

SUPREME COURT OF ARKANSAS

No. CR12-587

JAMES EDWARD DANIELS, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 16, 2013

PRO SE MOTIONS FOR PERMISSION
TO SUPPLEMENT/AMEND BRIEF
[DREW COUNTY CIRCUIT COURT,
CR 10-153, HON. ROBERT BYNUM
GIBSON, JR., JUDGE]MOTIONS DENIED; ORDER
AFFIRMED.**PER CURIAM**

Appellant James Edward Daniels, Jr., lodged an appeal in this court from an order denying postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2012). He filed two motions that request permission to supplement and amend his brief to include documents that he asserts pertain to his case. We deny the motions because the documents are not relevant to appellant's appeal, and we affirm the order denying postconviction relief.

A Drew County jury convicted appellant on charges of possession of marijuana with the intent to deliver and possession of methamphetamine with the intent to deliver. The prosecution had charged appellant with the additional crimes of attempted first-degree battery and first-degree child endangerment, but the judge directed a verdict on the child-endangerment charge, and the jury acquitted appellant on the battery charge. The Arkansas Court of Appeals affirmed the judgment. *Daniels v. State*, 2012 Ark. App. 9.

Appellant filed a timely pro se Rule 37.1 petition. In it, he alleged (1) ineffective assistance of counsel, (2) denial of due process, (3) actual or constructive denial of counsel, and

(4) denial of a fair trial.

Appellant alleged ineffective assistance on a number of bases. He alleged that trial counsel failed to properly investigate and failed to prepare an adequate strategy for trial. In addition, he alleged that counsel filed a motion to withdraw after trial, that counsel did not adequately prepare him to take the stand or advise him concerning that decision, that counsel failed to take a number of steps to implement a strategy to obtain a conviction on simple possession rather than possession with intent to deliver or call character witnesses, and that counsel failed to move to dismiss the methamphetamine charge on the basis that the prosecutor had charged his codefendants with the same charge. Appellant alleged ineffective assistance of appellate counsel because counsel failed to challenge the denial of trial counsel's request for a continuance to prepare for trial and because counsel failed to argue in his brief how appellant was prejudiced by the denial of another motion for continuance in which appellant sought to obtain different counsel.

Appellant asserted due-process violations on the basis that the trial court refused to grant a continuance to allow him time to retain different counsel or for the attorney representing him to further prepare for trial, because the judge was biased, and because the trial court permitted his trial attorney to withdraw. His denial-of-counsel claims were on two bases related to the court's failure to grant a continuance so that he could retain other counsel. Appellant based his claim of unfair trial procedure on a lack of competent assistance from an attorney who was not of his choosing, the trial court's bias, and the court's failure to grant the continuances requested.

The trial court denied the petition without a hearing. The order denying relief referenced

the petition and a response by the State that does not appear in the record.¹ The order directly addressed only a portion of the claims in the petition, cursorily dispensing with the majority of appellant's allegations of ineffective assistance as simply "ludicrous on their face."

After the case had been fully briefed, appellant filed his pro se motions for permission to supplement/amend brief. In the motions, appellant states that he received the documents that he seeks to add to his brief, which are copies of a plea statement and judgment against one of his codefendants, after he had filed his brief. The documents are not included in the record before this court. The trial court did not reference those documents in its order, even though the documents are a part of the public records of the court's clerk and may therefore have been available. Moreover, as explained further below, the documents are simply not necessary in disposing of the issues raised in appellant's Rule 37.1 petition.

As noted, the case has been fully briefed, and our review of the briefs and the record makes it clear that appellant cannot prevail. 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).

In appellant's first point on appeal, he asserts that the trial court demonstrated bias in its order denying the petition, that the trial court failed to make written findings as required by

¹Appellant also filed a "Brief in Support of Petitioner's Rule 37.1 Petition" on the same date that he filed the petition. If considered as a part of the petition, this additional filing would have caused the petition to exceed the page limitations in the rule. *See* Ark. R. Crim. P. 37.1 (b). It is not clear if the trial court considered this "brief" that appellant filed in denying the petition. We need not, however, consider whether the court could treat the additional pleading as an amendment because the "brief" did not raise any additional issues and added nothing that would alter the conclusions reached in this opinion.

Arkansas Rule of Criminal Procedure 37.3, and that he is entitled to a hearing on the petition. Although we agree that the order included some comments that were curtly dismissive of appellant's claims, and that the order did not include appropriate findings on each of the claims in the petition, the comments in the order did not demonstrate some personal prejudice against appellant or bias by the trial court. The mere fact that rulings are adverse to the appellant is not enough to demonstrate bias. *Brown v. State*, 2012 Ark. 399, ___ S.W.3d ___. Nor is a lack of simple courtesy, without apparent animosity, sufficient.

