

## SUPREME COURT OF ARKANSAS

No. CR 11-446

CHARLES EDWARD JONES  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered December 8, 2011

PRO SE MOTION FOR TRANSCRIPT  
AND PETITION FOR WRIT OF  
MANDAMUS [PULASKI COUNTY  
CIRCUIT COURT, CR 2008-1753, HON.  
HERBERT WRIGHT, JUDGE]APPEAL DISMISSED; MOTION AND  
PETITION MOOT.

## PER CURIAM

Following his conviction on four counts of rape, appellant Charles Edward Jones filed in the trial court a timely pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011) that was denied. He lodged an appeal of the order in this court, and he has filed a motion for transcript and a petition for writ of mandamus, in which he seeks to compel the trial court to provide him with a transcript of his trial. Because it is clear that appellant cannot prevail, we dismiss the appeal, and the motion and petition are therefore moot.

This court has consistently held that an appeal of the denial of a petition for a postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Goldsmith v. State*, 2010 Ark. 158 (per curiam). We dismiss the appeal because appellant did not state claims in his petition that, if cognizable, provided sufficient facts to support relief. *See Wormley v. State*, 2011 Ark. 107 (per curiam).

Appellant listed four grounds for relief in the petition, introduced as claims of ineffective

assistance of counsel, although some of the claims also asserted error by the trial court. The claims of trial error included, however, were not cognizable in a Rule 37.1 proceeding. *See Mingbougha v. State*, 2011 Ark. 219 (per curiam). Only such claims that are sufficient to void the judgment and render it a nullity are cognizable. *See id.* The rule does not permit a direct attack on a judgment or permit a petition to function as a substitute for a direct appeal. *Id.*

Appellant included in his petition claims that the jury did not decide the evidence, that the evidence was insufficient, and that he was prejudiced by the admission of testimony by a doctor that a witness who was the victim in a separate rape case pending against appellant had tested positive for chlamydia. The Arkansas Court of Appeals addressed the same challenge to the sufficiency of the evidence and the admission of the doctor's testimony in appellant's direct appeal. *Jones v. State*, 2010 Ark. App. 324. A proceeding under Rule 37.1 does not allow an appellant the opportunity to reargue points that were decided on direct appeal. *Goodman v. State*, 2011 Ark. 438 (per curiam). Moreover, claims challenging the sufficiency of the evidence are not cognizable in Rule 37.1 petitions as a direct attack on the judgment. *Delamar v. State*, 2011 Ark. 87 (per curiam). The admissibility of evidence such as the doctor's testimony is also an issue that is not open to collateral attack. *See Leak v. State*, 2011 Ark. 353 (per curiam). Concerning his claim that the jury did not decide the evidence, appellant failed to provide any factual basis or otherwise explain the allegation, and, as the trial record confirms, the jury did, in fact, render the judgment of conviction at trial.

The grounds appellant presented in his petition asserting ineffective assistance of counsel reiterated the same claims of trial error and additionally asserted (1) that counsel did not properly

object to the admission of the evidence of another rape, (2) that counsel had a conflict of interest somehow related to prosecutorial misconduct and the entry of a guilty plea, (3) that counsel had a conflict of interest relating to an unconstitutional arrest and the failure to suppress evidence of the other rape, and (4) that counsel failed to properly cross-examine a witness or suppress evidence from the unrelated case concerning the victim's having chlamydia. Appellant did not provide any facts that would support a finding of prejudice in regard to these claims.

Our standard of review requires that we assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fernandez v. State*, 2011 Ark. 418, \_\_\_ S.W.3d \_\_\_ (per curiam). Under the *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Id.*

In order to meet the second prong of the test, the petitioner must show that counsel's deficient performance prejudiced petitioner's defense so that he was deprived of a fair trial. *Id.* Concerning the prejudice requirement, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Atkins v. State*, 2011 Ark. 398 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* A claimant must show that his counsel's performance fell below an objective standard of reasonableness and that this deficient

performance prejudiced the defense. *Wade v. State*, 2011 Ark. 411 (per curiam). There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and a claimant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Id.*

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Payton v. State*, 2011 Ark. 217 (per curiam). Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, and such statements and allegations will not warrant granting postconviction relief. *Id.* A court is not required to research or develop arguments contained in a petition for postconviction relief. *Id.*

In this case, appellant made conclusory allegations, failed to identify specific acts or omissions, and, to the extent that he may have identified any act or omission, he utterly failed to provide any facts that would indicate prejudice to the defense. Where appellant identified a specific act, such as a failure to object, he did not demonstrate that there was a reasonable probability that the fact-finder's decision would have been different absent counsel's alleged error.

In order to demonstrate prejudice for a failure to object, appellant must have submitted facts to support the proposition that counsel could have raised a specific meritorious argument and that failing to raise that specific argument would not have been a decision supported by

reasonable professional judgment. *See Hoyle v. State*, 2011 Ark. 321, \_\_\_ S.W.3d \_\_\_ (per curiam). Appellant did not identify any meritorious argument, or any argument other than that raised on appeal, that counsel might have made to have prevented admission of the evidence.

Concerning the allegations that counsel had a conflict of interest, appellant did not need to further demonstrate prejudice provided he demonstrated an actual conflict; because he did not make that demonstration in the petition, he was required to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *See Carter v. State*, 2011 Ark. 226 (per curiam). Appellant did not fully identify any conflict or explain how the alleged conflict could have impacted the outcome of the trial. Prosecutorial misconduct, standing alone, is not a claim cognizable in a Rule 37.1 petition. *Travis v. State*, 2010 Ark. 341 (per curiam) (citing *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006)). Appellant appeared to reference withheld evidence that counsel did not respond to, but neither the evidence nor the appropriate response was identified. Appellant did not identify the guilty plea in another case that he appears to reference, nor did he detail how that plea related to a claim of conflict or ineffective assistance. Appellant pointed to counsel's mindfulness of the pedophile exception on which the State relied to support admission of the evidence of another rape and the victim's sexually transmitted disease, but did not explain how that cognizance created a conflict or prejudiced the defense.

Appellant asserted that his arrest was unconstitutional and that he was denied due process and a fair trial, but he did not explain how those assertions related to either a conflict of interest or a claim of ineffective assistance. He complained repeatedly concerning the admission of the

evidence of another rape, but he did not provide a basis to support how that evidence might have been suppressed that was not based upon the same issues raised on appeal.

Appellant provided no meritorious basis for further cross-examination of the witness that he alleged counsel failed to impeach. Appellant largely failed to identify any specific error by counsel, and completely failed to identify any basis for prejudice. Because appellant did not state facts to support a meritorious claim, the petition was clearly without merit, and the trial court did not err in denying postconviction relief. Appellant cannot prevail on appeal, and the appeal is dismissed.

Appeal dismissed; motion and petition moot.