

SUPREME COURT OF ARKANSAS

No. CR11-1051

BRIAN CHARLAND

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 31, 2012

APPEAL FROM THE CARROLL
COUNTY CIRCUIT COURT,
[NO. CR2007-164]
HON. GERALD K. CROW,
JUDGE

AFFIRMED.

KAREN R. BAKER, Associate Justice

Appellant Brian Charland appeals an order of the Carroll County Circuit Court denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. Appellant argues that the circuit court erred in failing to conduct an evidentiary hearing. We have jurisdiction pursuant to Rule 37.1 and Arkansas Supreme Court Rule 1-2(a)(8) (2011). We affirm.

In October 2007, the Berryville Police Department initiated an investigation after receiving a complaint that appellant had raped his seven-year-old daughter, A.C. Appellant confessed that he had A.C. perform sexual acts on him. A.C. testified in detail at trial that appellant performed sexual acts on her and had her perform sexual acts on him. The jury convicted appellant of three counts of rape and sentenced him to twenty-five years' imprisonment on each count, to be served consecutively for an aggregate sentence of seventy-five years. The court of appeals affirmed his conviction and sentence in *Charland v. State*, 2011 Ark. App. 4, ___ S.W.3d ___.

Appellant filed a timely postconviction petition, arguing that his trial counsel, Cindy

Baker, was ineffective for not calling witnesses who could have shown that his confession was coerced because appellant was concerned that the police would take his children. Appellant claimed “that the defense witnesses called by defense counsel at trial had more information to shed light on the issue and defense counsel was advised of this and did not put on this evidence.” Appellant also asserted that Baker was ineffective because she was operating under a methamphetamine-induced psychosis when she was representing him. He said that according to a newspaper article, Baker pled guilty to several drug charges that covered the time during which she prepared and defended appellant. Appellant asserted that because the newly discovered, ineffective-assistance-of-counsel evidence afforded no adequate statutory legal remedy, his due process rights under article 2, sections 8 and 13 of the Arkansas Constitution were violated.

The State responded that Baker had opposed the admissibility of the verbal and written confessions and had argued at the suppression hearing and at trial that the confessions were coerced because appellant believed that if he did not confess to raping A.C., his children would be taken from him. April Charland, appellant’s wife, testified at trial that she told appellant “they were going to take the kids” and “that he better fix it.” The State also asserted that appellant testified the police never threatened to take his kids away; rather, his motivation to confess stemmed from what his wife told him when they were driving to the police station. The State also contended that the assertions of Baker’s impairment were conclusory and did not warrant postconviction relief.

In an order entered on August 15, 2011, the circuit court denied postconviction relief.

The order stated that appellant failed to make any proffer as to the testimony that the witnesses would have given if called at his criminal trial, and appellant failed to demonstrate how he had been prejudiced by Baker's subsequent drug conviction. Appellant timely appealed from this order.

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. "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." *State v. Barrett*, 371 Ark. 91, 95, 263 S.W.3d 542, 545 (2007).

In an appeal from a 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 effective. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The petitioner must first show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Harrison v. State*, 371 Ark 474, 268 S.W.3d 324 (2007). In doing so, a claimant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

Unless a petitioner makes both showings, it cannot be said that the conviction resulted

from a breakdown in the adversarial process that renders the result unreliable. *Barrett, supra*. The petitioner must show that there is a reasonable probability that, but for counsel's errors, the fact finder would have had a reasonable doubt respecting guilt, and the decision reached would have been different absent the errors. *Id.* In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Id.* Further, conclusory statements cannot be the basis of postconviction relief. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

Appellant argues that the circuit court erred in denying his postconviction petition without holding an evidentiary hearing. Specifically, he contends that because Baker's drug usage was acknowledged by her criminal plea, merely asserting that she was ineffective was sufficient to warrant an evidentiary hearing. Arkansas Rule of Criminal Procedure 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999). A court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. Ark. R. Crim. P. 37.3(a); *see also Smith v. State*, 290 Ark. 90, 717 S.W.2d 193 (1986).

Appellant cites to *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006), as authority that he was entitled to an evidentiary hearing. In *Lee*, the petitioner sought to recall the mandate and reopen postconviction proceedings, arguing that his Rule 37.5 counsel was impaired by alcohol use during the time he represented Lee in postconviction proceedings, a fact admitted

to by counsel. In granting the motion to recall the mandate, we noted that the impairment was reflected in the record by numerous, specific examples of counsel's inability to defend his client during the course of the Rule 37 hearing. In contrast, in *Anderson v. State*, 2011 Ark. 488, ___ S.W.3d ___, allegations of Rule 37.5 counsel's impairment were that counsel admitted to using drugs several years after the trials and that co-counsel noticed a change in his behavior between the first and second trial, describing it as "going off the deep end." Finding this insufficient to merit postconviction relief, we stated that the petitioner failed to explain specifically how counsel's performance was deficient and how such deficient performance prejudiced his defense.

Here, the postconviction petition stated that Baker's performance was deficient because she failed to call several witnesses and failed to elicit certain testimony from the witnesses she did call. Appellant asserted that this deficiency was caused by Baker's impairment, which he contended manifested in her being uncommunicative, glassy-eyed, and difficult to understand. For ineffective-assistance-of-counsel claims based on a failure to call a witness, the petitioner must name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant's petition did not. Instead, his allegations are conclusory in nature and cannot be the basis of postconviction relief. *Id.* Moreover, in the absence of specific information regarding omitted testimony, appellant cannot demonstrate how it would have changed the outcome of his trial. *Id.* Thus, appellant failed to demonstrate how he was prejudiced by Baker's alleged impairment. Without some showing

of prejudice as required by *Strickland*, the petition was conclusive on its face that no relief was warranted, and the circuit court did not err in not holding an evidentiary hearing. See *Polivka, supra*.

Appellant also asserts that the circuit court did not specify what portions of the record were relied on in concluding that he was not entitled to postconviction relief. When a petition for postconviction relief is denied without an evidentiary hearing, Rule 37.3(a) requires that the court specify “any parts of the files, or records that are relied upon to sustain the court’s findings.” Absent such specific findings, there can be no meaningful appellate review because this court determines whether the findings are supported by a preponderance of the evidence. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). If the trial court fails to make such findings, it is reversible error, except in cases where it can be determined from the record that the petition is 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. *Henington v. State*, 2012 Ark. 181, ___ S.W.3d ___. In this case, the circuit court’s order denying postconviction relief stated that the court had reviewed the file, noting that Baker objected to evidence, moved for a directed verdict, cross-examined the State’s witnesses, and made opening and closing arguments. Further, the order set forth appellant’s claims and the reasons the court denied those claims. Thus, we conclude that the circuit court’s written findings complied with Rule 37.3.

Finally, appellant asserts that the circuit court denied postconviction relief because Rule 37.1 counsel requested two continuances. The record reflects that the circuit court

scheduled two hearings on the petition, and counsel requested two continuances. Afterward, the circuit court entered an order based on its review of the file. Appellant suggests that the circuit court's animus toward counsel for requesting the continuances was the reason the petition was denied without a hearing. Appellant was not entitled to an evidentiary hearing pursuant to Rule 37.3(a), and the fact that the circuit court had previously scheduled hearings is of no moment.

Affirmed.