

SUPREME COURT OF ARKANSAS

No. CR 09-709

DENNIS GARY RILEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 29, 2011

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT, CR 2008-35, HON.
ROBERT BYNUM GIBSON, JR.,
JUDGEAFFIRMED IN PART AND REVERSED
AND REMANDED IN PART.

PER CURIAM

On the day before he was scheduled for trial on charges of capital murder and aggravated robbery, appellant Dennis Gary Riley entered a negotiated guilty plea to those charges, and the judgment reflects that he received consecutive sentences of life imprisonment without parole on each count. Appellant then filed a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011) that was denied. He appeals that order, and we reverse and remand for an order in compliance with Arkansas Rule of Criminal Procedure 37.3.

In his petition for postconviction relief, appellant alleged that his attorneys were ineffective in that they pressured him to accept the plea agreement. Appellant asserted that his attorneys failed to properly seek a continuance and were unprepared for trial. He alleged that counsel should have realized that his chances were good not to have received the death penalty and to have received, instead, a conviction on a lesser-included offense if he had gone to trial. He further alleged that they failed to advise him of those facts.

The trial court entered an order that denied the petition without a hearing. The order

stated that, because appellant challenged his guilty plea, the only issue was whether the plea was knowingly, voluntarily, and intelligently entered, and the record of the plea hearing did not support appellant on that issue. The order also noted that appellant's allegations concerning counsel's failure to request a continuance¹ "are bizarre," with nothing in the record to support those allegations. On appeal, appellant asserts that the trial court erred in denying the petition without a hearing.

Where no hearing is held on a Rule 37.1 petition, the trial court has an obligation to provide written findings that conclusively show that the petitioner is entitled to no relief. *Camacho v. State*, 2011 Ark. 235 (per curiam); *see also* Ark. R. Crim. P. 37.3. This court may affirm the denial of a Rule 37.1 petition, regardless of the adequacy of the order, if we can determine from the record that the petition was wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Gonder v. State*, 2011 Ark. 248, ___ S.W.3d ___ (per curiam) (citing *Davenport v. State*, 2011 Ark. 105 (per curiam)). The order here, while brief, provides some findings on appellant's claims and references the record of the plea hearing. At least one issue, however, appears to require further development to resolve.

This court has discussed claims of ineffective assistance of counsel when a defendant has entered a guilty plea, and we have recognized that cognizable claims in a Rule 37.1 petition are generally limited to those asserting that the defendant's plea was not entered intelligently and

¹The order also references a claim concerning a failure to request a change in venue that appellant does not raise on appeal.

voluntarily upon advice of competent counsel. *See Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. Where the judgment was based on a guilty plea, a petitioner claiming ineffective assistance of counsel must demonstrate prejudice by showing that there was a reasonable probability that, but for counsel's alleged error, the petitioner would not have pled guilty and would have insisted on going to trial. *Goldsmith v. State*, 2010 Ark. 158 (per curiam). An appellant who has entered a guilty plea normally will have considerable difficulty in proving any prejudice, as the plea rests upon an admission in open court that the appellant did the act charged. *Id.* A petitioner under Rule 37.1 must allege some direct correlation between counsel's deficient behavior and the decision to enter the plea. *Herron v. State*, 2011 Ark. 71 (per curiam).

Appellant alleged that counsel manipulated him into accepting the plea agreement by taking advantage of some psychological limitations that were disclosed by expert reports; by using particular relatives who would support their efforts; and by isolating him from his wife, who was less supportive of accepting the plea agreement. Counsel's persuasive techniques as alleged in the petition, however, did not rise to the level of coercion, and the fact that counsel may have been motivated to some extent by the limited amount of time for trial preparation does not necessarily dictate that counsel's recommendation concerning accepting the plea offer was flawed or that appellant would not have accepted the plea despite the alleged error. Appellant did not make a showing of a direct correlation between counsel's failure to obtain a continuance and his decision to accept the plea.

Concerning the issue of whether counsel provided an appropriate recommendation and the necessary information to his client in order to make an intelligent decision to enter the plea,

however, appellant asserted facts that, if proved in a hearing, tend to support his claim. The allegation that counsel failed to provide sufficient information concerning the strength of the State's case, on its face, is not one that would not support relief, and we cannot say by reference to the record that this claim was without merit.

Counsel's decision to recommend acceptance of the plea offer was a matter of strategy. Where a decision by counsel is 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. *Croy v. State*, 2011 Ark. 284, ___ S.W.3d ___ (per curiam). 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. *Id.* Even if not supported by reasonable professional judgment, because appellant in this case entered a guilty plea, the error must have been one that directly caused appellant to enter the plea when he would not have otherwise.

The petition here raised issues that challenged whether counsel's strategic decision to recommend the plea offer was based upon reasonable professional judgment. Appellant asserted that counsel should have realized that the State would have difficulty proving the aggravating circumstances necessary in this case for the death penalty. Appellant also contended that there was a good possibility, if appellant had gone to trial, that he would have received a sentence on a lesser-included offense. The latter allegation is undercut by the evidence that was discussed

on the record. The issue of the aggravating circumstances, however, is not so clearly contradicted by the record. We cannot say on this issue that appellant is entitled to no relief.

What can be gleaned from the record of the plea hearing is that appellant did not dispute that he shot and killed the victim, Bobby Hampton, or that he took Mr. Hampton's wallet after killing him. While appellant did not, in the plea proceedings, contest his culpability for the death, he never clearly admitted the requisite intent for the charges. He disclaimed any intention to kill Mr. Hampton. Appellant stated, however, that he became angry when Mr. Hampton said that he would not repay money that he owed appellant, and appellant maintained that he intended to fire the shot above the victim's head in order to scare him. The trial court found the requisite factual basis for the plea only after reviewing appellant's prior statement to the police, the autopsy report indicating the placement of the wound, and other evidence. The court remarked that the evidence, taken in conjunction with appellant's admissions, supported a premeditated killing.

Appellant admitted to taking the victim's wallet after the shooting, but his uncontradicted statement was that he had no reason to believe that Mr. Hampton carried large sums of money. While counsel may have been aware of additional facts not disclosed in the transcript of the hearing, the limited facts available through the record before us do not provide an adequate demonstration to settle the matter. The same evidence showing premeditation that undercuts appellant's claim that he could have received a lesser-included offense, tends to undercut the State's case for the aggravating circumstances.

We are cognizant that removing the potential for a death sentence weighs heavily toward

a professionally-well-reasoned decision to recommend accepting a plea, but counsel's strategic decision to recommend taking a plea, if professionally reasonable, should take into consideration, and include some discussion with his client concerning, a weak case for aggravating circumstances. Counsel appeared to be aware that the robbery aspect of the case was weak; counsel attempted to limit the plea to a charge on capital felony murder rather than premeditated murder. If appellant were to show that counsel erred in failing to make an appropriate recommendation, and could then demonstrate that the State's case on the issue appeared so weak that, if properly advised, he might reasonably have decided to put the State to its proof, then he could demonstrate the requisite prejudice for his claim.

As to this single issue in the petition, the trial court's findings were insufficient for our review, and it appears that a hearing was warranted on the claim. Accordingly, we reverse and remand for a hearing and findings on that issue alone.²

Affirmed in part and reversed and remanded in part.

²We note that, as with any other such proceeding, should the trial court rule adversely, appellant may appeal that adverse decision.