

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-41

EVERETT GENE FOSTER, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 27, 2010

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[NO. CR-09-214]

HONORABLE BARBARA ELMORE,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

A Lonoke County jury convicted Everett Gene Foster, Jr., of second-degree sexual assault and sentenced him to fifteen years in the Arkansas Department of Correction. On appeal, he argues that he was denied his Sixth Amendment right to effective assistance of counsel. More specifically, he argues that his trial counsel (1) failed to file any pretrial motions or any discovery requests; (2) failed to meet with him for a sufficient period of time to properly prepare for trial; (3) failed to interview witnesses in preparation of trial; (4) failed to subpoena the victim's brother who was in the house at the time of the alleged abuse; (5) failed to effectively cross-examine the victim's mother; (6) failed to subpoena his employment records, which would have shown he was at work during a significant portion of time during which the abuse allegedly occurred; and (7) failed to seek postconviction relief from the trial court's denial

of his motion to quash the entire jury panel. Foster further argues that, because of the inherent conflict created when trial counsel also serves as appellate counsel, his attorney failed to seek appropriate postconviction relief on the basis of ineffective assistance of counsel.

Foster's ineffective-assistance-of-counsel claims, however, are not properly before us because he failed to raise them at the trial court level. Rule 37 of the Arkansas Rules of Criminal Procedure provides the primary vehicle for postconviction relief due to ineffective assistance of counsel, although "such relief may be awarded a defendant on direct appeal in limited circumstances" based on a motion for a new trial. *See, e.g., Missildine v. State*, 314 Ark. 500, 507, 863 S.W.2d 813, 818 (1993). A claim on direct appeal is only appropriate, however, when the facts surrounding the claim were fully developed during the trial or during hearings conducted by the trial court. *See Ratchford v. State*, 357 Ark. 27, 31, 159 S.W.3d 304, 307 (2004). This is because "the trial court is in a better position to assess the quality of legal representation than we are on appeal." *Ratchford*, 357 Ark. at 32, 159 S.W.3d at 307. *See also Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996). Because no ineffective-assistance claim was made to the trial court, Foster's claims cannot be considered directly on appeal. *See Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998). Accordingly, this appeal is affirmed.

We note, however, that although these issues were not properly preserved for our consideration on a direct appeal, Mr. Foster is not foreclosed from raising these issues in a Rule 37 motion. Rule 37.2(c) of the Arkansas Rules of Criminal Procedure allows a Rule 37 petition to be brought within sixty days of the mandate being issued by this court.

Cite as 2010 Ark. App. 713

Affirmed.

HENRY and BROWN, JJ., agree.