

SUPREME COURT OF ARKANSAS

No. CR 10-885

MICHAEL A. GREEN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 15, 2011

PRO SE APPEAL FROM THE DREW
COUNTY CIRCUIT COURT [CR 2006-
172], HON. SAM POPE, JUDGEAFFIRMED.**PER CURIAM**

A jury in Drew County found appellant Michael A. Green guilty of possession of a controlled substance (crack cocaine) with intent to deliver, for which he was sentenced as an habitual offender to a term of sixty years in prison. The Arkansas Court of Appeals affirmed. *Green v. State*, 2010 Ark. App. 151.

On April 22, 2010, appellant filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 (2011), alleging that he received ineffective assistance of counsel at trial. In conjunction with the petition, appellant filed a twenty-one page “Brief in Support” of the petition. The circuit court denied the petition without a hearing. In its order entered on July 9, 2010, the circuit court made findings addressing appellant’s claims of ineffective assistance of counsel that were asserted in the petition. The court found that the brief appellant filed with the petition was in violation of Arkansas Rule of Criminal Procedure 37.1(b), which sets a ten-page limit on petitions, and the court declined to consider any arguments contained in the brief that were not raised in the petition. Appellant filed a motion

to reconsider on July 19, 2010, which the circuit court denied by an order dated August 4, 2010. Appellant filed a notice of appeal on August 9, 2010.

Appellant raises two points for reversal, questioning the court's finding that a hearing was not necessary and the court's refusal to consider his brief. We find no merit in the arguments raised and affirm.

The record reflects that an officer with the drug task force and appellant's parole officer directed the stop of appellant's vehicle after receiving a tip from a confidential informant. Numerous rocks of crack cocaine, weighing a total of five grams, were found in appellant's shirt pocket. Appellant was subsequently charged with possession with intent to deliver. Appellant's defense was that he possessed the crack cocaine for his own personal use and not for purposes of sale, and he testified to that effect at trial.

In his Rule 37.1 petition, appellant claimed that he received ineffective assistance of counsel because his counsel did not pursue a motion to suppress; because counsel failed to file a motion to dismiss based on an alleged speedy-trial violation; because counsel failed to investigate the affirmative defense of entrapment; because counsel failed to confer with the passengers in appellant's vehicle, who were "material fact witnesses;" because counsel failed to secure an expert to rebut the testimony of the State's expert; and because counsel "coerced an errant confession" from him by advising him to testify. In its order, the circuit court found that a motion to suppress would have been unavailing because appellant was on parole and had consented in advance to a search of his person and vehicle by his parole officer. The court found that counsel was not ineffective for not filing a speedy-trial motion to dismiss because the court considered and denied appellant's pro se motion to dismiss on the basis of a speedy trial

violation and because that ruling was affirmed on direct appeal. The court also rejected the claim that appellant's testimony was coerced based on appellant's statements on the record that he wished to testify. The circuit court recounted appellant's testimony and found nothing in the record to support a defense of entrapment. Further, the court found that appellant had not stated what the testimony of the unnamed material witnesses would be or how their testimony would have been helpful to his defense. Finally, the circuit court found that counsel was not ineffective for not securing an expert to counter the opinion of the State's witness that the cocaine was possessed with the intent for sale because the witness also testified that his opinion could have been wrong.

On appeal, appellant does not challenge the substantive findings made by the circuit court in denying appellant's claims of ineffective assistance of counsel. Instead, appellant argues that the circuit court erred by failing to conduct a hearing and by refusing to consider the brief he tendered in support of the petition.

With regard to the hearing, this court has recognized that a trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders*, 352 Ark. 16, 98 S.W.3d 35. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or on the face of the petition itself, that the allegations have no merit. *Id.* Moreover, a Rule 37.1 hearing is not available to a petitioner in hopes of finding grounds for relief. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004); *Hayes v. State*, 280 Ark.

509, 660 S.W.2d 648 (1983) (per curiam).

Here, the circuit court's order denying appellant's Rule 37.1 petition is sufficient to indicate that the court made its findings from the record and that the record supported its decision to deny appellant's petition. We cannot say that the trial court erred when it denied appellant's petition without a hearing.

Appellant next claims error in the circuit court's refusal to consider the brief appellant filed with his petition and the arguments contained therein. The circuit court found that the brief was an attempt to exceed the ten-page-limit rule found in Rule 37.1(b) and that appellant had not shown good cause for filing an expanded petition.

Our standard on review as to the denial of leave to amend is abuse of discretion; we determine whether the trial court's decision was arbitrary or groundless. *Rodriguez v. State*, 2010 Ark. 78 (per curiam) (citing *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006) (per curiam)). The trial court does not abuse its discretion by denying leave to amend where an appellant failed to set forth any legitimate ground or justification for filing an enlarged petition. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000). In this instance, appellant did not file a motion asking leave to expand the petition, nor did he assert any justification for doing so in the brief. Therefore, we can find no abuse of discretion in the circuit court's decision not to consider the brief.

Affirmed.