

**ARKANSAS COURT OF APPEALS**

DIVISION II

No. CR-21-419

MALACHI MUHAMMAD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 23, 2022

APPEAL FROM THE MONROE  
COUNTY CIRCUIT COURT  
[NO. 48CR-16-46]

HONORABLE CHALK MITCHELL,  
JUDGE

AFFIRMED

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**BRANDON J. HARRISON, Chief Judge**

This is the second time this postconviction case has come before us. Malachi Muhammad appeals the circuit court’s denial of his petition for postconviction relief. We affirm the circuit court’s order.

In October 2017, a jury found Muhammad guilty of first-degree murder, and he was sentenced to thirty-five years’ imprisonment. This court affirmed his conviction in February 2019. *Muhammad v. State*, 2019 Ark. App. 87, 572 S.W.3d 21 (*Muhammad I*). In May 2019, Muhammad filed in the circuit court a pro se petition for postconviction relief under Ark. R. Crim. P. 37 (2019), claiming ineffective assistance of counsel and requesting an evidentiary hearing. Specifically, Muhammad alleged that his trial counsel had been ineffective because he (1) failed to request jury instructions on the lesser-included offenses of second-degree murder and manslaughter and (2) failed to object to an erroneous jury instruction during the sentencing phase that instructed Muhammad would be eligible for parole after serving 70 percent of his sentence, when his prior criminal history required him

to serve 100 percent.<sup>1</sup> Without convening a hearing, the circuit court denied Muhammad’s petition. Muhammad appealed, and this court reversed and remanded for the circuit court to either hold a hearing or issue written findings in compliance with Ark. R. Crim. P. 37.3(a). *Muhammad v. State*, 2020 Ark. App. 424 (*Muhammad II*).

The circuit court convened a Rule 37 hearing on 4 June 2021. Omar Greene, Muhammad’s trial counsel, testified that it would have been reasonable to ask for jury instructions on the lesser-included offenses. But, he explained, he and Muhammad had discussed trial strategy prior to trial, Muhammad was adamant that his defense should be self-defense, and they decided that they would “go for broke” and not ask for instructions on lesser-included offenses. Greene also agreed that he should have objected to the erroneous instruction given in the sentencing phase. Muhammad testified that he did not recall a conversation with Greene regarding lesser-included offenses.

From the bench, the court found that it would not second-guess trial counsel on matters of trial strategy, specifically the decision to present an “all or none” defense of self-defense. The court found that it could not make a finding that trial counsel’s performance was deficient or that the alleged deficient performance prejudiced Muhammad. The court declared that Muhammad’s Rule 37 petition was meritless and should be dismissed.

The circuit court’s written order stated in part,

The Defendant subpoenaed his previous counsel, Omar F. Greene, who testified herein. Mr. Greene testified credibly that the matter of not requesting lesser included offenses in jury instructions was a matter of trial

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<sup>1</sup>On direct appeal, Muhammad argued that the circuit court had erred in giving the instruction, but because there was no contemporaneous objection, we held that the argument was not preserved for our review. *See Muhammad I, supra*.

strategy which had been discussed with, and approved by, the Defendant. The Court will not second guess counsel and strategy.

This Court cannot make a finding under Strickland v. Washington, 466 U.S. 668 (1984)[,] that the service and advice of defense counsel was deficient so as to not provide representation as guaranteed by the Constitution.

The Defendant had the burden of proof in this hearing and he has not met that burden of proof.

The Defendant's Petition for Relief Under Rule 37 Proceeding is denied as it is without merit.

Muhammad now appeals this order.

We assess the effectiveness of counsel under a two-prong standard as set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a petitioner 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. *Walton v. State*, 2013 Ark. 254 (per curiam). 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 that, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Id.*

Second, the petitioner must show that this deficient performance prejudiced his defense so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*,

373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* A petitioner must satisfy both prongs of the test, and it is not necessary to examine both components of the inquiry if the petitioner fails to satisfy either requirement. *See Pennington v. State*, 2013 Ark. 39 (per curiam) (noting that it is not necessary to determine whether counsel was deficient if the petitioner fails to demonstrate prejudice as to an alleged error).

We will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). 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.*

#### I. *Objection to Sentencing Instruction*

Muhammad first argues that the circuit court erred in dismissing his claim of ineffective assistance of counsel based on counsel's failure to object to the erroneous instruction at sentencing. In his petition, he asserted that the Arkansas truth-in-sentencing statute<sup>2</sup> required the jury to be informed of the truth about the results of its sentencing decision as it affected him and that not correcting this mistake nullified the statute and deprived him of due process of law. Muhammad also argued that he was prejudiced by this misstatement of the law because in sentencing him to thirty-five years, the jury apparently

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<sup>2</sup>Arkansas Code Annotated section 16-97-103(1) (Repl. 2016) provides that "[e]vidence relevant to sentencing by either the court or a jury may include, but is not limited to, . . . [t]he law applicable to parole, meritorious good time, or transfer."

intended for him to serve only twenty-four years. The circuit court did not make a specific finding on this claim.

