

## SUPREME COURT OF ARKANSAS

No. CR 11-148

SHERMAN WATSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 26, 2012

PRO SE PETITION FOR WRIT OF CERTIORARI AND MOTIONS TO AMEND PETITION, FOR TRANSCRIPT, FOR EXTENSION OF TIME TO LODGE RECORD, AND FOR USE OF TRIAL TRANSCRIPT [HOT SPRING COUNTY CIRCUIT COURT, CR 2007-278, HON. CHRIS E WILLIAMS, JUDGE]

APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI AND MOTIONS MOOT.

## PER CURIAM

Appellant Sherman Watson appealed the denial of his pro se petition under Arkansas Rule of Criminal Procedure 37.1 (2011). He filed a number of motions concerning the appeal. This court granted a motion to supplement the record and remanded three times in order to address a jurisdictional issue raised by the record. *Watson v. State*, 2011 Ark. 482 (per curiam); *Watson v. State*, 2011 Ark. 268 (per curiam); *Watson v. State*, 2011 Ark. 202 (per curiam). The issue to be resolved on remand was the date that appellant's Rule 37.1 petition was first tendered to the circuit clerk for filing.

The record first presented to this court in this appeal contained a single petition that was file marked well after the time allowed for filing a Rule 37.1 petition and, thus, raised a jurisdictional issue, in that the timely filing of a Rule 37.1 petition is jurisdictional. *Watson*, 2011 Ark. 202. The trial court has now returned an order finding that appellant's petition was timely

tendered for filing on December 9, 2009. Appellant tendered a petition within the required time, and, although the circuit clerk marked the petition as filed on a later date, the later filing date marked was clerical error. See *Meraş v. State*, 2010 Ark. 121 (citing *White v. State*, 373 Ark. 415, 284 S.W.3d 64 (2008) (per curiam)). The trial court therefore properly treated the petition as timely filed.

Having determined that jurisdiction lies, we nevertheless dismiss the appeal based upon the record as amended. Appellant's petition for writ of certiorari and his motions are rendered moot as a result.

An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Croft v. State*, 2010 Ark. 83 (per curiam); *Crain v. State*, 2009 Ark. 512 (per curiam). Appellant did not present sufficient facts in his petition, or in the hearing on the petition,<sup>1</sup> to support a claim for postconviction relief under the rule.

The supplemented record shows that appellant filed a proposed amendment to the petition that included additional claims. The record of the hearing on the Rule 37.1 petition indicates that the trial court considered claims raised in the amendment as well as those raised in the petition, and the court then denied the petition. This court does not reverse a denial of

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<sup>1</sup>Appellant indicates in the motion to amend the petition for writ of certiorari that appellant appeared before the trial court on a number of occasions prior to the hearing on the petition that is included in the record. He indicates that the hearings are relevant to issues concerning his attempts to subpoena witnesses and appointment of counsel. As discussed in this opinion, however, those issues are not relevant to the determinative issues in this appeal, and the supplemented record is sufficient for purposes of our review. Even if appellant had secured the two witnesses that he indicated at the hearing he would call, his two codefendants, the result in this case would not have been different.

postconviction relief unless the trial court's findings are clearly erroneous. *Mitchem v. State*, 2011 Ark. 148 (per curiam). The trial court's ruling denying relief on the claims was not clearly error.

The majority of appellant's claims were assertions that the evidence against him was not sufficient, raised in various ways. Claims challenging the sufficiency of the evidence are a direct attack on the judgment and are not cognizable in Rule 37.1 petitions. *Delamar v. State*, 2011 Ark. 87 (per curiam). Assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Id.* Appellant's claim of actual innocence was a direct attack on the judgment and a challenge to the sufficiency of the evidence that is not cognizable in a Rule 37.1 proceeding. *Travis v. State*, 2010 Ark. 341 (per curiam). Prosecutorial misconduct, another claim raised by appellant multiple times, is not a claim cognizable in a Rule 37.1 petition. *Id.*

Appellant did raise a number of claims of ineffective assistance of counsel, which, in contrast to direct attacks on the judgment, are collateral challenges that may be cognizable in Rule 37.1 proceedings. *Davenport v. State*, 2011 Ark. 105 (per curiam). The trial court found that appellant failed to demonstrate prejudice from the alleged ineffective assistance.

