

Cite as 2010 Ark. 341

SUPREME COURT OF ARKANSAS

No. CR 08-1320

KENNY TRAVIS, JR.
Appellant

v.

STATE OF ARKANSAS
Appellee**Opinion Delivered** September 23, 2010APPEAL FROM THE CIRCUIT
COURT OF MISSISSIPPI COUNTY,
CHICKASAWBA DISTRICT, CR
2006-202, HON. VICTOR L. HILL,
JUDGE

AFFIRMED.

PER CURIAM

In 2006, a jury found appellant Kenny Travis, Jr., guilty of capital murder and aggravated robbery and sentenced him to an aggregate term of life without parole. This court affirmed the judgment. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007). Appellant timely filed a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010) that was denied. We granted appellant's motion, filed by retained counsel, for a belated appeal. *Travis v. State*, 375 Ark. 244, 289 S.W.3d 474 (2008) (per curiam).

On appeal, appellant raises two points, as follows: (1) the trial court erred in denying the Rule 37.1 petition without an evidentiary hearing; (2) the order entered did not contain findings of fact as required by Arkansas Rule of Criminal Procedure 37.3 (2010). We find no reversible error and affirm.

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The circuit court need not hold a hearing on a Rule 37.1 petition when the petition and the files and the records of the case conclusively show that the petitioner is entitled to no relief. Ark. R. Crim. P. 37.3(a). Under Rule 37.3(a), the trial court is required to make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings. *Id.*; see also *Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. Here, the trial court made only broad, general findings that the evidence was overwhelming and that appellant received a fair trial, without addressing the individual allegations listed. This court will affirm the denial of a Rule 37.1 petition notwithstanding the circuit judge's failure to make adequate written findings under Rule 37.3 in two circumstances, as follows: (1) where it can be determined from the record that the petition is wholly without merit; (2) where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Shaw v. State*, 2010 Ark. 112 (per curiam). Here, regardless of the sufficiency of the trial court's findings in the order, we can determine from the record that the petition was wholly without merit.¹

¹ Appellant asserts that this court may not make such a determination in this case, "based on the cold record," suggesting without citation that our precedent calls for an evidentiary hearing in Rule 37.1 proceedings in capital cases. Appellant was tried for capital murder, but the State did not seek the death penalty. It is true that this court has recognized that the death penalty is a unique punishment that demands unique attention to procedural safeguards. *Collins v. State*, 365 Ark. 411, 231 S.W.3d 717 (2006) (citing *Robbins v. State*, 354 Ark. 1, 114 S.W.3d 217 (2003)); see also Ark. R. Crim. P. 37.5 (2010). The same considerations are not present in this case because the jury was not instructed concerning the death penalty and appellant was not sentenced to death. As we explain, and despite appellant's contention to the contrary, the claims here may be resolved by review of the record. Appellant appears to suggest that factual findings are needed to determine whether trial counsel acted in accord with reasonable trial strategy, but the analysis here does not

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In the petition, appellant alleged ineffective assistance of counsel for failure to act to ascertain the time of the victim's death in order to prepare an alibi defense, failure to object to an incorrect statement in the information concerning the date of the charged crime, failure to obtain a ruling as to the admission of a cell phone into evidence, failure to object to testimony by witnesses not excluded from the courtroom during testimony, and failure to object to the use of perjured testimony by the prosecution. Appellant also raised claims of prosecutorial misconduct, double jeopardy, actual innocence, actual and constructive denial of counsel, and denial of due process.

A number of appellant's claims are conclusory, not supported with a factual basis, or are not claims cognizable in a Rule 37.1 proceeding. Prosecutorial misconduct is not a claim cognizable in a Rule 37.1 petition. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). A claim of actual innocence is a direct attack on the judgment and a challenge to the sufficiency of the evidence that is not cognizable in a Rule 37.1 proceeding. *See Bell v. State*, 2010 Ark. 65, ___ S.W.3d ___ (per curiam). Appellant's claims of actual and constructive denial of counsel and denial of due process were stated in the petition as bare, conclusory allegations without factual development of any kind. Conclusory statements cannot be the basis of postconviction relief. *State v. Brown*, 2009 Ark. 202, ___ S.W.3d. ___.

Even those claims in the petition that contained some factual allegations failed to allege facts sufficient to support the claim. Appellant alleged a double jeopardy violation in that he

require a finding that counsel made a strategic decision.

