

Cite as 2022 Ark. App. 248

ARKANSAS COURT OF APPEALS

DIVISION I

No. CR-21-82

JEREMY ANDREW AVERY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 25, 2022

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. 26CR-16-255]

HONORABLE MARCIA R.
HEARNSBERGER, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Jeremy Avery appeals the Garland County Circuit Court’s order denying his petition for postconviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure (2022). Avery argues seven points on appeal that his trial counsel was ineffective and that the circuit court erred in its rulings. We affirm the circuit court’s denial of Avery’s petition for postconviction relief.

I. Procedural History

A. Direct Appeal

On April 18, 2018, Avery was convicted of two counts of aggravated robbery and sentenced to an aggregate prison term of fifty years in the Arkansas Division of Correction. These charges originated from two aggravated robberies: the first occurred on March 13, 2016, at the Subway Sandwich Shop located on Park Avenue in Hot Springs; and the second

took place on March 26, 2016, at the Sonic Drive-In located on Westwego Road, in Hot Springs. In each, Avery brandished a gun, demanded money, and took approximately \$470.

This court affirmed Avery's convictions in an opinion issued on September 25, 2019. *See Avery v. State*, 2019 Ark. App. 405, 585 S.W.3d 742. Specifically, we held that Avery had failed to preserve his challenge to the sufficiency of the evidence and that the circuit court committed no abuse of discretion in allowing Officer A.J. Tart to testify that he could identify Avery's voice because it was shown that Officer Tart had a reliable basis for his identification. The mandate from that appeal was filed on October 24, 2019.

B. Rule 37 Petition

On the sixtieth day following the mandate, Avery filed his initial pro se Rule 37 petition for relief on December 23, 2019, with the Garland County Circuit Court, which alleged numerous errors by trial counsel and contained a proper verification. This court dismissed the petition without prejudice on January 3, 2020, because it failed to conform to the statutory rules for a Rule 37 petition. He filed another Rule 37 petition January 17, alleging the following claims against trial counsel:

1. Failure to investigate—generally;
2. Failure to move for suppression of evidence;
3. Failure to properly impeach witnesses;
4. Failure to object regarding privilege against self-incrimination; and
5. Sentencing ineffectiveness as well as miscellaneous appellate ineffectiveness.

The State filed a motion to dismiss and response to the petition on February 5, alleging that because it was filed after the sixty-day deadline following the mandate, it should

be dismissed. On September 17, 2020, without holding a hearing, the circuit court entered a five-page order denying the State's motion to dismiss because it had dismissed Avery's initial Rule 37 petition without prejudice, and he had filed his current Rule 37 petition within a short time in proper form, and denying Avery Rule 37 relief.

In its order, the circuit court denied relief on Avery's first claim, *that trial counsel was ineffective for failing to investigate generally*, noting that Avery has the burden of pleading sufficient facts to support the grounds for postconviction relief, all of which must be set forth in the body of the petition, such that it can determine whether to deny the petition without an evidentiary hearing or to set an evidentiary hearing. The circuit court explained that in order to merit postconviction relief, a petitioner bears the heavy burden of supporting his allegations with facts that establish the defense suffered actual prejudice and that the facts must affirmatively support the petitioner's claims of actual prejudice.

The circuit court found that Avery presented no facts or evidence to support this claim that his counsel failed to investigate his case. In support of that finding, the circuit court referenced the testimony of eyewitnesses to each of the aggravated robberies; that both incidents were captured on video that were played for the jury; and that there was a multitude of corroborating physical and digital evidence introduced by the State. The circuit court noted that the defense strategy presented to the jury was that another person committed the crimes. James Sharp, an individual serving a life sentence, testified that he was the person who committed the crimes using Avery's cell phone, vehicle, and other belongings. This evidence was rebutted by the State. The jury had the opportunity to decide

if Avery fit the description given by witnesses of the robbery and whether he was physically in two places at once.

