

ARKANSAS SUPREME COURT

No. CR 07-580

VASUN BUFORD
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 24, 2008

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [CIRCUIT COURT OF CLARK
COUNTY, CR 2004-61, HON. JOHN A.
THOMAS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

A jury found appellant Vasun Buford guilty of rape and sentenced him to life imprisonment. This court affirmed the judgment. *Buford v. State*, 368 Ark. 87, ___ S.W.3d ___ (2006). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied. Appellant lodged an appeal of that order in this court, and he has filed the motion for extension of time in which to file appellant's brief that is now before us.

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. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (per curiam); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (per curiam). It is clear that appellant cannot prevail as his petition was not sufficient to support relief under Rule 37.1.

Appellant filed his petition on January 23, 2007. On February 21, 2007, appellant filed a

pleading styled as a memorandum and brief in support of the petition. Under Ark. R. Crim. P. 37.2, all grounds for relief must be raised in the original petition, and appellant did not request leave to amend the petition under Rule 37.2(e). Nor does the trial court's order indicate that the later pleading was taken into consideration. We therefore only consider the initial petition in determining whether appellant pleaded grounds sufficient to support relief under Rule 37.1.

Each of appellant's nine claims was based upon an allegation of ineffective assistance of counsel. 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 v. State*, ___ Ark. ___, ___ S.W.3d ___ (Oct. 4, 2007) (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. *Id.*

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, ___ S.W.3d ___ (2006). Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam); *see also State v. Barrett*, ___ Ark. ___, ___ S.W.3d ___ (Sept. 27, 2007). Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

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, ___ S.W.3d ___ (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 appellant's first claim, he asserted ineffective assistance for trial counsel's failure to preserve for review a question of error concerning the trial court's admission of expert testimony that the victim had been sexually abused. The question, however, was preserved for appeal and addressed in our opinion. We held that the trial court did err in admitting opinion testimony by the expert in which she concluded that the victim was not lying about the sexual abuse, but that the error was harmless. *Buford*, 368 Ark. at 91, ___ S.W.3d at ___. A proceeding under Rule 37.1 does not allow an appellant the opportunity to reargue points that were decided on direct appeal. *Williams v. State*, 369 Ark. 104, ___ S.W.3d ___ (2007).

In appellant's next claim, he argued that trial counsel was ineffective for failure to call a witness who would testify as to certain evidence in the case that did not indicate the presence of semen. 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 that 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).

Appellant did not plead facts in his petition that would establish prejudice as to this claim. As our opinion on direct appeal noted, the evidence of guilt was overwhelming. The victim and two

eye witnesses testified as to the events. Appellant failed to establish that testimony concerning the absence of this particular physical evidence would have affected the outcome of the trial. His claim therefore failed to provide substantive facts to meet his burden to overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

In appellant's third claim, he asserted ineffective assistance for failure to object to an amendment to the information. While appellant contended this failure left trial counsel inadequate time to prepare a defense, he did not indicate what further preparation might have been undertaken or the resulting benefit of that preparation. His claim was conclusory and he again failed to provide a basis to establish prejudice from the alleged deficient performance.

In appellant's fourth claim, he alleged ineffective assistance for failure to request an instruction for a lesser-included offense. This court has held that as a matter of trial strategy, competent counsel may elect not to request an instruction on lesser-included offenses. *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984) (per curiam). Appellant's defense at trial was a complete denial, and not to request instructions as to lesser-included offenses was consistent with that strategy.

Appellant next claimed ineffective assistance for trial counsel's failure to object to the jury selection process and move for a change of venue. Appellant alleged that he was convicted by an all-white jury and that the process was not free from racial discrimination and prejudice. Appellant's allegations were made without factual substantiation, in that he did not present a proposed basis for either the objection or the motion. Counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant's conclusory claims did not serve to establish how trial counsel could have successfully challenged the selection process.

Counsel did object as to the venire panel, as noted in our opinion on direct appeal, although

the objection was based upon pretrial publicity, not racial bias. In his petition, appellant failed to provide a basis for objection to the panel, or any other basis on which counsel might have objected to the process. Persons comprising the venire are presumed to be unbiased and qualified to serve. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003). Appellant's allegation that the jury was all-white, without more, did not raise an implication that the process was not free from discrimination. *See id.*; *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984).

Nor did appellant offer any factual basis on which trial counsel might have sought a change in venue. To establish that the failure to seek a change in venue amounted to ineffective assistance of counsel, a petitioner must offer some basis on which to conclude that an impartial jury was not empaneled. *Echols v. State*, 354 Ark. 530, 560, 127 S.W.3d 486, 505 (2003) (quoting *Huls v. State*, 301 Ark. 572, 580, 785 S.W.2d 467, 471-472 (1990) (per curiam)). Appellant did not include any offer of such a basis in his petition.

Next, appellant claimed ineffective assistance of counsel for failure to investigate. He did not specify what would have been discovered through further investigation or explain how any additional information could have changed the outcome of the trial. A petitioner cannot succeed merely by alleging that counsel was not prepared or did not spend enough time on the case, but must show that, but for counsel's lack of preparation, there is a reasonable probability that the outcome of his trial or sentence would have been different. *Camargo*, 346 Ark. at 129, 55 S.W.3d at 263.

In appellant's seventh claim, he alleged trial counsel was ineffective for failure to request a comparison of semen found on certain evidence. Appellant did not state what such a comparison would show or how this information could have changed the outcome of the trial. Once again, appellant's claim was conclusory, without factual basis.

In appellant's last two claims in his petition, he sought to reassert the preceding claims, and

in the eighth claim restated failure to object or preserve the arguments for appeal as grounds. In the last claim, he alleged that the claims individually and collectively violated appellant's constitutional right to a fair trial. To the extent that each of the claims individually might be restated as a failure to object or preserve for appeal, as restated, the claims again failed as conclusory allegations without sufficient factual substantiation because appellant provided no basis for objection. The claims failed collectively, as well. This court has consistently refused to recognize the doctrine of cumulative error in allegations of ineffective assistance of counsel. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam); *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).

Because none of appellant's claims in his petition were sufficient to support relief on a petition under Rule 37.1, he cannot prevail upon appeal of the trial court's denial of postconviction relief. Accordingly, we dismiss the appeal and the motion is moot.

Appeal dismissed; motion moot.