

**SUPREME COURT OF ARKANSAS**

No. CR12-342

DAVID E. LEWIS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 7, 2013

PRO SE MOTION FOR EXTENSION OF BRIEF TIME AND ACCESS TO THE RECORD ON APPEAL [APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT, CR 04-250, HON. DAVID G. HENRY, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

**PER CURIAM**

Pursuant to a negotiated plea agreement, appellant David E. Lewis pled guilty to three counts of possession of cocaine with intent to deliver, one count of possession of marijuana with intent to deliver, and two counts of battery in the second degree, and the State recommended to the court that appellant receive a total of 360 months in prison.<sup>1</sup> Appellant failed to appear for his sentencing hearing, however, and, after he was eventually apprehended, the trial court denied appellant's motion to withdraw his plea and sentenced him to 864 months' incarceration.

On appeal, the Arkansas Court of Appeals reversed and remanded the case, holding that the circuit court erred in not allowing appellant to withdraw his plea. *See Lewis v. State*,

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<sup>1</sup>The plea agreement covered charges against appellant in a number of cases. Case number CR 04-250, which is the subject of the instant appeal, consisted of only one count of possession of cocaine with intent to deliver and one count of possession of marijuana with intent to deliver.

101 Ark. App. 176, 272 S.W.3d 113 (2008). Following remand, a jury trial was held, and appellant was convicted of one count each of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. Appellant's sentence was enhanced pursuant to Arkansas Code Annotated section 5-64-411 (Repl. 2005) for committing the crimes within 1000 feet of a park, and he was sentenced to a cumulative term of 1000 months' incarceration. The Arkansas Court of Appeals affirmed. *Lewis v. State*, 2010 Ark. App. 641.

Subsequently, appellant timely filed a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010), in which he alleged: (1) trial counsel had been ineffective for not investigating the underlying basis for appellant's arrest and not attempting to suppress the evidence discovered pursuant to that arrest; (2) the trial court erred in denying appellant's pro se motions for continuance and for appointment of new counsel; (3) appellant is entitled to more jail-time credit than he was given in the judgment-and-commitment order; (4) appellant's sentence was illegal. A hearing was held on the petition, and the circuit court entered a written order that denied appellant's first, second, and fourth claims, but left open the third claim pending the court's determination of exactly how much jail-time credit appellant was due. Appellant timely filed a notice of appeal from this order.<sup>2</sup>

Now before us is appellant's pro se motion for extension of time and for access to the record on appeal. However, because it is clear that appellant could not prevail if his appeal were allowed to proceed, the appeal is dismissed, and appellant's motion is accordingly moot.

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<sup>2</sup>Prior to the lodging of the record on appeal in this court, the circuit court entered a supplemental order that increased appellant's jail-time credit from 25 days to 1194 days.

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. *Redus v. State*, 2013 Ark. 9 (per curiam) (citing *Thacker v. State*, 2012 Ark. 205 (per curiam)); *Little v. State*, 2012 Ark. 194 (per curiam); *Perry v. State*, 2012 Ark. 98 (per curiam).

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Strain v. State*, 2012 Ark. 42 (per curiam) (citing *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. *Strain*, 2012 Ark. 42 (citing *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (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). 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 such an extent that the appellant was deprived of a fair trial. *Strain*, 2012 Ark. 42.

Appellant's first claim in his original petition was that trial counsel was ineffective for not investigating the underlying basis for appellant's arrest and not attempting to suppress the

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evidence discovered pursuant to that arrest. The circuit court found that appellant had been arrested pursuant to an outstanding arrest warrant issued in a separate case, and testimony at the Rule 37.1 hearing established that the arresting officer was also the officer involved in the issuance of the warrant. The circuit court further found that trial counsel had initially filed a motion to suppress the evidence, as no arrest warrant was contained in the prosecutor's file, but counsel withdrew that motion after a copy of the warrant was produced and counsel was satisfied that the warrant was valid. Appellant's argument, both in his petition and at the hearing, seemed to be that the arrest warrant was invalid because it predated the State's request for such a warrant. The circuit court found that this allegation was without merit, as the State had provided information to the court in support of its request for an arrest warrant on August 6, even though the criminal information in the case was not filed until August 9.<sup>3</sup> Ultimately, the court held that trial counsel had duly investigated the circumstances surrounding appellant's arrest, and counsel's representation of appellant "was not deficient in any way."

Generally speaking, a challenge to the validity of an arrest warrant is not cognizable under Rule 37.1. See *Gunn v. State*, 291 Ark. 548, 726 S.W.2d 278 (1987). Counsel's decision whether to challenge the admission of evidence seized pursuant to the execution of an arrest warrant is cognizable, however. See generally *Watson v. State*, 2012 Ark. 27 (per

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<sup>3</sup>Testimony at the Rule 37.1 hearing strongly suggests that appellant has conflated the filing of a criminal information and the "affidavit, recorded testimony, or other information" requirement for issuance of an arrest warrant under Arkansas Rule of Criminal Procedure 7.1(b).

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curiam). A petitioner who makes such a challenge must demonstrate that a motion to suppress would have been meritorious had trial counsel pursued it. *See id.*

Here, we cannot say that the circuit court's decision was clearly erroneous. Testimony established that counsel had reviewed the warrant and found it to be facially valid; thus, he felt that the evidence would not be suppressed, and he withdrew his motion. No evidence was presented that suggested that counsel was incorrect in his determination or that he could otherwise have successfully challenged the validity of the arrest. In sum, appellant failed to meet his burden of proof by providing facts that affirmatively supported his claims of prejudice. *Jones v. State*, 2012 Ark. 215 (per curiam); *Payton v. State*, 2011 Ark. 217 (per curiam).