The circuit court found that there was no need for a hearing regarding Avery's first claim because he failed to meet his heavy burden of demonstrating specifically what additional preparation or further investigation would have shown and a reasonable probability that it would have changed the outcome of the trial.

Next, the circuit court rejected Avery's second claim, *that trial counsel was ineffective for failure to move for suppression of evidence*, finding this claim unsupported by facts or evidence that would have merited a motion to suppress evidence. Avery was properly mirandized prior to giving a statement and signed the Garland County Sheriff's standard *Miranda* form prior to giving his voluntary statement.

The circuit court found that any challenge by Avery's counsel would have been meritless, noting that defense counsel is not ineffective if counsel fails to make meritless claims on behalf of the client. The court stated that Avery failed to present any evidence the outcome of his trial would have been different had his counsel pursued meritless claims. The circuit court further found that Avery failed to present what prior bad acts his counsel should have moved to suppress in the sentencing phase or on what grounds these would have been suppressed and noted that previous criminal history is relevant and admissible in a sentencing hearing.

The circuit court found that there was no need for a hearing regarding Avery's second claim because he failed to provide the court with evidence demonstrating how the outcome of the trial would have been different had his counsel filed these motions on

Avery's behalf. He failed to meet his heavy burden of demonstrating a reasonable probability that a motion to suppress his statement or evidence of his prior bad acts or criminal history would have changed the outcome of the trial.

The circuit court also denied Avery's third claim, *that trial counsel was ineffective for failing to properly impeach witnesses*. The circuit court found that Avery failed to provide facts showing that sheriff's deputies or other witnesses provided inconsistent statements during the trial. Because Avery failed to support his mere accusations of inconsistent statements and how counsel's alleged failure to point these out caused him actual prejudice in the outcome of his case, the circuit court found there was no need for a hearing on this allegation.

The circuit court next considered Avery's fourth claim, *that trial counsel was ineffective for failing to object regarding privilege against self-incrimination*. The circuit court found there was no need for a hearing on this allegation because Avery failed to specify which statements or items his defense counsel should have challenged or on what grounds. The circuit court found that he failed to state a factual basis for a challenge to venue or for why the judge should recuse herself from the case. Defense counsel participated in jury selection, and Avery presented no evidence to show the strikes made by counsel were inappropriate or against the adopted trial strategy. Accordingly, the circuit court found that Avery failed to show anything that would demonstrate a different outcome at trial had his counsel made these frivolous motions.

Next, the circuit court rejected Avery's fifth claim, *that trial counsel was ineffective during sentencing as well as miscellaneous appellate ineffectiveness*. The circuit court found that there was no need for a hearing to be conducted on Avery's claim because he failed to present any

points that his trial counsel should have argued or, if he failed to reserve an argument he did make, that it would have resulted in a different outcome in his case.

Avery filed both a motion for reconsideration of this Rule 37 petition and a notice of appeal on October 28, 2020. On November 5, the State filed a response to Avery's motion for reconsideration, which was deemed denied because the circuit court took no action on it. This appeal followed.

II. *Standard of Review and Applicable Law*

Our supreme court reiterated the standard of review in postconviction-relief cases in *Baumann v. State*, 2021 Ark. App. 58, at 6–7:

When reviewing a circuit court's ruling on a petitioner's request for Rule 37.5 relief, this court will not reverse the circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *Kemp v. State*, 347 Ark. 52, 55, 60 S.W.3d 404, 406 (2001). 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 made. *Id.*, 60 S.W.3d at 406.

When considering an appeal from a circuit 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 Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), the circuit court clearly erred in holding that counsel's performance was not ineffective. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). In making this determination, we must consider the totality of the evidence. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

The benchmark for judging a claim of ineffective assistance of counsel must be “whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Pursuant to *Strickland*, we assess the effectiveness of counsel under a two-pronged standard. First, a petitioner raising a claim of ineffective assistance must 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. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007). A petitioner making an ineffective-assistance-of-counsel claim must show

that his counsel's performance fell below an objective standard of reasonableness. *Springs [v. State]*, 2012 Ark. 87, 387 S.W.3d 143. A court must indulge in a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*, 387 S.W.3d 143.

Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.*, 387 S.W.3d 143. The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Howard*, 367 Ark. at 18, 238 S.W.3d at 24. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*, 238 S.W.3d 24. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*, 238 S.W.3d 24. "[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

(Quoting *Johnson v. State*, 2020 Ark. 168, at 4–6, 598 S.W.3d 515, 519–20.)

The petitioner has the burden of pleading "in concise, nonrepetitive, factually specific language" at least one cause of action that is cognizable under the rule, and the petitioner must plead facts that support his or her claim. Ark. R. Crim. P. 37.1. It is in an evidentiary hearing that the petitioner has the burden of producing evidence to support his or her claims. *Id.*

III. Discussion

A. Failure to Investigate and Present Evidence Regarding Avery's Eye Color

Avery breaks this argument into three separate sections: (1) failure to object to perjury and false testimony; (2) failure to object to publishing improperly formed and/or improperly filed document not presented with discovery; and (3) failure to investigate. However, these claims all involve his assertion that his trial counsel was ineffective for failing to investigate and present evidence that his eyes allegedly are brown instead of blue, as testified to by a

witness to his robbery and confirmed at trial by Lt. Russell Severns of the Garland County Sheriff's Department.

In the first section of Avery's brief, he argues that Lieutenant Severns perjured himself when he testified that Avery's eyes are blue. Secondly, he asserts that counsel was ineffective for failing to object to a booking document that reflected that his eyes are blue rather than brown. And in his third section, he claims that counsel was ineffective because he possessed "evidence to prove that the State and State's witnesses were presenting false information to the jury" about the color of his eyes. Avery has included in his addendum several documents that purport to show that his eyes are brown, but the documents were not presented to the circuit court.

Despite Avery's argument in his Rule 37 petition that his trial counsel was ineffective for failing to investigate and for failing to properly impeach witnesses, he failed to assert before the circuit court that counsel had failed to investigate, impeach witnesses, or challenge any evidence concerning the color of his eyes. His Rule 37 petition does not mention his eye color—it was not until Avery filed a motion for reconsideration after his Rule 37 petition had been denied that he claims ineffective assistance of counsel based on his alleged eye color, and the related documents included in his addendum were presented to the circuit court. By that time, it was too late to raise the issue. *See Ark. R. Crim. P. 37.2(d)* (2021). It is well settled that Arkansas appellate courts do not address arguments raised for the first time on appeal. *Jackson v. State*, 2018 Ark. 209, at 4, 549 S.W.3d 346, 348. Nor will they consider factual substantiation added to bolster allegations made below. *Barker v. State*, 2014 Ark. 467, at 3, 448 S.W.3d 197, 199.

Accordingly, we hold that these allegations, to the extent generally made below, were properly dismissed by the circuit court. The circuit court recognized that Avery's allegations of ineffective assistance of counsel for failing to investigate (Rule 37 petition ground I) and for failing to impeach witnesses (Rule 37 petition ground III) were conclusory. Conclusory statements that counsel was ineffective cannot form the basis of postconviction relief. *Anderson v. State*, 2011 Ark. 488, at 5, 385 S.W.3d 783, 788.

