Cite as 2022 Ark. App. 381

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-21-383

NOAH DOUGLAS WRIGHT APPELLANT V. STATE OF ARKANSAS APPELLEE	OPINION DELIVERED OCTOBER 5, 2022 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT [NO. 16JCR-17-461] HONORABLE PAMELA HONEYCUTT, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Noah Wright appeals the Craighead County Circuit Court's order denying his petition for postconviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure (2022). Wright argues two 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 Wright's petition for postconviction relief.

I. *Procedural History*

A. Direct Appeal

On September 7, 2018, Wright was convicted of battery in the first degree for stabbing Danny Painter in the neck with a knife and was sentenced as a habitual offender to thirty-five years' imprisonment. Wright's sole issue on direct appeal challenged the circuit court's ruling that Painter would not be allowed to read the results of a blood-alcohol test

contained in his medical records that already had been admitted into evidence because the test results were not in a form that would be commonly understood by a jury.

This court affirmed Wright's conviction in an opinion issued on September 11, 2019.[1] *See Wright v. State*, 2019 Ark. App. 364, at 6–7, 584 S.W.3d 711, 714. Specifically, we held that Wright's claims of due-process and confrontation-clause violations were not preserved for appeal. We also noted that his claim that the circuit court erred under Arkansas Rule of Evidence 403 by finding that the testimony would be more prejudicial than probative was preserved. Nonetheless, we held that this preserved argument was unavailing because there was a danger that the jury would confuse the results number with the more common measurement of blood-alcohol content and because there was no expert to explain the differences. *Id.* at 7, 584 S.W.3d at 714–15. We further held that the testimony would have been more prejudicial than probative because the drug and alcohol use of a victim when justification is at issue typically is inadmissible when the defendant is unaware of the fact. *Id.* at 7–8, 584 S.W.3d at 715. Finally, we stated that even if the circuit court's ruling was in error, the error was harmless because Painter confirmed he had consumed two or three beers that day, and Wright's trial counsel was able to argue about the results of the blood-alcohol test in the medical records during closing argument. *Id.* at 8, 584 S.W.3d at 714.

B. Rule 37 Petition and Amended Petition

[1]The mandate from the direct appeal was issued on October 10, 2019.

Wright filed a timely pro se petition for relief under Rule 37 on December 3, 2019, with the Craighead County Circuit Court, alleging that trial counsel was ineffective for allowing the medical report to be entered into evidence without an expert witness, for allowing the prosecutor to "testify" by reading portions of the medical report to the jury without objection, and for failing to procure an expert witness to testify regarding the results of the blood-alcohol test.

The State did not file a response to Wright's pro se Rule 37 petition. The circuit court held a hearing on the matter on August 19, 2020, with Wright participating via Zoom. Wright's trial counsel, William Stanley, testified at the hearing that he had informed Wright of his opinion as to the merits of a self-defense claim and that the minimum sentence if a jury found him guilty would be thirty years' imprisonment because he was a habitual offender. On this basis, trial counsel advised Wright to take the State's plea offer of fifteen years' imprisonment, but Wright refused.

Trial counsel also testified that he did not see an evidentiary basis for excluding the medical records based on relevance *and* the Hospital Records Act of 1995, codified at Ark. Code Ann. § 16-46-108 (Repl. 1999), which states that medical records kept as required by Arkansas Rule of Evidence 803(6) (2022) shall be admissible in evidence if accompanied by an affidavit of the custodian of the records and proper notice is given to the opposing party.

Trial counsel noted that Wright was adamant that he had a right to defend himself; thus, the trial strategy was to present a justification defense. Pursuant to this strategy, trial counsel chose not to hire an expert to testify as to blood-alcohol content because such

testimony would have shown that Painter's blood-alcohol content was quite low—sixty-four times less than the legal limit for intoxication while driving. Instead, he chose to argue during closing that Painter's blood-alcohol content was outside the normal range delineated in the medical records. He explained that an expert would have made clear that Painter had very little alcohol in his system; however, without an expert, Stanley could assert that the testing indicated significant alcohol consumption. In addition, trial counsel noted that he attempted to emphasize the test result through the testimony of Painter; but, as previously discussed, this was ruled inadmissible by the circuit court.

On December 4, 2020, the circuit court entered a three-page written amended order that denied relief .[2] The order restated Wright's claims that his counsel was ineffective when he (a) agreed to the medical records being admitted without objection and (b) did not call an expert to explain the "125H < 10" result. The circuit court specifically found the following:

> 11. Mr. Wright's counsel allowed the records into evidence without objection and then argued to the jury that the victim's blood alcohol proved he was intoxicated.
>
> 12. This was a trial tactic decided by counsel. Counsel used the test results to his client's full advantage.
>
> 13. Had an expert been called by Mr. Wright's counsel, it would have worked to his detriment because the expert would have explained the meaning of the reading was just a trace amount of alcohol.

[2]Pursuant to Wright's request, the initial order was amended to clarify that all claims in his Rule 37 motion were denied.

