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SUPREME COURT OF ARKANSAS

No. CR 11-215

JONATHAN E. OLIVAREZ APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** January 26, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 2010-113, HON. JAMES O. COX, JUDGE REVERSED AND REMANDED.

PER CURIAM

Appellant Jonathan E. Olivarez pled guilty to charges of delivery of methamphetamine, attempted murder in the first degree, and being a felon in possession of a firearm. Pursuant to the negotiated plea, he received 480 months' suspended imposition of sentence for the delivery of methamphetamine, 300 months' incarceration with an additional 60 months' suspended imposition of sentence for the attempted murder, and 240 months' incarceration for the firearm charge, with all sentences to run concurrently. According to appellant, prior to accepting the State's offer, he inquired of trial counsel regarding the amount of time he would have to serve before being eligible for parole, and trial counsel answered that appellant would only have to serve one-third to one-half of the sentences, less "good time," before being eligible for parole on both the attempted-murder and felon-in-possession convictions.

Once appellant was taken into custody by the Arkansas Department of Correction ("ADC"), he was informed that, because he had previously been convicted of a violent crime, he was not eligible for parole on the attempted-murder sentence under Act 1805 of 2001, which

is codified as Arkansas Code Annotated section 16-93-609 (Repl. 2006).[1] Upon learning of this fact, appellant timely filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), in which he alleged ineffective assistance of counsel based on trial counsel's incorrect statement about appellant's parole eligibility. The trial court denied appellant's petition without holding an evidentiary hearing, and it is from that denial that appellant brings the instant appeal. For the reasons explained herein, we reverse the trial court's decision.

Where, as here, a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to Rule 37.1 are those that allege that the plea was not made voluntarily and intelligently or that it was entered without effective assistance of counsel. *See Jamett v. State*, 2010 Ark. 28, ___ S.W.3d ___ (per curiam); *French v. State*, 2009 Ark. 443 (per curiam); *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). To establish prejudice and prove that he was deprived of a fair trial due to ineffective assistance of counsel, an appellant who has pled guilty must demonstrate a reasonable probability that, but for counsel's errors, he would not have so pleaded and would have insisted on going to trial. *Buchheit v. State*, 339 Ark. 481, 6 S.W.3d 109 (1999) (per curiam) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)). In his original Rule 37.1 petition in the trial court, appellant alleged that his acceptance of the State's plea offer was made only after trial counsel informed appellant that he would have to serve one-third or, "at worst," one-half of the sentences, less "good time," before being eligible for parole on both the felon-in-possession and

[1]Pursuant to this statute, appellant is not eligible for release on parole because he was previously convicted of first-degree battery, a violent felony offense, in CR 2005-574. *See Olivarez v. State*, 2011 Ark. App. 440 (affirming trial court's revocation of appellant's suspended imposition of sentence and granting counsel's motion to withdraw).

the attempted-murder charge. Thus, according to appellant, he accepted the State's offer because he "would likely have to serve between four to six years before becoming eligible for parole" and, had trial counsel correctly informed appellant that he would have to serve twenty-five years, he would not have accepted the State's offer.

The trial court did not hold an evidentiary hearing on appellant's petition, and it denied the petition by a written order that held flatly, "Defense attorneys are not required to inform their clients about parole eligibility." Appellant then wrote a letter to the trial court, stating that the trial court's order likely would not constitute "written findings and conclusions of law" as required by this court under Rule 37.3(a), and asking the court to enter "detailed findings of fact and conclusions of law" in support of its ruling. Appellant cited *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999),in support of his request to the trial court; however, the trial court did not enter an amended order.

We have consistently held that Rule 37.3 requires an evidentiary hearing in postconviction proceedings unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *Rodriguez v. State*, 2010 Ark. 78, ___ S.W.3d ___ (per curiam) (citing *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003)). If the trial court fails to make such findings, it is reversible error, unless the record before this court conclusively shows that the petition is without merit. *Sanders*, 352 Ark. 16, 98 S.W.3d 35 (citing *Bohanan v. State*, 327 Ark. 507, 939 S.W.2d 832 (1997) (per curiam)). Here, we cannot say that appellant's petition is without merit.

While the trial court's statement about defense attorneys having no duty to inform clients

about parole eligibility was partially correct, we have distinguished cases in which there was no advice given about parole eligibility from cases in which an attorney made positive misrepresentations that resulted directly in an appellant's acceptance of the negotiated plea. *See Cummings v. State*, 2011 Ark. 410 (per curiam) (citing *Buchheit v. State*, 339 Ark. 481, 6 S.W.3d 109 (1999) (per curiam)). In the former situation, where a defense attorney simply does not inform a defendant that the he would not be eligible for parole, we have held that this is not ineffective assistance of counsel. *Id.* On the other hand, where an attorney's misadvice was "of a solid nature, directly affecting [appellant's] decision to plead guilty," we have recognized that such positive misrepresentations may amount to ineffective assistance. *Buchheit*, 339 Ark. 481, 485, 6 S.W.3d 109, 112 (quoting *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990)).

In the instant case, appellant's petition states that he accepted the State's offer based on the misrepresentation of trial counsel. Additionally, the transcript from the plea hearing demonstrates that, when speaking to appellant's co-defendant about the sentences imposed, the trial court stated:

> Now, you've got eighteen years penitentiary time to do. How much of that you do is up to you. After you get out you've got seven more left that you'll be under the jurisdiction of this court, and I want you to be a model citizen during that period of time. If you can do this, you can put this thing behind you.

Immediately thereafter, the trial court addressed appellant regarding his sentences:

> Mr. Olivarez, you are hereby sentenced to the Arkansas Department of Corrections for twenty-five years with the condition of suspended imposition of sentence which is forty-five years. Meaning that whenever you get out of your penitentiary time, you're going to be under the jurisdiction of this court for an

additional forty-five years.

While the trial court's statements to the two defendants were not identical, it is possible that appellant took "whenever you get out of your penitentiary time" to refer to a possibility of parole, especially given the court's previous statement to the other defendant that how much of the sentence he actually served would be "up to [him]," a more obvious reference to the possibility of parole. Nothing else said by the trial court to appellant or his co-defendant during the hearing references the possibility of parole.

Based on the transcript of the plea hearing and the alleged positive misrepresentations of trial counsel regarding appellant's parole eligibility, we simply cannot say that the files and record of this case conclusively show that appellant is entitled to no relief. *See Rodriguez*, 2010 Ark. 78, ___ S.W.3d ___. In such cases, we have held that the lack of written findings of fact and conclusions of law as required by Rule 37.3(a) amounts to reversible error. *See Sanders*, 352 Ark. 16, 98 S.W.3d 35 (citing *Stewart v. State*, 295 Ark. 48, 746 S.W.2d 58 (1988)). For this reason, we reverse the order of dismissal and remand for compliance with Rule 37.3.

It may well be that the circuit judge will want to hold a hearing on appellant's petition pursuant to Rule 37.3(c), following which he must make findings of fact and conclusions of law. *Rackley v. State*, 2010 Ark. 469 (per curiam); *Reed*, 375 Ark. 277, 289 S.W.3d 921. If the trial court does not conduct a hearing and, instead, dismisses appellant's petition, then the court shall make written findings of fact and conclusions of law, specifying the parts of the record relied upon in determining that appellant was not entitled to a hearing. *See Reed*, 375 Ark. 277, 289 S.W.3d 921. In either instance, if appellant wishes to appeal the trial court's decision, he may do so in

accordance with our procedural rules.

Reversed and remanded.