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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CR-18-80

DAVID CHARLES RAUPERS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: September 12, 2018

APPEAL FROM THE CARROLL
COUNTY CIRCUIT COURT,
WESTERN DISTRICT
[NO. 08WCR-16-42]

HONORABLE SCOTT JACKSON,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

David Raupers appeals the order of the Carroll County Circuit Court denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37. We affirm.

Following a collision that resulted in the deaths of motorcyclists Marquita and David Magee on June 18, 2016, the State charged Raupers with two counts of negligent-homicide, four counts of aggravated assault, one count of driving while intoxicated, and one count of driving left of center. On February 24, 2017, Raupers pled guilty to all charges. On March 27, 2017, the circuit court sentenced Raupers to (1) two consecutive fifteen-year terms of imprisonment for the two counts of negligent-homicide, (2) a six-year term of imprisonment for the four counts of aggravated assault to run concurrently with the

negligent-homicide sentences, (3) a one-year jail sentence for driving while intoxicated, and (4) a thirty-day jail sentence for driving left of center.

On June 26, 2017, Raupers filed in the circuit court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37. He alleged that his trial counsel was ineffective for failing to: (1) investigate Raupers's claim that he was not intoxicated, (2) investigate Raupers's claim that he was denied medical treatment, (3) investigate Raupers's medical health, (4) investigate Raupers's mental competency, (5) properly advise Raupers about his felony charges and their respective penalties, and (6) investigate or defend against Raupers's criminal charges. As the final point argued in his petition, he challenged the circuit court's jurisdiction based on the lack of a grand jury indictment.

Without an evidentiary hearing, the circuit court entered its order on October 27, 2017, denying Raupers's petition. On November 16, 2017, Raupers appealed the decision to this court.

This court will not reverse the circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *Mancia v. State*, 2015 Ark. 115, at 4, 459 S.W.3d 259, 264. 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.* at 4, 459 S.W.3d at 264.

On appeal from the denial of a Rule 37 petition following a guilty plea, there are only two issues for review—(1) whether the plea of guilty was intelligently and voluntarily entered, (2) whether the plea was made on the advice of competent counsel. *Id.* at 11, 459

S.W.3d at 267. Further, the *Strickland* “cause and prejudice” standard applies to claims of ineffective assistance of counsel in cases involving guilty pleas. *Id.* at 5, 459 S.W.3d at 264.

To determine whether a plea was made on the advice of competent counsel, an appellant must demonstrate that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair proceeding. *Osburn v. State*, 2018 Ark. App. 97, at 2–3, 538 S.W.3d 258, 260–61; *Blackwell v. State*, 2017 Ark. App. 248, at 3, 520 S.W.3d 294, 298.

An appellant claiming ineffective assistance of counsel must first show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed to the appellant by the Sixth Amendment to the United States Constitution or, else, it is presumed that counsel’s conduct falls within the wide range of reasonable professional assistance. *Blackwell*, 2017 Ark. App. 248, at 3, 520 S.W.3d at 298. Secondly, prejudice is established by demonstrating that there is a reasonable probability that, but for counsel’s errors, appellant would not have pled guilty and would have insisted on going to trial. *Osburn*, 2018 Ark. App. 97, at 3–4, 538 S.W.3d at 261. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* at 3, 538 S.W.3d at 261; *Blackwell*, 2017 Ark. App. 248, at 4, 520 S.W.3d at 298.

An appellant must satisfy both prongs of the test, and it is unnecessary to examine both components of the inquiry if the appellant fails to satisfy either requirement. *Blackwell*, 2017 Ark. App. 248, at 3, 520 S.W.3d at 298. Conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. *Id.* at 3, 538 S.W.3d at 261.

On appeal, Raupers first argues that his trial counsel was ineffective for failing to investigate Raupers's claim that he was not intoxicated. For support, he alleges that his blood should have been tested by a neutral medical professional at the hospital, which would have proved that he was not intoxicated. Under his first point on appeal, he further argues that he "could not be convicted of both negligent homicide and driving while intoxicated since driving while intoxicated had to be proven in order to established [sic] he had committed negligent homicide under felony class B classification." He states that an investigation would have revealed certain exculpatory evidence proving his innocence, would have demonstrated that he was subject to a heart attack and blackout, and would have shown that he lacked the required intent for his crimes. He claims that an investigation would have resulted in a more favorable outcome for him, assuming he had pursued trial.

We hold that the circuit court did not clearly err in finding that Raupers was not entitled to postconviction relief under this claim. Absent specific acts or omissions committed by trial counsel, Raupers's allegations are abstract, hypothetical, and conclusory in nature, which cannot serve as the basis for postconviction relief. *Engstrom v. State*, 2016 Ark. 45, at 4, 481 S.W.3d 435, 439. Moreover, the Arkansas Supreme Court has held that "[a]n appellant who has pleaded guilty normally will have considerable difficulty in proving any prejudice as [the] plea rests upon [an] admission in open court that [appellant] [committed] the act with which [he] was charged." *Jamett v. State*, 2010 Ark. 28, at 4, 358 S.W.3d 874, 877. The trial record indicates that Raupers was administered a test, which registered his blood-alcohol content at .201 at the time of the collision, and the circuit court found that Raupers intelligently and voluntarily pled guilty to the crimes for which he was

charged. Because he has offered only unsupported allegations that do not establish that he was prejudiced in some way, the circuit court did not clearly err in finding that Raupers was not entitled to relief under this claim.