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was convicted of capital murder and aggravated robbery when the robbery charge was used to prove the capital murder charge. The circuit court would not have had authority to sentence appellant for a charged felony and the underlying felony under prior law. *See Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008) (citing *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003)). Under the law applicable here, however, separate convictions and sentences are authorized for capital murder and any felonies utilized as underlying felonies for the murder. Ark. Code Ann. § 5-1-110(d)(1)(A) (Supp. 2007); *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004).

Appellant's claims of ineffective assistance of counsel were also without merit. Appellant provided only conclusory allegations in support of his claim that counsel should have objected to perjured testimony; he did not offer any basis for a successful objection to the testimony or supporting facts for the claim that the testimony was false. Ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Britt v. State*, 2009 Ark. 569, ___ S.W.3d ___ (per curiam). As a reflection of this requirement, counsel is not ineffective for failing to make an argument that is meritless. *Johnson v. State*, 2009 Ark. 553 (per curiam). The petition must provide facts that affirmatively support an appellant's claims, and conclusory statements cannot form the basis of postconviction relief. *Id.* Appellant failed to present a meritorious claim because he failed to demonstrate that counsel could have made a meritorious objection.

Appellant did set out a basis for an objection to the admission of the cell phone into evidence. In the petition, appellant asserts that counsel was ineffective because counsel should

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have renewed his motion to exclude the evidence on the basis that the chain of custody was not properly established. Even so, appellant failed to set forth facts to support that allegation in that he did not state facts to demonstrate any prejudice from the alleged error.

The standard of review on appeal from a trial court's denial of postconviction relief as to a claim of ineffective assistance of counsel is the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *French v. State*, 2009 Ark. 443 (per curiam). 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 so as to deprive him of a fair trial. *Id.*, at 3; *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A claim of ineffective assistance must therefore state facts sufficient to satisfy both prongs of the *Strickland* test.

The cell phone was admitted into evidence to provide the jury with statements appellant made that were recorded by one of the witnesses. The witness also testified about the statements that appellant made, and the defense cross-examined the witness both about the time that he held the phone before turning it over to the police and the potential for tampering with the phone. Even if appellant had established his allegation of error in failing to contest admission of the phone, he did not demonstrate that he could have established that the admission of the phone prejudiced his defense.

Appellant's claim of ineffective assistance as a result of failure by counsel to oppose or appeal the admission of testimony from two witnesses was based on appellant's assertion that the witnesses were not subject to the sequestration rule, and the defense was surprised by the

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evidence.² Neither basis demonstrates a potentially meritorious objection. *See Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996) (the State is not required to provide the defense with the names of rebuttal witnesses until the defense presents its case); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988) (no error in permitting testimony of rebuttal witness despite sequestration rule).

Appellant's final claims concern counsel's failure to object to the incorrectly stated date of the crime in the information and failure to learn the correct time and date of death in order to prepare an alibi defense. The information and amended information filed in this case indicate that the charges occurred "on or about the 24th day of June, 2005," and our opinion on direct appeal references the date noted in the information. Appellant contends that the actual date of the crime was June 25, 2005, and that counsel should have taken steps to obtain the coroner's report and used it to question and impeach witnesses, should have ascertained the exact time and date of the death of the victim, should have requested a bill of particulars regarding the date and time of the murder, and should have provided the defendant with a reasonable opportunity to prepare an alibi defense.

Generally, the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009). In this case, it was apparent that the victim had significant notoriety in the community; learning of the murder or the police response to the call concerning the murder

²Appellant did oppose the testimony of each witness, although in one case on other bases than discussed here, but did not contest the adverse ruling on appeal.

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were events used as reference points for much of the testimony. Under the circumstances of appellant's trial, he did not establish that the time of the murder was of critical significance.

Appellant did testify at trial that he was in Memphis at the time the murder occurred in Osceola. The defense was clearly aware prior to trial that the shooting actually occurred on June 25. A letter from appellant written during the time he was incarcerated prior to trial identifies the date "this stuff suppose [sic] to happen" as June 25, 2005. Another such letter also indicates more generally that appellant was aware of the date and the need to establish an alibi for it. In the petition, appellant did not identify any specific testimony that would have been impeached by reference to June 25 as the date of the murder, nor does our review of the record disclose any. Any inconsistencies in the testimony that might have been raised by discrepancies in the specific hour and time of the death do not appear significant.

Because, with reference to the record in this case, appellant clearly failed to set forth facts in the petition that would establish prejudice or otherwise support the claims cognizable under Rule 37.1, the petition was wholly without merit, appellant was clearly entitled to no relief, and no hearing was warranted. Regardless of the sufficiency of the trial court's findings, we therefore affirm the denial of postconviction relief.

Affirmed.