

ARKANSAS SUPREME COURT

No. CR 07-645

JOE NEWTON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 17, 2008

APPEAL FROM THE CIRCUIT COURT
OF ASHLEY COUNTY, CR 2003-227,
HON. SAMUEL B. POPE, JUDGE

AFFIRMED.

PER CURIAM

In 2006, appellant Joe Newton, who is also known as Joe Gene Newton, was convicted by a jury of capital murder and sentenced to life imprisonment without parole. We affirmed. *Newton v. State*, 336 Ark. 587, 237 S.W.3d 451 (2006). Subsequently, appellant timely filed in the trial court a verified pro se petition pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition and appellant, now represented by counsel, 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, 146 S.W.3d 871 (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). Additionally, on appeal, we do not consider matters outside the scope of the verified petition filed in the trial court. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).

In his original pro se petition, appellant made two arguments: (1) there was insufficient

evidence to convict him and he was actually innocent of the charge against him; (2) trial counsel was ineffective for failing to file a motion in limine to suppress an illegal search and seizure and the evidence obtained during that search. The trial court, in denying Rule 37.1 relief, held that appellant's first claim was a direct attack on the judgment, and not a proper postconviction argument. The trial court also found that appellant's second claim, regarding illegal search and seizure, was raised on direct appeal and could not be reargued in a Rule 37.1 petition.

Turning to appellant's appeal, in Point I, he alleges that the trial court failed to liberally construe the original Rule 37.1 petition and address all issues raised by appellant. As his sub-points, he contends that: (a) the first ground raised by appellant in the trial court regarding sufficiency of the evidence was actually a claim of ineffective assistance of counsel which the trial court failed to consider; (b) appellant's Rule 37.1 illegal search and seizure issue differed from the illegal search and seizure issue raised in the direct appeal, and the trial court erred in failing to address that issue.

As to Point I(a), it is clear that appellant's original argument was not a claim of ineffective assistance of counsel. He argued to the trial court that the State did not meet its burden of proving each element of either capital murder, first degree murder, or second degree murder. He also argued that he was not charged with an underlying felony to support a capital murder conviction, and that he was actually innocent of the crime. At no point in this argument did appellant point to deficient actions of trial counsel, although he did so in his second ground for Rule 37.1 relief. He is thus precluded from raising a new argument of ineffective assistance of counsel on appeal. *Morgan, supra*.

Appellant's sufficiency of the evidence argument was a direct attack on the judgment. Rule 37.1 provides a means to collaterally attack a conviction, and is not a method for a direct attack on

the judgment or a substitute for an appeal. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam). This argument in the original Rule 37.1 petition was couched in terms of sufficiency of the evidence and actual innocence. A claim of actual innocence is a direct challenge to the sufficiency of the evidence that supported a conviction, and sufficiency of the evidence can not be raised in a Rule 37.1 proceeding. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

As for requiring a liberal interpretation of Rule 37.1 petitions as appellant urges, he provides no valid authority for this contention. The United States Supreme Court case cited by appellant, *Rhines v. Weber*, 544 U.S. 269 (2005), does not stand for the proposition that pro se petitions for state postconviction relief must be liberally construed by the state courts. We will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003). There is no legal basis to apply a liberal interpretation to appellant's Rule 37.1 petition in order to consider an improper direct challenge to the judgment as a valid collateral attack.

Next, in Point I(b) on appeal, appellant argues that trial counsel rendered ineffective assistance. 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).

After quoting from the original Rule 37.1 petition argument at length, appellant complains on appeal that the trial court failed to address appellant's ineffective-assistance-of-counsel claim related to his assertion of an illegal search and seizure. Appellant acknowledges that illegal search and seizure was raised in his direct appeal. He nonetheless contends that the search and seizure argument articulated in the Rule 37.1 petition presented a different underlying theory for suppression and is therefore not precluded in seeking postconviction relief.

In the original Rule 37.1 petition, the gravamen of appellant's argument was that the lack of probable cause and exigent circumstances resulted in an illegal search and seizure. Further, appellant contended that trial counsel was ineffective for failing to file a motion in limine to suppress the search in order to seek an interlocutory appeal of the trial court's denial of the motion to suppress.¹ There is no merit to the arguments made below or to this court.

