SLIP OPINION

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SUPREME COURT OF ARKANSAS

No. CR 11-248

MICHAEL LEE COWAN APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 15, 2011 PRO SE APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 2009-314, HON. JAMES O. COX, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

PER CURIAM

Appellant Michael Lee Cowan was convicted of two counts of sexual assault in the second degree and was sentenced as a habitual offender to 960 months' imprisonment. The Arkansas Court of Appeals affirmed. *Cowan v. State*, 2010 Ark. App. 715. On December 3, 2010, appellant filed a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010), which the circuit court denied without a hearing. Now before us is appellant's pro se appeal of the circuit court's order.

On appeal, appellant asserts four bases for postconviction relief: (1) trial counsel was ineffective for failing to object to prejudicial testimony; (2) appellant was incompetent to waive his right to testify because he was delusional; (3) the circuit court erred in denying him his right to allocution; (4) trial counsel failed to allow appellant to testify on his own behalf. Because we find that appellant's fourth point may possibly have merit, we reverse and remand to the trial court to conduct a hearing and enter a new written order on that issue only.

This court does not reverse a denial of postconviction relief unless the circuit court's

SLIP OPINION

findings are clearly erroneous. *Reed v. State*, 2011 Ark. 115 (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*. In an appeal from a trial court's 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 not ineffective. *Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___ (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Reese v. State*, 2011 Ark. 492 (per curiam) (citing *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 the deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair trial. *Id.*

With respect to the requirement that prejudice be established, a petitioner must show that there is a reasonable probability that the fact-finder'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.* There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel that, when viewed from counsel's

SLIP OPINION

perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Carter*, 2011 Ark. 226, ___ S.W.3d ___.

Appellant first asserts that his trial counsel was ineffective for failing to object to certain testimony that he claims was prejudicial. We, however, are precluded from addressing this claim, as there was no ruling on this argument by the circuit court in its order. Where the trial court provides written findings on at least one, but less than all, of the petitioner's claims, we have held that an appellant has an obligation to obtain a ruling on any omitted issues if they are to be considered on appeal. *See Watkins*, 2010 Ark. 156, ___ S.W.3d ___; *Wofford v. State*, 2009 Ark. 325 (per curiam); *see generally Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). If the order did not contain a ruling on an issue or issues, it was incumbent on appellant to file a motion asking the court to address the omitted issues. *Russell v. Webb*, 2011 Ark. 307 (per curiam); *Watkins*, 2010 Ark. 156, ___ S.W.3d ___. The requirement that an appellant obtain a ruling on all issues he wishes to raise on appeal is procedural, and all appellants, including those proceeding without counsel, are responsible for following procedural rules in perfecting an appeal. *See Raines v. State*, 336 Ark. 49, 983 S.W.2d 424 (1999) (per curiam). Matters left unresolved are waived and may not be raised on appeal. *See Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

As his second point on appeal, appellant argues that he was incompetent to waive his right to testify because he was delusional. We do not consider this claim, however, because appellant raises it for the first time in this appeal. In his Rule 37.1 petition, appellant asserted that his trial counsel was ineffective for failing to raise his incompetence. It is well settled that an appellant

SLIP OPINION

may not change on appeal the scope and nature of his arguments made below. *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). Moreover, we cannot consider arguments raised for the first time on appeal. *Lee v. State*, 2010 Ark. 261 (per curiam).

For his third argument, appellant asserts that the trial court erred in denying him the right of allocution. A review of the circuit court's order, however, reveals no ruling on this issue. As we have already observed, the failure to obtain a ruling on an issue at the trial court level precludes review on appeal. *See Watkins*, 2010 Ark. 156, ___ S.W.3d ___; *Wofford*, 2009 Ark. 325. Nor is such a claim cognizable in a Rule 37.1 petition; claims of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Hale v. State*, 2011 Ark. 478 (per curiam) (citing *Hawthorne v. State*, 2010 Ark. 343 (per curiam)).

Moreover, a review of appellant's trial record reveals that, after the circuit court announced appellant's sentence, the court referred to appellant's right of allocution and inquired of appellant whether there was anything he wished to say. Arkansas Code Annotated section 16-90-106(b) (Repl. 2006) provides that, "[w]hen the defendant appears for judgment . . . [h]e or she must be asked if he has any legal cause to show why judgment should not be pronounced against him or her." This court has held that, if a question is addressed to the defendant that affords him an opportunity to express why sentencing should not be pronounced, it is unnecessary that the precise language of the statute be used. *White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979). Where, as here, the question asked by the court gave the appellant the unfettered right to state any cause, legal or otherwise, as to why sentence should not be pronounced, no prejudicial error as to allocution was presented. *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978) (statute was

SLIP OPINION

satisfied where the inquiry by the circuit court consisted of the question, "Do you have anything that you wish to say?").

