

SUPREME COURT OF ARKANSAS

No. CR 09-917

WILLIAM THOMAS HALE
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** November 10, 2011PRO SE APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT, CR 2006-
877, HON. GRISHAM PHILLIPS, JUDGE**AFFIRMED.****PER CURIAM**

Appellant William Thomas Hale appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2008). In 2008, Hale was convicted of internet stalking and was sentenced to 276 months' imprisonment. The Arkansas Court of Appeals affirmed. *Hale v. State*, CACR 08-755 (Ark. App. Jan. 7, 2009) (unpublished). Appellant asserts in the instant appeal that the circuit court erred in denying his petition. We affirm the circuit court's order.

On March 27, 2009, appellant filed his petition pursuant to Rule 37.1. In it, he asserted that his trial counsel, who also served as appellate counsel, was ineffective for failing to (1) inform him of a change in his trial date, (2) inform him of a change in the date of his omnibus hearing, (3) allow him to testify, (4) object to "ghost evidence," (5) file a reply brief on his behalf during his direct appeal, (6) object to the admission of evidence seized in an illegal search, and (7) file a motion for change of venue. In addition, appellant asserted that the prosecutor engaged in misconduct by charging him with rape, although that charge was subsequently nolle

crossed, and by the use of lies and “ghost evidence” to convict him.¹ As already noted, the circuit court denied appellant’s petition.

This court does not reverse a denial of postconviction relief unless the circuit court’s findings are clearly erroneous. *Reed v. State*, 2011 Ark. 115 (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.*

We assess the effectiveness of counsel under the 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 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.* In addition, the petitioner must show that counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel’s performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense. *Id.* There is a strong presumption that trial counsel’s conduct falls within the wide range of

¹To the extent that certain statements in appellant’s brief might be construed as challenging the evidence against him, we note that sufficiency of the evidence is not a claim cognizable in Rule 37.1 petitions. *Rodriguez v. State*, 2010 Ark. 78 (per curiam). Such a challenge is a direct attack on the judgment and must be made at trial and on appeal. *Flanagan v. State*, 2010 Ark. 140 (per curiam). Appellant did challenge the sufficiency of the evidence in his direct appeal, and, as already noted, our court of appeals affirmed. *Hale*, CACR 08-755 (Ark. App. Jan. 7, 2009).

reasonable professional assistance, and an appellant 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. *Carter v. State*, 2011 Ark. 226 (per curiam).

A review of appellant's series of allegations of ineffective assistance of counsel reveals that they were entirely conclusory in nature in that there was no factual substantiation to demonstrate how his counsel's conduct specifically prejudiced the defense. Appellant did not explain how he was prejudiced by the change in dates of his hearing and trial, other than to state that he was given "false hope." Nor did he demonstrate how his counsel's failure to allow him to testify prejudiced his defense. While he contends that he would have clarified "several misconceptions" at trial, he did not state what these misconceptions were or how he would have clarified them. We have held that, while an accused has the right to choose whether to testify at his trial, a petitioner seeking postconviction relief must do more than simply state that he was not allowed to testify. *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985). He must state specifically what the content of his testimony would have been and demonstrate that his failure to testify resulted in actual prejudice to his defense. *Id.* This, appellant did not do.

Appellant further asserted that his trial counsel failed to object to what appellant has characterized as "ghost evidence." However, as the circuit court correctly found, he failed to identify the specific evidence to which he was referring, and conclusory statements cannot be the basis of postconviction relief. *Shaw v. State*, 2010 Ark. 112 (per curiam). With respect to his claim that his counsel was ineffective at the appellate level for failing to file a reply brief, he is

mistaken. First, our rules do not expressly require the filing of a reply brief in a criminal appeal. Ark. Sup. Ct. R. 4-3(d) (2008). In addition, appellant failed to specify in his petition what points his counsel should have raised in response to the State's brief.

Likewise, appellant asserted that his counsel was ineffective for failing to object to the admissibility of evidence, which he claims was seized without his consent and without probable cause. Again, appellant failed to substantiate his claim as he did not specify the evidence to which he was referring. Also, while appellant claimed that his counsel should have filed a motion for change of venue, he failed to explain the grounds on which his counsel could have based the motion. Such allegations were conclusory in nature, lacking any factual substantiation on which a finding of ineffective assistance of counsel could have been based. *Frost v. State*, 2010 Ark. 440 (per curiam).

As a final matter, appellant also asserted in his petition that the prosecutor in his case engaged in prosecutorial misconduct, claiming that the prosecutor used a rape charge, which was subsequently nolle prossed, to intimidate him, and the prosecutor also allowed witnesses to lie and present "ghost evidence." We have held, however, that prosecutorial misconduct is not a claim cognizable in a Rule 37.1 petition. *Travis v. State*, 2010 Ark. 341 (per curiam). Such claims of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Hawthorne v. State*, 2010 Ark. 343 (per curiam).

For all of the foregoing reasons, we affirm the circuit court's order denying appellant's petition for postconviction relief.

Affirmed.