

**SUPREME COURT OF ARKANSAS**

No. CR 10-896

MARCUS TERRELL ATKINS  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered September 29, 2011

PRO SE APPEAL FROM THE HOT  
SPRING COUNTY CIRCUIT COURT,  
CR 2007-102, HON. CHRIS E WILLIAMS,  
JUDGEAFFIRMED.**PER CURIAM**

Appellant Marcus Terrell Atkins appeals the denial of his pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007). He argues on appeal that he was not afforded effective assistance of counsel because his trial counsel failed to object when the trial judge sentenced appellant to a firearm enhancement rather than submitting the issue to the jury. We affirm.

In August 2007, appellant and two codefendants were tried before a jury on charges of first-degree battery, kidnapping, and possession of a firearm by certain persons. Appellant was convicted of all offenses and sentenced to 480 months' imprisonment. Additionally, appellant was sentenced by the trial court, rather than the jury, to fifteen years' imprisonment for commission of a felony with a firearm pursuant to Arkansas Code Annotated section 16-90-120 (Repl. 2006), and the court ordered all the sentences to run consecutively. On direct appeal, appellant's convictions, along with those of his codefendants, were affirmed. *Watkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635.

Appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, alleging several grounds for postconviction relief, including the argument that he now raises on appeal. A joint hearing was held on the Rule 37.1 petitions filed by appellant and the two codefendants, and an order denying Rule 37.1 relief was entered on June 19, 2009. Both codefendants appealed the denial of their petitions, and this court dismissed one and the other is pending. *See Watkins v. State*, 2010 Ark. 156, \_\_\_ S.W.3d \_\_\_ (per curiam).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (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.*

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 this deficient performance prejudiced his defense so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). As to the prejudice requirement, a petitioner must show that

there is a reasonable probability that the factfinder's decision would have been different absent counsel's errors. *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. *Id.*

Appellant asserts on appeal that the circuit court erred in denying his petition for postconviction relief on the basis of ineffective assistance of counsel where his trial counsel failed to object when the trial judge—rather than submitting the issue to the jury—sentenced appellant to an enhancement under Arkansas Code Annotated section 16-90-120. At the outset, we note that we have previously rejected this same argument in our opinion dismissing his codefendant's appeal from the same circuit court order. *See Watkins*, 2010 Ark. 156, \_\_\_ S.W.3d \_\_\_. There, we noted that

[t]he trial court's order denying postconviction relief found that trial counsel's decision not to object to sentencing by the court was trial strategy. The order noted that counsel did object to the application of the enhancement as subjecting appellant to double jeopardy, but did not otherwise object to the application of section 16-90-120. The trial court also determined that, statutorily, it was supposed to impose sentence on the enhancement rather than submitting the issue to the jury.

*Watkins*, 2010 Ark. 156, at 7–8. In analyzing the argument on appeal, we held as follows:

In his original Rule 37.1 petition to the trial court, as already noted, appellant's claim of ineffective assistance of counsel on the issue of his enhanced sentence under section 16-90-120 was based on counsel's failure to object to the trial court's sua sponte decision to sentence appellant on the enhancement rather than submitting that issue to the jury. To establish ineffective assistance of counsel based on failure to object, this court has held that it is not enough to show that a failure to object prevented an issue from being addressed on appeal. The *Strickland* test requires a showing of "a reasonable probability that, absent the errors, the *factfinder* would have had a reasonable doubt respecting guilt." "[T]he standard for judging the effectiveness of counsel requires a showing of more than the failure to raise an issue; the petitioner must establish prejudice *at trial* under *Strickland*."

Moreover, to the extent that appellant's argument is based on receiving a more severe

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sentence than he would have had the jury sentenced him, we note that a claim of prejudice based on the severity of the sentence is an issue for a plea for executive clemency and is unavailing in a Rule 37.1 petition.

*Watkins*, 2010 Ark. 156, at 9–10 (internal citations omitted).

Appellant's Rule 37.1 petition filed below and the arguments he now makes on appeal are virtually identical to those made by his codefendant, which this court has previously rejected. Appellant has provided no additional argument or convincing citation to authority. Therefore, based on the reasoning as explained in *Watkins*, this court is convinced that the circuit court did not err in denying appellant's petition for Rule 37.1 postconviction relief on the basis of ineffective assistance of counsel.

Affirmed.