On appeal, Muhammad again asserts that the truth-in-sentencing statute requires that the jury be correctly informed about the results of its sentencing decision. He contends that his trial counsel admitted his error in not objecting to the instruction, which Muhammad argues is proof of ineffectiveness, and that he was prejudiced because the jury thought he would be eligible for parole after serving 70 percent of his sentence, but instead he must serve the entirety of the sentence recommended by the jury. Finally, he argues that because the circuit court did not articulate its reasoning or make written findings to explain its ruling on this claim, this court cannot conduct a meaningful appellate review.

The State responds that Muhammad's argument fails because he has not demonstrated prejudice. It argues that Muhammad was sentenced to thirty-five years' imprisonment, less than the maximum allowed sentence of forty years' imprisonment or life imprisonment that he could have received, and a petitioner seeking postconviction relief from a sentence of less than the maximum cannot show prejudice from the sentence alone. *See England v. State*, 2018 Ark. App. 137, 543 S.W.3d 553. The State also cites cases that have previously held there was no showing of prejudice under similar circumstances. *See Myers v. State*, 2012 Ark. 143, 400 S.W.3d 231 (holding that trial counsel's failure to challenge constitutionality and effect of 70 percent parole law did not constitute deficient performance, nor prejudice defendants, as required to support claim of ineffective assistance); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (holding that trial counsel's

failure to insist on a jury instruction at a bifurcated sentencing proceeding that defendant would be ineligible for parole did not rise to the level of ineffective assistance).

We cannot reach the merits of this issue because it has been waived on appeal. Our mandate in *Muhammad II* required the circuit court to either hold a hearing or make written findings in compliance with Rule 37.3(a). The court chose to convene a hearing, and when a hearing is granted on a petition for postconviction relief, Ark. R. Crim. P. 37.3(c) requires the circuit court to provide written findings of fact and conclusions of law on every point on which the hearing is held. *Scott v. State*, 351 Ark. 619, 96 S.W.3d 732 (2003) (per curiam). However, there are two different situations that can arise under this rule.

In cases where the circuit court fails to enter any written findings following a hearing, the appellate courts have consistently remanded the case to the circuit court for fact-finding on all the issues raised in the petition. *See, e.g., Scott, supra*. But where the circuit court provides written findings on at least one, but less than all, of the petitioner's claims, our supreme court has held that 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, 362 S.W.3d 910 (per curiam). In this case, the circuit court made written findings only on the issue of counsel's failure to request jury instructions on lesser-included offenses, *see infra*. Because the circuit court ruled on only one of the grounds for relief that Muhammad raised in his petition, and he did not obtain a ruling on the omitted issue, it cannot be considered on appeal.

## II. *Failure to Request Jury Instructions on Lesser-Included Offenses*

Muhammad's second argument is that the circuit court erred in dismissing his claim of ineffective assistance of counsel based on his trial counsel's failure to request jury instructions on the lesser-included offenses of second-degree murder and manslaughter. In his petition, he argued that although his trial counsel presented a defense of self-defense under an "all or nothing" theory, counsel should have also requested instructions on the lesser-included offenses after certain evidentiary rulings "hampered" the defense's attempt to show that the alleged murder was justified. He claimed that counsel's "all or nothing" approach left him with "no defense at all." As explained above, the circuit court found that the decision to not request jury instructions on the lesser-included offenses was trial strategy and not grounds for finding ineffective assistance of counsel.

On appeal, Muhammad again asserts that the circuit court erred in dismissing his claim of ineffective assistance of counsel based on his trial counsel's failure to request jury instructions on the lesser-included offenses of second-degree murder and manslaughter. He denies that he and his trial counsel ever discussed the advantages and disadvantages of including lesser-included offenses as part of the trial strategy. He argues that there was a rational basis for the instructions, that the circuit court would likely have given the instructions, and that a trial strategy that did not include requesting the instructions was not reasonable.

In response, the State points to the circuit court's finding that trial counsel was credible in his testimony that the decision not to ask for instructions on lesser-included offenses was a matter of trial strategy. The State contends that this strategy was a reasonable

exercise of professional judgment and not ineffective assistance. The State asserts that Muhammad has failed to show prejudice under *Strickland* because he has not shown a reasonable probability that the fact-finder's decision would have been different absent counsel's errors.

We defer to the circuit court's determination on matters of credibility in a postconviction appeal. *Gould v. State*, 2019 Ark. App. 418, 585 S.W.3d 182. And trial strategy and tactics are not grounds for a finding of ineffective assistance of counsel. *Smith v. State*, 2015 Ark. 165, 459 S.W.3d 806. Thus, we hold that the circuit court did not clearly err in denying this claim.

Affirmed.

ABRAMSON and GLADWIN, JJ., agree.

*Malachi Muhammad*, pro se appellant.

*Leslie Rutledge*, Att'y Gen., by: *David L. Eanes, Jr.*, Ass't Att'y Gen., for appellee.