In order to prevail on any claim of ineffective assistance of counsel, a petitioner is required to demonstrate prejudice in that the alleged error would have impacted the outcome of the trial. *Wormley v. State*, 2011 Ark. 107 (per curiam). For a claim of ineffective assistance based on failure to investigate, a petitioner must describe how a more searching pretrial investigation would have changed the results of his trial. *Id.* (citing *McCraney v. State*, 2010 Ark. 96, \_\_\_ S.W.3d \_\_\_ (per curiam)).

Appellant alleged that his attorney was ineffective for failing to conduct further

investigation and for failing to put on evidence that appellant contended would have been favorable to him concerning surveillance-camera video and witnesses who saw appellant while he was in the Sears store from which certain merchandise was stolen. Appellant did not provide affidavits or other statements from the witnesses that indicated any potential testimony that would have exonerated appellant. He did not introduce the video that he claimed would have shown that he did not have the opportunity to steal the merchandise, nor did he establish that the video existed and would have been admissible as evidence.

Appellant also alleged that counsel was ineffective for failing to file two motions, one to suppress evidence from a search of the car appellant had been in prior to his arrest and one to sever the prosecution of the two charges. Appellant failed to demonstrate that counsel could have pursued a successful motion as to either claim.

Appellant did not show that counsel could have demonstrated that the two theft charges were not part of a single scheme or plan, as the testimony by appellant's codefendants at trial indicated. *See* Ark. R. Crim. P. 22.2(a) (2010); *see also Turner v. State*, 2011 Ark. 111, \_\_\_ S.W.3d \_\_\_. Appellant did not show that counsel would have had a basis on which to successfully challenge the vehicle search. The bases to challenge the search that appellant proposed in his petition were conclusory allegations that the officer did not have probable cause for the stop, that there was no consent to the search, and that there was no probable cause after the stop to justify the search. The testimony at trial indicated that the police officer had probable cause to stop the car concerning the felony theft charge because dispatch advised him that the clerk at the video store provided a license plate number for the car in which the suspects had left the

store. Even though the two police officers who had testified concerning the search were present at the Rule 37.1 hearing, appellant did not call the officers to testify or offer any other evidence in support of his claims.

The burden is on an appellant to provide facts that affirmatively support his claims of prejudice. *Smith v. State*, 2010 Ark. 137, \_\_\_ S.W.3d \_\_\_ (per curiam). Conclusory statements cannot form the basis of postconviction relief. *Id.* Because he has the burden of proof, when a hearing is conducted on the merits of the claim, a petitioner asserting ineffective assistance must provide adequate evidence in support of those facts in order to establish his claim. *Mitchem v. State*, 2011 Ark. 148 (per curiam). Appellant failed to meet that burden; he did not establish prejudice from the alleged failures to move for severance or suppression.

Finally, appellant's petition alleged that his counsel had a conflict of interest. Appellant asserted that the conflict stemmed from appellant's attempt to have counsel relieved from representing him. The trial court did not provide a ruling on this issue, however. It is the obligation of an appellant to obtain a ruling from the trial court in order to preserve an issue for appellate review. *Reed v. State*, 2011 Ark. 115 (per curiam). Failure to obtain a ruling precludes our review of that argument on appeal. *Id.*

For those claims subject to our review, appellant did not carry his burden to demonstrate a meritorious claim for postconviction relief. He clearly cannot prevail on appeal.

Appeal dismissed; petition for writ of certiorari and motions moot.