Additionally, “where the trial court provides written findings on at least one, but less than all, of the petitioner’s claims, an appellant has an obligation to obtain a ruling on any omitted issues if they are to be considered on appeal.” *Watkins v. State*, 2010 Ark. 156, at 3, 362 S.W.3d 910, 914. In this case, Raupers failed to obtain a ruling from the circuit court on the issue of whether he can be convicted for both negligent-homicide and driving while intoxicated as he asserts his intoxication was never proved. Consequently, this court is precluded from addressing the omitted issue on appeal, even if it relates to double jeopardy or other constitutional matters. *See, e.g., Bryant v. State*, 2013 Ark. 305, at 3, 429 S.W.3d 193, 197; *Norris v. State*, 2013 Ark. 205, 427 S.W.3d 626.

Raupers next argues that the circuit court erred in finding that his trial counsel was not ineffective for failing to investigate Raupers’s claim that he was denied medical treatment by the Arkansas State Police after the collision occurred. He alleges that his blood would have been tested by the “hospital’s chemistry section chief” if he had been provided medical treatment and that this would have been significant or exculpatory evidence favorable to him, which would have created a reasonable doubt in the mind of the fact-finder.

Once again, an appellant will not be granted postconviction relief based on conclusory or unsupported allegations. *Blackwell*, 2017 Ark. App. 248, at 3, 520 S.W.3d at 261. Raupers offers only mere statements without support; concludes he should have

received additional medical treatment even though the first responders indicated that it was not necessary; and calls for an unperformed blood test that would have refuted the results of the breathalyzer. These allegations are not enough to grant Raupers postconviction relief; therefore, the circuit court did not clearly err in denying relief by ruling that Raupers pled guilty after being properly advised about the charges against him.

Next, Raupers argues that his trial counsel was ineffective because counsel failed to investigate the cause of his alleged blackout and failed to request a medical health evaluation. “Conclusory statements in a petition or in a brief on appeal are insufficient to overcome the presumption that counsel was effective.” *Ellis v. State*, 2014 Ark. 24, at 6. Raupers points out that he was seen only by the “in-house infirmary” but does not mention any specific act or omission that indicates his trial counsel was ineffective as it relates to evaluating Raupers’s medical health. Therefore, we cannot say that the circuit court clearly erred in denying him relief under this argument.

For his fourth point on appeal, Raupers argues that his trial counsel was ineffective by failing to investigate Raupers’s mental competency. He alleges that an investigation would have revealed that his alleged blackout, poor blood flow, and heart attack were all connected and established his competency at the time of his collision. As we have said, Raupers’s unsubstantiated, conclusory statements are not grounds for overturning a denial of postconviction relief. *Ellis*, 2014 Ark. 24, at 6. We find no merit here.

Raupers next argues that his trial counsel was ineffective because counsel did not properly inform him about “the class of each felony charges of negligent homicide A.C.A § 5-10-105 and aggravated assault A.C.A § 5-13-204” and their respective sentencing

ranges. He alleges that he “was under the impression that he would be given a sentence of only 10 years for all charges held against him, even though he had no knowledge of the accident.”

We reiterate that “[a]n appellant who has pleaded guilty normally will have considerable difficulty in proving any prejudice as [the] plea rests upon [an] admission in open court that [appellant] [committed] the act . . . charged.” *Jamett*, 2010 Ark. 28, at 4, 358 S.W.3d at 874. As reflected by the trial record, the circuit court found that Raupers understood the nature of the offenses for which he was charged and their respective penalties. He then agreed to waive his trial rights, including the right to jury sentencing. Just because Raupers did not receive a more lenient sentence, as he had hoped for, has nothing to do with his trial counsel’s effectiveness, and mere assertions to the contrary are baseless with respect to postconviction relief. *See Blackwell*, 2017 Ark. App. 248, at 3, 520 S.W.3d at 261. Under this claim, the circuit court’s ruling was not clearly erroneous.

Raupers next argues that his trial counsel was ineffective because he failed to investigate or develop a defense against his criminal charges. Raupers states, “If [I] would have been provided with plains [sic] of a defense from [my] counsel, ‘Josh Meister’ at all it would have given [me] the confidence needed to proceed to a jury trial.” As we have stated above, Raupers intelligently and voluntarily entered a guilty plea for all the charges against him. He stated in open court that he understood the nature of the charges and their respective penalties. He acknowledged that he had received good legal advice from his counsel and further stated that he was pleading guilty because he was guilty. We state once more that an appellant must identify specific acts or omissions to support postconviction

relief. *Blackwell*, 2017 Ark. App. 248, at 3, 520 S.W.3d at 261. Accordingly, we hold that Raupers’s bare assertion that his trial counsel failed to develop a defense has no merit and that the circuit court did not clearly err in denying relief under this ground.

Raupers’s final argument asserts that “there was no charge fairly made against [him] by the presentment of a grand jury as set out in [the] Arkansas Constitution.” The Arkansas Constitution provides that “all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the Prosecuting Attorney.” Ark. Const. amend. 21 § 1. The Arkansas Supreme Court has addressed this issue on a number of occasions and has refused to extend the right to a grand jury indictment to proceedings in this state. *Williams v. State*, 2016 Ark. 16, at 4, n. 1, 479 S.W.3d 544, 546 n.1. The State properly charged Raupers by filing the information that listed the charges against him. Therefore, Raupers’s argument fails, and he is not entitled to postconviction relief under this claim.

Having examined all of Raupers’s claims, we do not find the circuit court’s denial of his petition for postconviction relief to be clearly erroneous, and we affirm the circuit court’s decision.

Affirmed.

GLOVER and VAUGHT, JJ., agree.

David Charles Raupers, pro se appellant.

Leslie Rutledge, Att’y Gen., by: *Jason Michael Johnson*, Ass’t Att’y Gen., for appellee.