

SUPREME COURT OF ARKANSAS

No. CR 09-1167

JEREMIAH WALTON

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 14, 2012

PRO SE APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, CR 07-
2265, HON. WILLARD PROCTOR, JR.,
JUDGEAFFIRMED.

PER CURIAM

Appellant Jeremiah Walton appeals the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011). On appeal, appellant asserts that the trial court abused its discretion in denying certain requests appellant made concerning his preparations for the hearing on the Rule 37.1 petition and that the error denied him access to the courts and due process. In addition, appellant alleges that the trial court erred in failing to rule on each of the claims in the petition. Because appellant has demonstrated no reversible error by the trial court, we affirm.

The Arkansas Court of Appeals affirmed the judgment reflecting appellant's conviction on two counts of rape with an aggregate sentence of 300 months' imprisonment. *Walton v. State*, CACR 08-545 (Ark. App. Dec. 10, 2008) (unpublished). Appellant's daughter, who was ten years old at the time of trial, described the rapes and testified that appellant began to perform the acts of sexual intercourse and deviate sexual activity when she was six years old. Appellant challenged testimony concerning the physical exam of the victim by highlighting that the exam was normal and bringing in evidence of a previous sexual assault by the victim's grandfather to

contradict testimony about the thinning of the victim's hymen. Appellant also presented evidence that the victim had acted as if she was lying when she told appellant's sister-in-law about the allegations and that the victim's mother had told the sister-in-law and other witnesses that she had plans to put appellant in the penitentiary. The jury found the victim's testimony credible and returned convictions on both counts.

Appellant filed a timely Rule 37.1 petition and, on the same day, motions that sought a copy of the transcript, appointment of counsel, and leave to proceed in forma pauperis. The court granted appellant's motion to proceed as an indigent, but denied the request for counsel. Prior to the hearing on the Rule 37.1 petition, appellant appeared before the court and was advised that he should be prepared to proceed at the next hearing and should subpoena any potential witnesses in that regard. When appellant next appeared before the court, he indicated that he had been transferred to prison facilities without access to writing implements before he could finish preparing the subpoenas.

Appellant asserts in his brief that the circuit court abused its discretion by failing to grant his motion for production of documents and a request in the Rule 37.1 petition that he be permitted to amend the petition after he reviewed the transcript of his trial. Appellant based the claim on the allegation that he was prejudiced in his ability to adjudicate his claims. Appellant further asserts that the trial court erred in declining to appoint counsel because, as a result, appellant was unable to adequately prepare for the hearing or subpoena necessary witnesses.

Postconviction matters, such as Rule 37.1 petitions, are considered civil in nature, and there is no absolute right to appointment of counsel. *Noble v. State*, 2011 Ark. 200 (per curiam)

(citing *Smith v. State*, 2010 Ark. 365 (per curiam)). Nevertheless, if an appellant makes a substantial showing that he is entitled to relief in a postconviction appeal and that he cannot proceed without counsel, we have held that we will appoint counsel to represent an appellant in a postconviction proceeding. *Id.* In order to demonstrate an abuse of discretion by the trial court in declining to appoint counsel, appellant therefore would have had to have made some substantial showing in his request for counsel that his petition included a meritorious claim. *See Viveros v. State*, 372 Ark. 463, 277 S.W.3d 223 (2008) (per curiam).

In his brief, appellant asserts that he was prejudiced by his lack of counsel, but he does not demonstrate that he made the requisite showing in his requests for counsel to the trial court. Nor was such a demonstration evident from our examination of the motion for counsel and appellant's oral requests to the court for counsel. Appellant did little more in that regard than point to the petition.

Appellant includes in his brief some allegations that his claim of ineffective assistance had merit concerning his assertion that counsel had failed to adequately investigate the medical reports and had failed to challenge the doctor's testimony with expert testimony. He asserts in his brief that counsel admitted in the hearing on the petition to errors in that regard. Trial counsel only admitted at the hearing that she made a request for an independent medical examination of appellant's daughter, which was denied, and she did not admit to any error in failing to investigate or challenge the doctor's testimony. In fact, counsel testified that she thought that she did a fair job of cross-examining the doctor and pointing out the lack of physical evidence of a rape by appellant.

Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Myers v. State*, 2012 Ark. 143, ___ S.W.3d ___. The burden is on the petitioner to provide facts to support his claim of prejudice. *Id.* As noted above, trial counsel did challenge the doctor's testimony and provided substantial evidence to support the defense theory that the victim had in fact been raped by the grandfather and that appellant's wife had coached the girl into implicating her father. The jury found the child credible despite that evidence, and appellant did not demonstrate that further investigation or testimony would have provided any more compelling evidence in that regard. He did not include facts that would have supported such a demonstration in his Rule 37.1 petition.

Appellant also contends that the trial court erred in failing to grant his requests for a copy of the trial transcript and other documents. Our postconviction rules do not provide for discovery. *Clarks v. State*, 2011 Ark. 296 (per curiam) (citing *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005) (per curiam)); *Croy v. State*, 2011 Ark. 284, ___ S.W.3d ___ (per curiam). When a petitioner requests a copy of the transcript of his trial at public expense, this court will grant the request if the petitioner demonstrates some compelling need for specific documentary evidence to support an allegation contained in a petition for postconviction relief. *Daniels v. State*, 2012 Ark. 124 (per curiam). Appellant has been advised of that standard. See *Walton v. State*, 2009 Ark. 324 (unpublished per curiam). He does not, however, show that he made such a demonstration to the trial court concerning his request for the evidence to be produced. Because appellant does not show that he made a demonstration that he was entitled to a copy

of the transcript or other documentary evidence, he does not demonstrate error by the trial court in denying the request or in permitting an amendment of his petition.

Appellant makes some additional arguments in his brief that the trial court erred in denying him a continuance so that he could obtain writing materials and better prepare for the hearing or subpoena witnesses. He does not show that he demonstrated that this prejudiced his ability to present his evidence at the hearing to the trial court. While appellant initially indicated that he would need time to subpoena other witnesses, the trial court inquired specifically whether there were any other witnesses that would need to testify after trial counsel had concluded her testimony. Appellant's response at that time was no. Appellant indicates that he was unable to subpoena himself to testify at the hearing on the Rule 37.1 petition, but appellant was present and could have testified. Because appellant did not demonstrate to the trial court that he needed additional time for preparation, the trial court did not err in denying the request.

Finally, appellant alleges error in the trial court's failure to provide a ruling on each of his claims in the petition. It was, however, appellant's obligation to obtain a ruling. *Myers*, 2012 Ark. 143, ___ S.W.3d ___ (citing *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam)). Accordingly, appellant has failed to demonstrate any error by the trial court in the denial of his Rule 37.1 petition.

Affirmed.