

SUPREME COURT OF ARKANSAS

No. CR 09-427

JOSEPH M. BIENEMY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 8, 2011

PRO SE APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT, CR
2007-211, HON. ROBERT EDWARDS,
JUDGE

AFFIRMED.

PER CURIAM

This is a pro se appeal from an order denying a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011) filed by appellant Joseph M. Bienemy. Because there was no clear error in the trial court's findings that trial counsel was not ineffective, we affirm the denial of postconviction relief.

Appellant was convicted of capital murder and sentenced to a term of life imprisonment without parole. This court affirmed his conviction and sentence. *Bienemy v. State*, 374 Ark. 232, 287 S.W.3d 551 (2008). Appellant subsequently filed in the trial court a Rule 37.1 petition, asserting that he was entitled to postconviction relief because his trial counsel was ineffective. He also sought leave to file an amended petition for postconviction relief, asserting additional allegations that his counsel was ineffective. The trial court, without a hearing, denied appellant's original Rule 37.1 petition and also denied appellant's request to enlarge his petition via the filing of the amended petition. This appeal followed.

This court does not reverse a denial of postconviction relief unless the trial 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.*

In making a determination on a claim of ineffective assistance of counsel, this court considers the totality of the evidence. *Anderson v. State*, 2010 Ark. 404, ___ S.W.3d ___ (per curiam). Our standard of review requires that we assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Shipman v. State*, 2010 Ark. 499 (per curiam). Under the *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).

Additionally, in order to meet the second prong of the test, the petitioner must show that counsel’s deficient performance prejudiced petitioner’s defense to such an extent that he was deprived of a fair trial. *Carter v. State*, 2011 Ark. 226 (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. *Mingboupha v. State*, 2011 Ark. 219 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

At appellant’s trial, the State introduced numerous pieces of evidence recovered from the scene of the crime. These items included shell casings, projectile fragments, paper towels, and cigar butts, including one butt that had a plastic mouthpiece and contained DNA matching appellant’s DNA. Appellant’s assertion that his trial counsel should have sought

suppression of this evidence seems to center on his contention that the evidence did not link him to the crime, and he was prejudiced by its introduction. The trial court rejected appellant's argument, finding that any motion to suppress would likely have been denied and also finding that there was ample evidence supporting appellant's conviction. The court concluded that appellant had failed to demonstrate that his counsel's performance was deficient. We agree.

First, appellant's contention that his counsel should have sought a motion to suppress is based on his conclusory allegation that, if certain evidence had been excluded, he would not have been convicted. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1. Appellant had the burden to prove his allegations for postconviction relief. *Hampton v. State*, 2010 Ark. 330 (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587. Trial counsel cannot be ineffective for failing to make an objection or argument that is without merit. *Flowers v. State*, 2010 Ark. 364, ___ S.W.3d ___ (per curiam); see also *Tubbs v. State*, 2009 Ark. 249, ___ S.W.3d ___ (per curiam). Appellant, therefore, was required to demonstrate that he could have prevailed on the motion. Appellant failed to do so because, as previously explained, his assertion of ineffective assistance was nothing more than a conclusory allegation.

Even ignoring the conclusory nature of appellant's allegation, there is still no merit to his argument that his counsel was deficient because appellant cannot demonstrate that he would have prevailed if a motion to suppress had been filed. Even though not all the items

recovered at the crime scene and introduced at trial directly linked appellant to the crime, the items were relevant to the State's case, as they were among things recovered by the investigating officers at the scene of the crime. Moreover, those items were found in the same general area as the cigar butt, which contained a DNA sample that matched appellant's DNA and linked him to the scene of the crime. This court has noted that the State is entitled to prove its case as conclusively as it can, subject to Arkansas Rule of Evidence 403. *See Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006). Accordingly, we cannot say that the trial court erred in denying appellant's requested Rule 37.1 relief, as he failed to satisfy the *Strickland* test establishing that his counsel's performance was deficient.

Appellant also argues that the circuit court erred in denying his motion to file an amended Rule 37.1 petition. Therein, appellant raised several additional allegations that his trial counsel was ineffective, including allegations that counsel failed to properly investigate the case and offer mitigating evidence. Additionally, appellant asserts that his constitutional rights were violated when the circuit court denied him the right to file the amended petition without first conducting an evidentiary hearing or providing written findings supporting such a denial.

First, there is no merit to appellant's assertion that the trial court failed to make written findings. The trial court, in its order denying the original Rule 37.1 petition, denied appellant's motion to file the amended petition after specifically finding that Rule 37.1(b) limits petitions to ten pages, and appellant's original petition, excluding the signature, verification, and affidavit pages, was ten pages in length.

Moreover, this court has consistently held that due process does not require courts to

Cite as 2011 Ark. 320

provide an unlimited opportunity to present postconviction claims or prevent a court from setting restrictions on the presentation of claims. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000); *Washington v. State*, 308 Ark. 322, 823 S.W.2d 900 (1992) (per curiam). All litigants, including those who proceed pro se, must bear responsibility for conforming to the rules of procedure, unless there is some good cause for not doing so. See *Peterson v. State*, 289 Ark. 452, 711 S.W.2d 830 (1986) (per curiam); *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984) (per curiam); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983) (per curiam). The restrictions in Rule 37.1 are not burdensome, unduly time-consuming, or unreasonable, and appellant has not demonstrated that the court erred in requiring him to comply with the rule.

As to appellant's contention that he was entitled to a hearing on his motion to file an amended Rule 37.1 petition, it is also without merit. This court has explained that the circuit court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). Moreover, conclusory allegations that are unsupported by the facts do not provide a basis for either an evidentiary hearing or postconviction relief. *Id.* A Rule 37.1 hearing is not available to a petitioner in hopes of finding grounds for relief. *Id.*

Finally, in his brief on appeal from the denial of his requested Rule 37.1 relief, appellant asserts that he is entitled to relief under Arkansas Code Annotated section 16-112-202(a)(1) (Repl. 2006), which provides that a writ of habeas corpus can issue based on new scientific evidence proving that a person is actually innocent of the offense or offenses for

Cite as 2011 Ark. 320

which he or she was convicted. Specifically, appellant asserts that he is entitled to “make a motion for performance fingerprint, forensic deoxyribonucleic acid testing or XRF or any other test which [has] become available through advances in technology to demonstrate [his] actual innocence. The petitioner is making such a motion herein.” This court has held that newly discovered evidence is a direct challenge to a judgment of conviction and not a basis for postconviction relief under Rule 37.1. *Rodriguez v. State*, 2010 Ark. 78 (per curiam), and, thus, we need not address appellant’s reference to relief under the statute.

Affirmed.