Cite as 2012 Ark. 412

SUPREME COURT OF ARKANSAS

No. CR 12-831

KENNETH CRAIN, JR.
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

Opinion Delivered November 1, 2012

PRO SE MOTION FOR BELATED APPEAL OF ORDER [LONOKE COUNTY CIRCUIT COURT, CR 10-90, HON. PHILLIP T. WHITEAKER, JUDGE]

MOTION DENIED.

PER CURIAM

In 2010, petitioner Kenneth Crain, Jr., was found guilty by a jury of aggravated robbery and theft of property with a sentence enhancement for use of a firearm in commission of the offenses. He was sentenced to 396 months' imprisonment. The Arkansas Court of Appeals affirmed. *Crain v. State*, 2011 Ark. App. 296. Subsequently, petitioner timely filed in the trial court a verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied on August 24, 2011. Petitioner did not file a notice of appeal within thirty days of the entry of the trial court's order as required by Arkansas Rule of Appellate Procedure–Crim. 2(a)(4) (2012). Now before us is petitioner's motion to proceed with a belated appeal of the court's order.

Petitioner bases the motion on the claim that the circuit clerk did not promptly send to him a copy of the court's order denying relief, as required by Arkansas Rule of Criminal Procedure 37.3(d), and that the failure to do so entitles petitioner to pursue a belated appeal.

Regardless of whether petitioner received prompt notice that his petition had been denied, we deny the motion for belated appeal because it is clear that petitioner could not prevail on appeal. *Mingboupha v. State*, 2011 Ark. 219 (per curiam); *see also Sparacio v. State*, 2010 Ark. 335 (per curiam). An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appeal is without merit. *Mingboupha*, 2011 Ark. 219; *Kelley v. State*, 2011 Ark. 175 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Sparacio*, 2010 Ark. 335; *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (citing *Pierce v. State*, 2009 Ark. 606 (per curiam)).

The claims for postconviction relief advanced by petitioner in his Rule 37.1 petition were conclusory in nature without factual substantiation sufficient to establish a meritorious claim for postconviction relief. He alleged the following: he was not allowed to complete voir dire of the jury because the judge was in a rush; a black person was struck "on purpose" from the jury panel by the prosecution with no known reason; the county's population is twenty-five percent black and, therefore, black persons should have made up twenty-five percent of the jury; he told his attorney that one of the jurors "was falling asleep" during trial, but counsel did nothing about it; there was no evidence linking him to the crime except "word of mouth;" his attorney did not attack the credibility of the lead detective who had a history of falsifying reports; his counsel did not fight to get him tried separately from his co-defendant.

The claims were each simply statements without support to show that petitioner suffered prejudice that could be addressed under Rule 37.1. It is well settled that trial error should be addressed at trial and on direct appeal. *Evans v. State*, 2012 Ark. 375 (per curiam). For that reason, mere trial error does not provide a ground for postconviction relief. Even assertions

implicating a constitutional right are not cognizable under the rule unless sufficient to render the judgment of conviction a nullity. The rule does not permit a direct attack on the judgment or substitute for a direct appeal from the judgment. *Evans*, 2012 Ark. 375; *Hill v. State*, 2010 Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). Questions of a constitutional dimension are waived if not brought on direct appeal in accordance with the prevailing rules of procedure. *See Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). A fundamental claim that would render the judgment in a criminal case void can be considered under Rule 37.1, but those 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 Wells v. State*, 2012 Ark. 375 (per curiam); *see also Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984). Appellant did not meet his burden of demonstrating that the judgment in his case should be vacated under Criminal Procedure Rule 37.1.

As to appellant's allegation that the evidence was insufficient to sustain the judgment, questions pertaining to the sufficiency of the evidence are also matters to be addressed at trial and on direct appeal and are not cognizable in a postconviction proceeding. *See Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___. As stated, a postconviction proceeding is not a substitute for direct appeal. Likewise, it is not an opportunity to challenge the strength of evidence. *See Jones v. State*, 2012 Ark. 215 (per curiam).

With respect to appellant's contentions that his attorney did not represent him properly, there is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant 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. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam). Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, nor do they warrant granting postconviction relief. *Kelley*, 2011 Ark. 175; *Delamar*, 2011 Ark. 81; *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156 (per curiam). We have repeatedly held that conclusory claims are insufficient to sustain a claim of ineffective assistance of counsel. *Reed v. State*, 2011 Ark. 115 (per curiam); *Wormley v. State*, 2011 Ark. 107 (per curiam); *Delamar,* 2011 Ark. 87.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 352 S.W.3d 874 (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. *Watkins*, 2010 Ark. 156; *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

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. *Miller v. State*, 2010 Ark. 114. Under the two-pronged *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. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam).

As to the second prong of *Strickland*, the claimant must demonstrate that counsel's deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *See id.* Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Ewells,* 2010 Ark. 407, at 3. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Petitioner's unsubstantiated allegations clearly fell short of establishing that he was denied effective assistance of counsel at trial; accordingly, there is no good cause to permit an appeal from the order that denied postconviction relief.

Motion denied.

Kenneth Crain, Jr., pro se appellant.

No response.