Appellant's final point on appeal is that trial counsel was ineffective for failing to allow him to testify on his own behalf. In its order denying relief, the circuit court found that "[t]he allegation that trial counsel was ineffective for failing to call [appellant] to testify is contrary to Arkansas law" and that "[t]he decision to testify is purely one of strategy and not reviewable under Rule 37." The circuit court based this ruling on our holding in *Robinson v. State*, 295 Ark. 693, 750 S.W.2d 60 (1988) (per curiam). *Robinson*, however, is distinguishable from the instant situation, inasmuch as *Robinson* dealt with an allegation that trial counsel was ineffective for advising Robinson that he should not testify when the State would be able to use Robinson's prior convictions to impeach his credibility; in the instant case, appellant argues that trial counsel explicitly stated that appellant was not allowed to testify by virtue of his prior convictions. In the latter situation, we have recognized that such claims might support postconviction relief under Rule 37.1. *See Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985).

Our holding in *Robinson* was based on our holding in *Isom*, in which we noted that a petitioner who claims ineffective assistance based on trial counsel's refusal to let petitioner testify must satisfy the prejudice prong of *Strickland* by "stat[ing] specifically what the content of his testimony would have been and demonstrat[ing] that his failure to testify resulted in actual prejudice to his defense." *Id.* at 430, 682 S.W.2d at 758. Thus, while the circuit court's ruling was a correct statement of law as to cases where an appellant later disagrees with counsel's advice, it was not correct as to cases where an appellant argues that his attorney prevented him from

SLIP OPINION

testifying. Indeed, we have held that, in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to whether the client will testify. *Lockhart v. State*, 2011 Ark. 396 (per curiam) (citing *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002)). Case law has confirmed this tenet of the scope of representation. *Id.* The accused always has the right to choose whether to testify in his own behalf. *See Chenowith v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000). Counsel may only advise the accused in making the decision. *Id.*

In his petition, appellant averred that trial counsel informed him that, "by law, [appellant] was not allowed to testify because of his prior convictions." Furthermore, appellant claims that the only reason that he did not inform the trial court that he wished to testify was because trial counsel told him that he was not to address the court in any way unless he was responding to a direct question from the court. Finally, appellant stated in his petition that, had he been allowed to testify, his testimony would have included that he was incarcerated on the date that the sexual assault was alleged to have taken place, that one of the victims had previously told appellant that he "would pay" and would regret killing her cat, that documentary evidence confirmed that the victim still held a grudge regarding the dead cat, and that the victim had previously told appellant that she did not want him to be involved in a relationship with her mother.

Arkansas Rule of Criminal Procedure 37.3(a) allows the circuit court to dismiss a petition for postconviction relief without holding an evidentiary hearing where "the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief." *See Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003) (holding that it is undisputed that the trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain

SLIP OPINION

the court's findings without a hearing). In cases where a petition is denied without a hearing, however, Rule 37.3(a) requires that the circuit court "shall make written findings to that effect, specifying any part of the files, or records that are relied upon to sustain the court's findings." *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999). However, where the circuit court fails to make appropriate findings of fact and conclusions of law in accordance with Rule 37.3(a), and a petition states facts sufficient to render the allegations more than conclusory, we cannot say that the record before this court conclusively shows that the petition is without merit, and we have reversed the circuit court's decision and remanded for an evidentiary hearing in such situations. *See Sanders*, 352 Ark. 16, 98 S.W.3d 35; *see also Wooten*, 338 Ark. 691, 1 S.W.3d 8.

In the instant case, the trial court did not enter written findings of fact and conclusions of law supporting its determination that appellant was entitled to no relief. Moreover, appellant's original Rule 37.1 petition supported his claim of ineffective assistance of counsel for failure to allow appellant to testify with specific testimony that he would have given had he taken the stand. As such, we reverse the circuit court's denial of postconviction relief with respect to this single issue, and we remand for an evidentiary hearing in which the circuit court should determine whether trial counsel prevented appellant from testifying and, if so, whether this prevention resulted in prejudice to appellant, and the circuit court should enter a new written order consistent with the requirements of Rule 37.3(c). Should the new order contain a ruling adverse to appellant that he wishes to challenge, he will be required to perfect an appeal from that order.

Affirmed in part; reversed and remanded in part.