SLIP OPINION

Cite as 2011 Ark. 409

SUPREME COURT OF ARKANSAS

No. CR 09-1103

TILTON RHODES
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 6, 2011

APPEAL FROM THE DREW COUNTY CIRCUIT COURT, CR 2005-185, HON. SAM POPE, JUDGE

AFFIRMED.

PER CURIAM

Appellant Tilton Rhodes appeals an order of the Drew County Circuit Court denying his pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). For reversal, appellant raises two ineffective-assistance-of-counsel claims concerning counsel's alleged failure to prepare witnesses and to introduce evidence. We affirm.

Appellant was convicted of rape and second-degree sexual assault of a twelve-year-old girl for which 120 months' imprisonment was imposed for each offense. The sentences were ordered to be served consecutively. The Arkansas Court of Appeals affirmed. *Rhodes v. State*, 102 Ark. App. 73, 281 S.W.3d 758 (2008).

Appellant then filed in the trial court a pro se Rule 37.1 petition, alleging a violation of his Sixth Amendment right to counsel and claiming that defense counsel was ineffective because (1) he did not adequately prepare in his representation of appellant, and (2) he did not sufficiently prepare appellant or certain defense witnesses at trial. In his amended petition,

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appellant specifically complained that defense counsel met with him one time; that counsel did not investigate appellant's defense that appellant was living out-of-state at the time of the offenses; and that counsel failed to prepare appellant's uncle before calling him to testify.

The circuit court held an evidentiary hearing and entered an order denying appellant's petition. In its order, the circuit court found that appellant failed to show that, if counsel had better prepared the witnesses, the outcome of the case would have been different and that appellant had not shown that he was prejudiced by counsel's representation. The court further found that appellant's alibi defense was a question of fact for the jury. Appellant brings this appeal from the order.

On appeal, appellant argues that he was not properly represented and that he was denied his Sixth Amendment right to counsel. Specifically, appellant contends that two of the defense witnesses were insufficiently prepared to testify and that defense counsel failed to gain admission of documentary evidence, such as paycheck stubs, from appellant's place of employment in St. Louis, Missouri, at the time of the offenses.

We do not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Payton v. State*, 2011 Ark. 217 (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.*; *Hawthorne v. State*, 2010 Ark. 343 (per curiam).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." U.S. Const., amend. VI.

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This constitutional provision provides those accused with the right to effective assistance of counsel at every critical stage of a criminal proceeding. *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Miller v. State*, 2011 Ark. 114 (per curiam). In order to meet the second prong of the test, the petitioner must show that counsel's deficient performance prejudiced petitioner's defense so that he was deprived of a fair trial. *Id.*; *see also Mitchem v. State*, 2011 Ark. 148 (per curiam). A claimant must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Delamar v. State*, 2011 Ark. 87 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and a claimant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Kelley v. State*, 2011 Ark. 175 (per curiam). Where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then counsel's decision is not a basis for relief under Rule 37.1. *Anderson v. State*, 2010 Ark. 404, ___ S.W.3d ___ (per curiam).

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Based on our review of the record before us, we cannot say that the circuit court's findings were clearly erroneous. First, with regard to the issue of whether two defense witnesses—appellant's uncle and K.V., a victim in another alleged sexual assault—were sufficiently prepared, both witnesses testified that they spent a short period of time with defense counsel. However, both witnesses testified that their testimony would not have changed if they had spent more time with defense counsel. Considering this testimony, appellant failed to demonstrate how he was prejudiced by the amount of time that defense counsel spent with these witnesses. When a petitioner fails to demonstrate any prejudice, the Sixth Amendment question is decided against him. *Strickland*, 466 U.S. at 695.

Second, with regard to appellant's contention that defense counsel did not anticipate a hearsay objection to his paycheck stubs, we agree with the circuit court that the location of appellant's employment did not preclude him any access to a third sexual-assault victim, S.M. S.M. testified that she was sexually assaulted by appellant in 2002 or 2003 when she was fifteen years old. Appellant argued that he was employed and lived in St. Louis at that time. However, the jury was free to believe that appellant committed the offenses during a visit when he had access to S.M. Thus, appellant failed to carry his burden of providing deficient conduct and prejudice, the two necessary requirements of the *Strickland* test. Accordingly, we hold that the circuit court properly denied appellant's petition for postconviction relief and affirm the court's order.

Affirmed.