Rule 37.3 provides for summary disposition of petitions under Rule 37.1, and this court has interpreted Rule 37.3 as providing that an evidentiary hearing should be held unless it can be conclusively shown on the record or the face of the petition that the allegations have no merit. *Pennington v. State*, 2013 Ark. 39 (per curiam). In the event that the trial court exercises its discretion to summarily dispose of a Rule 37.1 petition without a hearing, then Rule 37.3 requires the court to provide specific written findings identifying the portions of the record relied upon, and if the trial court fails to make those findings, it is reversible error, except in those cases where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Id.* Appellant's petition was wholly without merit.

Appellant's first claims in the petition were claims of ineffective assistance of counsel.²

²The State asserts in its brief that appellant waived all claims of ineffective assistance because he did not include those claims in his points on appeal. Appellant's ineffective assistance claims were intertwined with his other claims and he reasserted ineffective assistance in some of his other claims. We need not, however, resolve whether appellant waived the claims on appeal because we determine that the petition in its entirety was without merit.

Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Webb v. State*, 2013 Ark. 153 (per curiam). Appellant's allegations of ineffective assistance in the petition failed to demonstrate prejudice.

The majority of appellant's claims were conclusory or lacked any substantiating facts to show prejudice. Conclusory statements that counsel was ineffective will not sustain a Rule 37.1 petition. *Mitchell v. State*, 2012 Ark. 242. Where appellant contended that counsel should have challenged a ruling or filed a motion, appellant did not show that counsel could have made any meritorious argument in support of the challenge. *See id.* Appellant did not show that further investigation would have been fruitful, what potential witnesses might have provided in reference to his character, or that there was a different and more successful strategy that counsel could have adopted. *See Walton v. State*, 2012 Ark. 269 (per curiam).

Appellant's only proposed alternate strategy of offering a lesser-included offense is not a sufficient basis on its own to support a finding of ineffective assistance. *See Marks v. State*, 2011 Ark. 324 (per curiam) (counsel is not ineffective merely because an all-or-nothing strategy fails). We note that a number of appellant's claims were based on his apparent assumption that the jury could not have concluded that the three occupants of the vehicle jointly possessed the drugs. That premise is false because multiple defendants may be found to jointly possess drugs found in a single location. *See Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994)

Concerning appellant's two claims that trial counsel was ineffective for failing to provide advice about appellant's decision to testify and for filing a motion to withdraw, any assertions

of prejudice are contradicted by the record. The trial court provided appellant with advice concerning his right not to testify following appellant's motion for directed verdict, and appellant was represented by counsel on appeal.

Appellant's remaining claims in the petition were also without merit. His allegations of due-process violations and otherwise unfair trial procedures, judicial bias, and faulty rulings at trial were largely not cognizable in a proceeding on a Rule 37.1 petition. *See Watson v. State*, 2012 Ark. 27 (per curiam) (assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal); *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam) (allegations of trial error that could have been raised at trial or on appeal may not be raised in Rule 37.1 proceedings). There is an exception, however, to the general rule that the Rule does not provide a remedy when an issue could have been raised at trial or argued on appeal for errors that are so fundamental as to render the judgment of conviction void or subject to collateral attack. *Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143. Appellant framed some issues as denial of counsel, which is fundamental error sufficient to render the conviction void.

Appellant's claims in the petition that were framed to allege denial of counsel contended only that he was either ineffectively represented or not represented by counsel of his choosing. Appellant's allegations of ineffective assistance failed to demonstrate prejudice, and those claims have already been addressed in this opinion.

Appellant raised the claim concerning the trial court's failure to grant his motion for a continuance to obtain counsel of his choice on direct appeal, and the court of appeals addressed it. *Daniels*, 2012 Ark. App. 9, at 4–7. Erroneous deprivation of the right to counsel of choice

is structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). A trial court, however, has wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar. *Id.* The court of appeals held that the trial court did not abuse its discretion in denying a continuance, concluding that there was no erroneous deprivation of the right to counsel of choice. *Daniels*, 2012 Ark. App. 9, at 4–7. The issue has been raised in a prior appeal and the conclusion of the court of appeals on the matter is law-of-the-case for all subsequent proceedings. See *State v. Harrison*, 2012 Ark. 198, ___ S.W.3d ___ (discussing application of the doctrine where the merits of the claim have previously been addressed and the claim was adjudicated); *Croy v. State*, 2011 Ark. 284, 383 S.W.3d 367 (per curiam). Because we can determine from the record and the petition that none of appellant’s claims in the petition were meritorious, the trial court’s denial of postconviction relief is affirmed.

Motions denied; order affirmed.

James Edward Daniels, Jr., pro se appellant.

Dustin McDaniel, Att’y Gen., by: *Valerie Glover Fortner*, Ass’t Att’y Gen., for appellee.