

SUPREME COURT OF ARKANSAS

No. CR 12-280

TIMOTHY ALLEN WELLS
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered August 14, 2012

APPELLANT'S PRO SE MOTION FOR
EXTENSION OF TIME TO FILE BRIEF
[HOT SPRING COUNTY CIRCUIT
COURT, 30CR 10-30, HON. PHILLIP
SHIRRON, JUDGE]APPEAL DISMISSED; MOTION MOOT.**PER CURIAM**

In 2011, appellant, Timothy Allen Wells, entered a plea of guilty to murder in the first degree and being a felon in possession of a firearm. An aggregate sentence of 840 months' imprisonment was imposed.

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The trial court denied the petition, and appellant has lodged an appeal in this court from the order.

Appellant now seeks by pro se motion an extension of time to file his brief-in-chief. As it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Thacker v. State*, 2012 Ark. 205 (per curiam); *Little v. State*, 2012 Ark. 194 (per curiam); *Perry v. State*, 2012 Ark. 98 (per curiam); *Riddell v. State*, 2012 Ark. 11 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Tucker v. State*, 2011 Ark. 543 (per curiam); *Jones v.*

State, 2011 Ark. 523 (per curiam); *Eaton v. State*, 2011 Ark. 432 (per curiam); *Grant v. State*, 2011 Ark. 309 (per curiam); *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

In his petition, appellant raised two allegations that his attorney was ineffective. He asserted that counsel failed to inform him that he could ask for a change of venue on the ground that he was frightened of the victim, who was the mayor of a city in the county where appellant was charged. In a related allegation, appellant contended that counsel denied him due process of law because there was no change of venue.

When a judgment is entered on a plea of guilty, with the exception of certain issues that appellant did not raise in his petition, cognizable claims are limited to those asserting that the petitioner's plea was not entered intelligently and voluntarily on advice of competent counsel. *Thacker*, 2012 Ark. 205; *Sandoval-Vega v. State*, 2011 Ark. 393, ___ S.W.3d ___ (per curiam). Here, appellant did not allege that he would not have entered his plea except for some error of counsel, and he did not contend that the plea was not intelligently and voluntarily entered.

Counsel is presumed to be competent. *Thacker*, 2012 Ark. 205; *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987) (citing *Rightmire v. State*, 275 Ark. 24, 627 S.W.2d 10 (1982)). A defendant assumes a heavy burden in asserting that counsel's advice was lacking in competence. *Branham*, 292 Ark. 355, 730 S.W.2d 226 (citing *United States v. Cronin*, 466 U.S. 648 (1984)). A defendant whose conviction is based upon a plea of guilty normally will have difficulty in proving any prejudice since his plea rests upon his admission in open court that he did the act

with which he was charged. *McMann v. Richardson*, 397 U.S. 759 (1970); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984) (citing Ark. R. Crim. P. 24.6); *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982). The burden is on the appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

When considering an appeal from a circuit court denial of a Rule 37.1 petition, 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 circuit court clearly erred in holding that counsel's performance was not ineffective. *Little*, 2012 Ark. 194; *Anderson v. State*, 2011 Ark. 488, ___ S.W.3d ___; *Biddle v. State*, 2011 Ark. 358 (per curiam). A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense. *Heard v. State*, 2012 Ark. 67 (per curiam).

As appellant's claims of ineffective assistance of counsel were unsupported by any assertion that was a basis for change of venue in his case, and he did not allege that he would not have entered the plea absent some error by counsel, he did not overcome the presumption that his plea was entered voluntarily with the advice of competent counsel. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Thacker*, 2012 Ark. 205; *Jones*, 2011 Ark. 523; *Payton v. State*, 2011 Ark. 217 (per curiam).

While a fundamental claim that would render the judgment in a criminal case void can be considered under Rule 37.1 after a plea of guilty is entered, even fundamental claims must

be supported by facts to demonstrate that a fundamental right was denied to a particular petitioner under the facts of his or her case. *See Holt v State*, 281 Ark. 210, 662 S.W.2d 822 (1984). Appellant did not meet his burden of demonstrating that his plea should be vacated under Criminal Procedure Rule 37.1.

Appeal dismissed; motion moot.

Timothy Allen Wells, pro se appellant.

No response.