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SUPREME COURT OF ARKANSAS

No. CR13-02

	Opinion Delivered April 11, 2013
JOHN WEBB, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	APPELLANT'S PRO SE MOTION FOR BELATED APPEAL [SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 10-1316, HON. J. MICHAEL FITZHUGH, JUDGE] APPEAL DISMISSED; MOTION TREATED AS MOTION TO FILE A BELATED BRIEF AND DECLARED MOOT.

PER CURIAM

In 2011, appellant John Webb, Jr., was found guilty by a jury of the rape of two sisters, who were minors at the time of the offenses. An aggregate term of 672 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Webb v. State*, 2012 Ark. App. 495.

Subsequently, appellant timely filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2012). The trial court denied the petition, and appellant has lodged an appeal in this court from the order. Now before us is appellant's "motion for belated appeal." As the motion is a request to file a belated brief, it is properly treated as a motion to file a belated brief.

As it is clear from the record that appellant could not prevail 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. *Davis v. State*, 2013 Ark. 118 (per curiam); *Holliday v. State*, 2013

Ark. 47 (per curiam); *Crain v. State*, 2012 Ark. 512 (per curiam); *Thacker v. State*, 2012 Ark. 205 (per curiam).

In his petition, appellant first contended that he was entitled to a new trial because there were a number of errors in his trial. He alleged that some of the testimony against him was false and later recanted; the testimony of the victims' mother and the older victim took him by surprise; the prosecutor failed to disclose exculpatory evidence and concealed the identity of an unnamed material witness until the day of trial and did not allow the defense sufficient time to interview the surprise witness; the prosecutor failed to "comply with the rule"; the medical examiner gave testimony about specific, typical characteristics of sexual abuse; the prosecutor coerced the mother of the victims into testifying with threats that she would lose her children; and proof of his prior crimes and bad character were admitted into evidence.

The claims did not state a basis for granting a Rule 37.1 petition. Allegations of trial error that could have been raised at trial and on the record on direct appeal are not cognizable in Rule 37.1 proceedings. *Davis*, 2013 Ark. 118; *Lewis v. State*, 2013 Ark. 105 (per curiam); *see also 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). With respect to appellant's assertions of prosecutorial misconduct, the arguments could also have been raised and addressed at trial. It is well settled that a claim of prosecutorial misconduct standing alone is not a ground for postconviction relief. *Johnson v. State*, 2012 Ark. 225 (per curiam).

Appellant also argued in his petition that, had his trial attorney done a proper background check, counsel could have found several letters from various government and nongovernment places where he had been employed to work with children that would have reported no negative responses to his work or his "being trashed around kids of any age." If the claim is considered as a claim of ineffective assistance of counsel, it failed to establish that counsel was remiss so as to warrant postconviction relief under the rule. Claims of ineffective assistance of counsel alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Pennington v. State*, 2013 Ark. 39 (per curiam); *Walton v. State*, 2012 Ark. 269 (per curiam). The effectiveness of counsel is assessed under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Simmons v. State*, 2012 Ark. 58 (per curiam); *Croy v. State*, 2011 Ark. 284, 383 S.W.3d 367 (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. *Strain v. State*, 2012 Ark. 42, ___ S.W.3d ___ (per curiam). 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. *See Abernathy v. State*, 2012 Ark. 59, 386 S.W.3d 477 (per curiam); *Kelley v. State*, 2011 Ark. 504; *Mitchem v. State*, 2011 Ark. 148 (per curiam).

When considering an appeal from a circuit court's 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 in *Strickland*, the circuit court clearly erred in holding that counsel's performance was not

ineffective. *Pennington*, 2013 Ark. 39; *Jackson v. State*, 2013 Ark. 19 (per curiam); *Little*, 2012 Ark. 194; *Anderson v. State*, 2011 Ark. 488, 385 S.W.3d 783; *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).

Appellant did not provide any substantiation for his conclusory claim that counsel could have found, and presumably succeeded in having admitted into evidence at trial, any evidence from former employers that he had worked with children without a problem. Moreover, when the totality of the evidence against him that was adduced at trial is considered, it cannot be said that the former employers' experience with appellant could have overcome the overwhelming evidence from the witnesses who testified. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims that counsel's conduct prejudiced him under the standards set out in *Strickland*. *Thacker*, 2012 Ark. 205; *Jones*, 2011 Ark. 523; *Payton v. State*, 2011 Ark. 217 (per curiam).

Appeal dismissed; motion for belated appeal treated as motion to file a belated brief and declared moot.

John Webb, Jr., pro se appellant.

No response.