

SUPREME COURT OF ARKANSAS

No. CR12-518

JAMES THOMPSON

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 25, 2013

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE BRIEF [MILLER
COUNTY CIRCUIT COURT, CR
10-97, HON. KIRK JOHNSON,
JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

After the Arkansas Court of Appeals affirmed appellant James Thompson's conviction on two counts of rape, he filed in the trial court a timely, verified petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2012). *See Thompson v. State*, 2011 Ark. App. 605. On the same day, appellant filed a memorandum of law in support of the petition under Rule 37.1. The court appeared to treat the two pleadings as separate petitions under the rule, and it denied the petitions without a hearing.¹ Appellant lodged an appeal of the order in this court. Appellant filed a motion requesting an extension of time in which to

¹If taken together as a single petition, the two pleadings exceeded the restrictions on page length in the rule. It is not necessary to consider whether the court appropriately addressed the two pleadings as separate petitions, possibly reflecting an amendment, however, because, even taking into consideration all claims advanced in both pleadings, the disposition here is the same. We also note that the order denying the petitions appears to provide a ruling on a separate motion for transcript that is not in the record before us. We need not address that ruling because, without a copy of the pleading, the record is not sufficient for review. The burden is on the party asserting error to bring up a sufficient record on which to grant relief. *Townsend v. State*, 2013 Ark. 106 (per curiam).

file his brief, and he has since tendered a brief. Because we dismiss the appeal, the motion is moot.

An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Wedgeworth v. State*, 2013 Ark. 119 (per curiam); *Davis v. State*, 2013 Ark. 118 (per curiam); *Watson v. State*, 2012 Ark. 27 (per curiam); *Riddell v. State*, 2012 Ark. 11 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Croft v. State*, 2010 Ark. 83 (per curiam); *Crain v. State*, 2009 Ark. 512 (per curiam). It is appropriate to dismiss the appeal because the claims for postconviction relief advanced by appellant in the Rule 37.1 petitions were conclusory in nature and without factual substantiation sufficient to establish a meritorious claim for postconviction relief. See *Crain v. State*, 2012 Ark. 412 (per curiam).

The general standard of review for an order that denies postconviction relief does not permit this court to reverse unless the trial court's findings are clearly erroneous. See *Davis*, 2013 Ark. 118; see also *Cooper v. State*, 2012 Ark. 123 (per curiam) (noting that issues concerning statutory interpretation are reviewed de novo). 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.*

Appellant presented three grounds for relief in the petitions and additionally alleged that he was entitled to an evidentiary hearing. Arkansas Rule of Criminal Procedure 37.3 provides for summary disposition of petitions where it can be conclusively shown on the

record or on the face of the petition that the allegations have no merit. *Pennington v. State*, 2013 Ark. 39 (per curiam). Because the allegations in the petitions were without merit, it was not clear error for the trial court to summarily deny the petitions.

The first ground in the petitions alleged ineffective assistance of counsel on the bases that trial counsel failed to adequately conduct pretrial investigation or to subject the prosecutor's case to meaningful adversarial testing. The second ground alleged denial of due process on the basis that appellant did not commit the crimes, and the presentation of newly discovered evidence would demonstrate his actual innocence.² The last ground alleged that appellant's right to be free from cruel and unusual punishment was violated when he received consecutive sentences despite mitigating factors.

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). *Lowe v. State*, 2012 Ark. 185, ___ S.W.3d ___ (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 the extent that the appellant was deprived of a fair trial. *Id.* A claimant must satisfy both prongs of the test, and it is not necessary to determine whether counsel was deficient if the petitioner fails to demonstrate prejudice as to an alleged error. *Pennington*, 2013 Ark. 39.

A defendant making an ineffective-assistance-of-counsel claim must show that his

²The heading in one of the pleadings for this argument referenced an Eighth Amendment violation, but the only argument presented in the pleading was for a due-process violation as indicated.

counsel's performance fell below an objective standard of reasonableness. *Miller v. State*, 2011 Ark. 114 (per curiam). In order to meet the second prong of the test, a claimant must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Delamar v. State*, 2011 Ark. 87 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Counsel is presumed effective, and allegations without factual substantiation are insufficient to overcome that presumption. *Hennington v. State*, 2012 Ark. 181, ___ S.W.3d ___. In claiming a deficiency, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* The petitioner has the burden of overcoming the presumption by identifying specific acts and omissions that, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.*

The burden is entirely on a petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support a claim of prejudice. *Wedgeworth*, 2013 Ark. 119. Conclusory statements cannot be the basis of postconviction relief. *Charland v. State*, 2012 Ark. 246.

Appellant's first basis for ineffective assistance was that counsel had failed to conduct adequate pretrial investigation. Neither pleading provided any facts in support of an assertion of prejudice concerning that claim. The order indicates in its discussion of appellant's claim of newly discovered evidence that there was a reference to an individual named Robert Washington, who may have been a potential witness, but the order also noted that this reference was without any specific summary of Washington's potential testimony or any other

information about potential evidence that might have been discovered. The record before this court, despite the trial court's reference, is completely devoid of any reference to specific evidence or witnesses that counsel may have discovered with additional investigation. There was no reference to Washington or to any other witness or evidence that could have been discovered.

There was, likewise, no specific description of alleged prejudice from any failure to conduct adversarial testing of the prosecution's case. Appellant's pleadings did not identify any specific conduct by counsel regarding the alleged failure to test, much less demonstrate how that testing might have changed the decision of the fact-finder in appellant's trial.

Appellant's second ground for relief asserted that he was deprived of due process because he was actually innocent and that there was newly discovered evidence in that regard. The claim is not one cognizable in a proceeding under Rule 37.1, in addition to the fact that the claim was not supported with any factual basis. We have already discussed the lack of factual pleading concerning newly discovered evidence. Appellant's claim of actual innocence is a direct attack on the judgment that amounts to a challenge to the sufficiency of the evidence against him. *See Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___. Such a due-process claim is a challenge that should have been raised at trial, and is not a claim cognizable in Rule 37.1 proceedings. *See Miller*, 2011 Ark. 114; *Crain*, 2009 Ark. 512.

Appellant's final claim in the pleadings was that his consecutive sentences were unconstitutional because there were mitigating factors that lessened his culpability. This court has previously rejected the argument that imposition of consecutive sentences is cruel and

unusual punishment. See *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983) (the cumulative effect of consecutive sentences does not make punishment cruel and unusual). Appellant did not identify any specific mitigating factors that he would assert should have lessened his culpability. The pleadings referenced cases where juvenile offenders were held less culpable, but appellant did not assert that he was a juvenile at the time of the crime, and he simply asserted that the same reasoning should be applied to other cases where mitigating factors exist. Appellant did not point to mitigating factors in his case, and, as noted, the mere fact that the sentences were imposed consecutively did not serve to offend the Eighth Amendment prohibition against cruel and unusual punishment. Appellant utterly failed to provide any factual substantiation for the claim.

All of appellant's claims in the pleadings were conclusory and without factual substantiation. It was not clear error for the trial court to summarily dismiss the petition without a hearing on the merits, and appellant cannot prevail on appeal.

Appeal dismissed; motion moot.

Appellant, pro se.

No response.