Appellant's second basis for postconviction relief was that the trial court erred when it denied appellant's pro se motions for a continuance and for appointment of new counsel. According to appellant, his appointed counsel would not communicate with him, leaving appellant "silent and unable to assist in his defense." In support, appellant cited *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), arguing that the court denied appellant an attorney with whom he could communicate. The circuit court found this claim to be one that should have been raised on appeal and was not cognizable in a Rule 37.1 petition.

Again, we cannot say that the circuit court's decision on this point was clearly erroneous. Appellant's claims are properly considered assertions of trial error, and such claims are not cognizable in a petition for Rule 37.1 relief. *See Lowe v. State*, 2012 Ark. 185 (per

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curiam); *Mingboupha v. State*, 2011 Ark. 219 (per curiam). Even if we construe appellant's claim as an allegation of constructive denial of counsel, which would be cognizable in a Rule 37.1 petition, appellant still failed to establish that relief was warranted. See *Tapia v. State*, 2010 Ark. 406 (per curiam). Appellant's entire allegation centered on his claim that he and his appointed counsel had a strained relationship, which falls far short of establishing constructive denial of counsel. See *id.* (noting that establishing constructive denial of counsel requires a petitioner to demonstrate specific omissions by counsel that would serve as a complete failure to subject the prosecution's case to testing). The mere fact that animosity exists between a criminal defendant and his attorney is not sufficient cause to replace the attorney. See *Malone v. State*, 291 Ark. 315, 724 S.W.2d 180 (1987) (per curiam). The right to an appointed attorney does not create a right to an appointed attorney of a defendant's choosing. See *id.* (citing *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982) (per curiam)).

Appellant's third claim in his petition for postconviction relief was that he was entitled to more jail-time credit than was reflected on the judgment-and-commitment order. Following the Rule 37.1 hearing, the circuit court investigated the matter and ultimately agreed with appellant, entering a supplemental order on his Rule 37.1 petition that increased his jail-time credit from 25 days to 1194 days. The court's supplemental order carefully spelled out how the 1194-day total was calculated, and we cannot say that the circuit court's decision was clearly erroneous on this point.

For his final claim, appellant alleged that his sentence was imposed in an illegal manner, inasmuch as the “jury imposed illegal, ambiguous terms of ‘70’ and ‘20’ but failed to specify ‘70’ and ‘20’ what?” Specifically, he argued that Arkansas Code Annotated section 5-4-401 (Repl. 2006) and Arkansas Code Annotated section 16-90-107 (Repl. 2007) require that appellant be sentenced within the applicable range, and that a sentence of “70” or “20,” which does not specify that the numbers refer to years of incarceration, is illegal. Further, appellant asserted that the trial court was not allowed to assume that the jury meant “years” when imposing the sentence. The circuit court found appellant’s entire argument to be without merit.

Sentencing is entirely a matter for the General Assembly in Arkansas, and the courts of this state are bound by the terms of the sentences enacted by the General Assembly. *Crouse v. State*, 2012 Ark. 442. At the time of appellant’s conviction, sentencing for drug offenses in Arkansas was governed by the ranges set forth in Arkansas Code Annotated section 5-64-401 (Repl. 2005).<sup>4</sup> Section 5-64-401 made possession of more than five grams, but less than twenty-eight grams, of cocaine with the intent to deliver punishable by ten to forty years’ imprisonment, or life. That section made possession of less than ten pounds of marijuana with intent to deliver punishable by four to ten years’ imprisonment.

Appellant had two previous convictions for drug offenses in 1994. See *Lewis v. State*, 101 Ark. App. 176, 272 S.W.3d 113 (2008). Thus, appellant was sentenced pursuant to the

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<sup>4</sup>The sentencing ranges in section 5-64-401 were repealed by Act 570 of the 2011 Acts of Arkansas.

enhancement in Arkansas Code Annotated section 5-64-408(a), which provides:

Any person convicted of a second or subsequent offense under this chapter shall be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice the amount otherwise authorized, or both.

Under section 5-64-408, the sentencing range for appellant was twenty to eighty years' imprisonment, or life, on the cocaine conviction and eight to twenty years' imprisonment on the marijuana conviction. It was mandatory, upon conviction for these crimes, that appellant be sentenced within those ranges. *See generally Osburn v. State*, 2011 Ark. 406 (holding that "shall" in a sentencing statute indicated that the punishment was mandatory).

Based on the mandatory nature of the sentencing range, it is clear that "70" and "20" refer to years of incarceration, as no other measurement of time would make sense; seventy months would fall far short of the twenty-year minimum for appellant's cocaine conviction, just as twenty months would fall short of the eight-year minimum for the marijuana conviction. Further, we note that appellant provided no evidence that the jury intended anything other than "years" in pronouncing the sentence, arguing only that the sentences were not within the legal range. That argument is clearly without merit, and we cannot say that the circuit court erred in holding that appellant's sentence was not illegal.

As it is clear that appellant could not prevail if his appeal were allowed to proceed, the appeal is dismissed. Appellant's motion for access to the record on appeal and for extension of time in which to file his brief is accordingly moot.

Appeal dismissed; motion moot.

*David E. Lewis*, pro se appellant.

No response.