B. Miscellaneous Appellate Ineffectiveness

Avery also argues that his counsel on direct appeal was ineffective because he did not allege that a telephone recording had been improperly admitted at trial because he failed object to the circuit court's imposing consecutive sentences and because counsel made an insufficient motion for directed verdict resulting in an appellate bar to his challenge to the sufficiency of the evidence. Similar to Avery's challenges to counsel's performance regarding evidence of Avery's eye color, these specific allegations of ineffective assistance of counsel he now makes on appeal from the denial of his Rule 37 petition were never properly raised before the circuit court. Although Avery's counsel did challenge the admission of the telephone-voice identification on direct appeal—and this court held that “there was no abuse of discretion in admitting the audio recording because it was properly identified and authenticated through” an officer's testimony, *see Avery*, 2019 Ark. App. 405, at 7, 585 S.W.3d at 747—the entirety of his allegation regarding counsel's performance on direct appeal contained in Avery's Rule 37 petition was that “when the Arkansas Court of Appeals handed down there (sic) opinion it stated that counsel failed to reserve or argue information for direct appeal.” In light of the record before us, we hold that the circuit court did not err

in finding that Avery failed to present any points that his trial counsel should have argued or, if he failed to reserve an argument he did make, there would have been a different outcome at trial.

C. Failure to Object to State's Use of Criminal History

Avery next argues that the fact that the State's witness, Lt. Joel Ware, testified that parole and probation officers had already detained Avery when he arrived at Avery's residence caused irreparable damage and bias for the jury. Avery maintains that this is irreversible prejudice because it was mentioned in the jury's presence. Avery maintains that when he brought this to his counsel's attention, his counsel acted as if he did not even hear this statement, and he failed to object to it. During cross-examination, when defense counsel attempted to persuade Lieutenant Ware to mention his previous statements again, the circuit court stopped the examination and stated that it "would not grant a mistrial." Avery submits that this was clearly a prejudiced statement.

The State correctly notes that Avery's claim that he was prejudiced when his trial counsel failed to object to testimony that when he was arrested, he had already been detained by probation and parole officers was not raised in Avery's Rule 37 petition. This court does not address arguments that are raised for the first time on appeal. *Jackson, supra*.

D. Failure to Maintain Competence

Avery next argues that defense counsel had no strategic defense as a competent attorney would do. We hold that there is no merit to Avery's generic catch-all claim alleging that his trial counsel "failed to maintain competence." For example, Avery contends that counsel was "inattentive at times" and confused the names of witnesses. He asserts that

counsel “allowed prejudicial statements to be made” but fails to specify the content of those statements. He contends that counsel “failed to make reasonable inquiry into facts at critical stages of litigation” but again does not identify any distinct omissions. None of this is sufficient to identify specific acts or omissions by counsel that could not have been the result of reasoned professional judgment. *Bond v. State*, 2013 Ark. 298, at 7–8, 429 S.W.3d 185, 191–92.

E. Sentencing Ineffectiveness

Multiple sentences are to run concurrently unless a verbal or written motion requesting that they run consecutively is made, *see* Ark. Code Ann. § 5-4-403 (Repl. 2013). The jury “fixed the sentence at twenty-five years,” not fifty years. Avery argues that his sentence is excessive and illegal on its face because it is not the sentence the jury decided to impose. The jury had the option to sentence him to fifty years, but it did not. He maintains that the court clearly overstepped the boundaries of the law and abused its discretion when it ordered that Avery’s sentences were to be served consecutively without the due process required to impose consecutive sentences.

We disagree and find no merit in Avery’s argument. Regarding sentencing, Avery asserted in his Rule 37 petition only that “ineffective assistance of counsel during sentencing hearing can result in *Strickland* prejudice because any amount of additional sentencing time has sixth Amendment significance.” Given the conclusory nature of Avery’s Rule 37 allegations, we hold that the circuit court did not err in dismissing his ineffective-assistance-of-counsel allegations, stating that Avery “failed to present any points his counsel should

have argued or if he failed to reserve an argument he did make, that it would have resulted in a different outcome in his case.” See *Anderson*, 2011 Ark. 488, at 5, 385 S.W.3d at 788.

Affirmed.

BARRETT and MURPHY, JJ., agree.

Jeremy A. Avery, Sr., pro se appellant.

Leslie Rutledge, Att’y Gen., by: *Pamela Rumpz*, Sr. Ass’t Att’y Gen., for appellee.