appellant was not improperly charged with kidnapping, and that trial counsel was not ineffective for failing to call a witness. Appellant has attempted to raise

other issues as well,¹ but these are the only issues on which he received a ruling from the trial court and for which he could be considered, under a very broad definition of the term, to have developed any argument. An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. See *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). This court will not research and develop arguments for appellants. *Williams v. State*, 371 Ark. 550, ___ S.W.3d ___ (2007).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006) (per curiam). 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. *Small v. State*, 371 Ark. 244, ___ S.W.3d ___ (2007) (per curiam).

Appellant first disputes the trial court's finding that appellant's first judicial appearance did not violate Arkansas Rule of Criminal Procedure 8.1. He appears to contest both the finding that appellant's first judicial appearance was within an acceptable period of time and that appellant was actually arraigned for this case as the trial court found the record in appellant's trial indicated.

Postconviction proceedings under Rule 37.1 do not permit a petitioner to raise questions that might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Here, the fact that appellant was tried on a plea of not guilty resulted in waiver on this issue, and he cannot demonstrate either prejudice or an error so fundamental as to render the

¹ Appellant lists five points of appeal, but separates his argument into only three paragraphs. The argument appears to combine some points together and mentions an issue raised below but not listed in the points.

judgment void as required in a Rule 37.1 proceeding. *See Scott v. State*, 355 Ark. 485, 139 S.W.3d 511 (2003). Denial of postconviction relief on this point was therefore not in error.

Appellant next contests the trial court's finding that appellant was charged by amended information with kidnapping prior to appellant's trial. Appellant contends that he was not charged with that crime before trial. While the record of appellant's direct appeal does not contain an amended information and the original information lists only rape, the record in this appeal contains a copy of an amended information with a file mark of May 24, 2004, that was attached as an exhibit to the State's response to appellant's petition for postconviction relief. The judgment indicates that appellant's trial was July 9, 2004.

Appellant offered only conclusory statements to the contrary in his petition in order to dispute the trial court's conclusion on this issue. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The record supports the findings on this point and the trial court was not clearly erroneous.

Finally, appellant argues that trial counsel was ineffective for failing to call a witness who appellant alleges had seen him with the victim. The trial court addressed this as two separate bases for relief raised in the petition and indicated that appellant did not identify any particular witness in the first basis. Mr. Al Hamdini was identified in the second basis and the trial court found that counsel did not call Mr. Hamdini as a matter of trial tactics outside the scope of relief under Rule 37.1.

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, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality

of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small*, 371 Ark. at 250, ___ S.W.3d at ___. Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

Where the trial court has determined a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then a decision not to call a witness or challenge a statement may not be a proper basis for relief under Rule 37.1. *See Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). 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. *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006).

The trial court's order on this issue referenced an affidavit from trial counsel provided by the State that stated Mr. Hamdini was served to appear at trial, but that, when interviewed, Mr. Hamdini professed no knowledge of any facts either supporting or harming appellant's case. The order also referenced an affidavit from the prosecuting attorney that indicated Mr. Hamdini had denied being present during the time that the victim was kidnapped and raped. Those affidavits are included in the record as exhibits to the State's response.

While the trial court may have erred to the extent that it considered evidence submitted by the State without providing appellant an opportunity to challenge the proffered testimony at a hearing, the record in this case does provide support, without the affidavits, for a finding that the decision was a matter of strategy. The record in appellant's direct appeal does not include a copy of any subpoenas, but does list one as served on Mr. Hamdini the day of the trial in the index.

Considering the information contained in the record that indicates that counsel was aware of Mr. Hamdini and could have called him as a trial witness if he elected to do so, we cannot conclude that the trial court committed error when it determined that trial counsel's failure to call Mr. Hamdini was a tactical decision.

Moreover, appellant did not meet his burden to plead facts sufficient to show that prejudice resulted from the alleged error by counsel. Considering the totality of the evidence presented at trial, even had Mr. Hamdini testified as petitioner alleged that he would, appellant did not show that this testimony was sufficient to have changed the outcome of the trial.

The petitioner claiming ineffective assistance of counsel has the burden of overcoming the presumption that counsel's conduct falls within the wide range of reasonable professional assistance by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, 238 S.W.3d 111 (2006). The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

In his petition, appellant alleged that Mr. Hamdini would have testified that the victim and her brother left the shop with appellant voluntarily, in contrast to the brother's testimony that he saw appellant pulling the victim through a field. Considering the other evidence presented at trial, including the testimony of the victim, we cannot say that Mr. Hamdini's testimony to that effect alone would have caused the jury a reasonable doubt respecting appellant's guilt.

Appellant has not shown that the trial court erred in denying postconviction relief. Accordingly, we affirm the order denying appellant's Rule 37.1 petition.

Affirmed.

Wills, J., not participating.