First, criminal defendants who seek to appeal adverse rulings must do so from the judgment of conviction, and not from the order that denied a suppression motion. *Hill v. State*, 363 Ark. 505, 215 S.W.3d 586 (2005); *see also Avery v. State*, 361 Ark. 352, 206 S.W.3d 828 (2005). Pursuant to Ark. R. App. P.–Crim. 3(a), the right to an interlocutory appeal is vested only in the State in limited circumstances. In the case before us, trial counsel was not ineffective for failing to seek an interlocutory appeal when none was available.

In addition, appellant complained in the original Rule 37.1 petition, and in this appeal by incorporation, that the lack of probable cause and exigent circumstances caused the search and

¹Specifically, appellant contended that trial counsel: should have Filed a Motion in Limine on Evidence and witnesses in which the Trial Court would not make the Final Judgment, and could be Appealed to Higher Courts for Final Judgment before Proceedings could continue. Thus, allowing the Defendant a better Review and closer Judgment of what was proper and allowable to be presented to the Jury, without any prejudice occurring.

seizure to be unconstitutional. This argument amounts to an attempt to reargue a settled evidentiary issue under the guise of ineffective assistance of counsel. Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). Moreover, arguments regarding evidentiary issues as argued by petitioner are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Appellant fails to demonstrate that the trial court erred in denying his Rule 37.1 petition.

In Point II on appeal, appellant avers that the trial court erred in not granting appellant's motions to file an over-length amended petition and for additional time in the Rule 37.1 proceeding in which to obtain counsel.² Appellant sets out several bases altogether in support of granting the motions, none of which were presented to the trial court.³ However, he is limited to the arguments made below. *Morgan, supra*.

Further, appellant argues to this court that these motions were filed in tandem, i.e., he was seeking additional time to hire an attorney for assistance to file an over-length amended petition. As neither motion indicated that claim of symbiosis, we will consider the motions independently.

We review a circuit court's denial of leave to amend a Rule 37.1 petition by an abuse-of-discretion standard. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but establishes that the trial decision was arbitrary or groundless. *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991).

²The motion for additional time was captioned as a motion to stay disposition of the case.

³The arguments on appeal in support of granting the motions are: (1) appellant received life imprisonment without parole as the sentence for capital murder; (2) appellant needed legal assistance as shown by his pleadings; (3) his family was in the process of hiring an attorney to represent him; (4) a sixty-day extension was not unreasonable; (5) appellant suffers from mental or emotional disease or defect.

Appellant makes no showing here that the trial court abused its discretion in denying the motion for leave to file an over-length amended petition. In order for the trial court to grant the motion for an over-length Rule 37.1 petition, appellant was required to show a “legitimate ground or justification for filing the enlarged petition.” *Rowbottom v. State*, 341 Ark. 33, 35, 13 S.W.3d 904, 906 (2000). Appellant’s motion argued only that the ten-page limit was unreasonable in light of the length of the trial transcript and the number of exhibits introduced at trial. As appellant previously filed a petition within the page limitation, and failed to state a legitimate ground for filing an over-length brief, the trial court did not abuse its discretion in denying the motion to file an amended petition.

Appellant maintains on appeal that the present case is similar to *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006), in which this court upheld an appellant’s right to amend a Rule 37.1 petition. There is no factual similarity between the two cases and the instant matter is not more compelling than the facts in *Butler*, as appellant argues here. The situation in *Butler* was far more complex than the present case and spanned a time period of nearly three years. It involved numerous appeals related to the Rule 37.1 petition, and concerned pleadings that were filed during a time in which the trial court had no jurisdiction over the Rule 37.1 petition. *Butler* does not factually support appellant’s argument that the trial court abused its discretion when it denied appellant’s motion to file an amended Rule 37.1 petition.

Now turning to the motion for continuance, we likewise review denial of the motion under an abuse-of-discretion standard. *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). In addition, an appellant must demonstrate prejudice that rises to the level of denial of justice, and results from deprivation of a continuance. *Id.*

The trial court did not abuse its discretion in denying appellant's motion for continuance in order for appellant to hire an attorney in the instant matter. The motion itself stated no grounds for the request. Furthermore, appellant fails to show that he suffered prejudice as a result of the motion being denied. Appellant waited more than five months after filing his original Rule 37.1 petition before he filed the motion for continuance, during which time he could have hired an attorney to represent him but failed to do so.

Affirmed.