

SUPREME COURT OF ARKANSAS

No. CR 10-730

ROBERT MALDONADO

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 27, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
CR 2007-603, HON. BARRY SIMS,
JUDGEAFFIRMED.**PER CURIAM**

Appellant Robert Maldonado appeals an order of the Pulaski County Circuit Court denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009). For reversal, appellant challenges the circuit court's ruling by asserting five allegations of error. We affirm.

On January 25, 2008, appellant pled guilty to eight counts of hot-check violations, and the circuit court sentenced him to eight years' probation with several conditions. On June 19, 2008, the State filed a petition to revoke appellant's probation, alleging that he had committed new criminal offenses, had failed to report to his probation officer, and had failed to pay his monthly supervision fee. The State amended its petition to include the allegations that appellant had written personal checks in violation of the conditions of his probation and had failed to report an arrest to his probation officer. Following a revocation hearing, the circuit court revoked appellant's probation and sentenced him to a total of eighty years' imprisonment. That sentence included twenty years' imprisonment on four hot-check counts to run consecutively

and ten years' imprisonment on the other felony counts to run concurrently. We affirmed. *Maldonado v. State*, 2009 Ark. 432. Appellant subsequently filed a Rule 37.1 petition, alleging that his original probationary sentence was illegal and void and that he could not have been placed on probation because of two prior felony convictions. Further, appellant alleged that his counsel was ineffective during the plea process and revocation proceedings by failing to raise the issue and to request resentencing. The State filed a response. After a hearing on the matter, the circuit court entered an order denying appellant's petition. From this order, appellant brings his appeal.

At the outset, appellant only argues that trial counsel rendered ineffective assistance during the revocation proceedings. Thus, any claim that trial counsel was ineffective during the plea stage is abandoned and cannot be reached. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). On appeal, appellant argues that the circuit court erred in sentencing appellant as a habitual offender and by failing to provide any findings of fact and conclusions of law in an order that the circuit court directed the State to prepare. Additionally, appellant contends that trial counsel was ineffective for failing to raise the sentencing issue and for failing to research the applicable statutes. Further, appellant asserts that this court should order resentencing because his original sentence of probation was void and illegal.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1. 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 ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *Id.*

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on a totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___; *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___; see *Jammett v. State*, 2010 Ark. 28, ___ S.W.3d ___ (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that the deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). With respect to the requirement that prejudice be established, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Watkins*, 2010 Ark. 156, ___ S.W.3d ___; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Sparkman*, 373 Ark. 45, 281 S.W.3d 277.

Appellant first argues that the circuit court erroneously sentenced him as a habitual offender, pursuant to Arkansas Code Annotated section 5-4-501 (Repl. 2006), and that his trial

counsel was ineffective for failing to raise this issue and to request resentencing. However, the record reflects that the judgment and commitment order, filed on September 8, 2008, specifically states “NA,” or not applicable, where the habitual-offender statute is referenced. Thus, we conclude that the record does not indicate that appellant was charged as, or proven to be, a habitual offender when he initially pled guilty.

Even if appellant did show a deficiency at either proceeding, he did not show prejudice as a result of trial counsel’s actions. Here, appellant showed no prejudice from his sentences, as each sentence is the maximum term possible for the particular class of felony committed *without* the habitual-offender-status enhancement that he asserts could have been added to each charge. *See* Ark. Code Ann. §§ 5-4-401, 5-4-501, and 5-37-302 (Repl. 2006). Further, the circuit court could have run all the sentences consecutively rather than concurrently, thereby resulting in a much longer period of confinement. *See* Ark. Code Ann. § 5-4-403(a) (Repl. 2006); *Maldonado*, 2009 Ark. 432, at 3. Thus, because appellant failed to demonstrate prejudice, we hold that the circuit court properly denied relief on his ineffective-assistance-of-counsel claims regarding his sentence.

Next, appellant argues that the circuit court, in relying upon the State to draft an order denying relief, erred in making independent findings of fact and conclusions of law as required by Arkansas Rule of Criminal Procedure 37.3(c). However, the circuit court adopted the order when the judge approved and signed the order that was drafted by the prosecuting attorney, and the order contained the requisite findings of fact and conclusions of law. *See Scott v. State*, 267 Ark. 628, 593 S.W.2d 27 (1980). For these reasons, we hold that the circuit court did not err.

Accordingly, we affirm the denial of relief on this basis.

Finally, appellant argues that his original sentence of probation was void and illegal and that this court should remand for resentencing because the circuit court lacked jurisdiction. We conclude that the circuit court had jurisdiction over appellant's criminal proceeding pursuant to amendment 80, section 6 of the Arkansas Constitution. Further, the circuit court's order was not invalid, as it accurately reflected the hot-check convictions and appropriate sentences. For these reasons, we hold that the circuit court properly denied appellant's petition for postconviction relief.

Affirmed.