14. Mr. Wright's arguments regarding the confrontation clause are without merit because the victim was questioned regarding his alcohol use that day, and his state of mind, and the blood alcohol results were admitted and were argued to Petitioner's benefit in an attempt to mislead the jury to believe the victim had a blood alcohol level in excess of (.08%) or that he was intoxicated.

15. A reading of the Court of Appeal's opinion shows that [Mr. Wright] brought up the same issues on Appeal. Opinion attached hereto as Exhibit "A."

16. [Mr. Wright] was granted a post-conviction hearing on the issues in this opinion on August 19, 2020.

17. Due to Covid-19 concerns, [Mr. Wright] appeared at the hearing via video appearance.

18. [Mr. Wright] was allowed to question witnesses and make arguments during the hearing.

19. During the hearing [Mr.] Wright's Attorney, Bill Stanley testified that he knew the victim's blood alcohol level of "125H" was positive for some alcohol via the hospital test but, at the same time he knew it was below the (.08) required for intoxication for the "legal" test and that he and his client's strategy was to create a question in the minds of the jury regarding the victim's intoxication.

20. Mr. Stanley, attempted to have the victim read the results and was overruled, that ruling was upheld on appeal.

21 Mr. Stanley then argued to the jury in closing that the victim was intoxicated.

22. There was no evidence that the victim was intoxicated other than the test results.

23. Even though [Mr. Wright] could not meet the threshold requirement of showing that he knew the victim was intoxicated, the evidence of intoxication test result was allowed into evidence for other reasons (justification defense).

24. [Mr.] Wright argued that his attorney should have called an expert witness to explain the blood alcohol test results to the jury. However, Mr. Stanley testified that an expert witness would have explained the victim's blood alcohol was

> a minute level and less than the (.08) required for intoxication and that would have hurt his case and he wouldn't have been able to argue intoxication to the jury.

The circuit court noted that in a Rule 37 proceeding, the burden of proof is on the petitioner to prove his allegations for postconviction relief., *see Ali v. State*, 2021 Ark. App. 482, at 5. The circuit court concluded: "After hearing counsel's arguments, this [c]ourt finds that not only did [Mr. Wright] not meet his burden of proof for Rule 37 relief but, [Mr. Wright] provided no proof at all that his counsel erred or was ineffective on his behalf." Wright filed a timely notice of appeal on December 22, 2020.

II. *Standard of Review and Applicable Law*

We recently reiterated the standard of review in postconviction-relief cases in *Avery v. State*, 2022 Ark. App. 248, at 6–7, 645 S.W.3d 374, 379–80 (quoting *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.

III. *Discussion*

A. Failure to Object to Admission of Medical Report

Wright submits that his trial counsel rendered ineffective assistance of counsel and that his lack of action resulted in the denial of due process and the right to a fair trial in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and the Arkansas constitutional counterparts. He argues this occurred (1) when trial counsel failed to object to the State's entering into evidence Dr. Sales's medical report without Dr. Sales or

any other expert witness's presence to explain the contents of the report to the jury and (2) when trial counsel failed to object when Prosecutor DeProw, read the medical report into evidence, which was testamentary and self-serving.

Wright argues that the medical report was both inadmissible and excludible. At the Rule 37 hearing, Prosecutor DeProw and Wright's trial counsel explained that the admissibility of the medical report was based on the Hospital Records Act. Prosecutor DeProw's position was that the Act mandates the admissibility of medical records that are authenticated, even in the absence of the treating physician to explain the notes or reports. Wright's trial counsel agreed, as shown on page 8 of the Rule 37 hearing transcript:

DEPROW: As a criminal defense attorney or a practitioner of criminal law opinion, what was the relevance of the medical records of Mr. Painter describing the extent of his injuries?

TRIAL COUNSEL: It was something the State had to prove in order to make Battery one. They would have had to prove the serious physical injury. They had to have medical proof in order to satisfy the definition of Battery One.

DEPROW: Would you agree they were relevant to that proceeding?

TRIAL COUNSEL: Correct, yes.

DEPROW: So, then the question becomes is there an evidentiary basis on which to exclude those records?

TRIAL COUNSEL: In this trial, no. The affidavit has to be fourteen days in advance of trial. There are procedures built into the statute. For the lack of better term. There are hoops that you must jump through or they're objectionable. We had a copy of them. We knew what was in them, and therefore, under the medical Records Affidavit Act there was not an objection to be made.

Wright argues that the attorneys' rationale was misplaced. He submits that irrespective of the Hospital Records Act or Rule 803(6), the circuit court still retains the power to weigh the relevance of the evidence in question against potential juror confusion. *See Lovell v. Beavers*, 336 Ark. 551, 553, 987 S.W.2d 660, 661 (1999).

Arkansas Rule of Evidence 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time. Or needless presentation of cumulative evidence. Arkansas courts have held that Rule 403 allows a trial court to exclude relevant evidence if its probative value is outweighed by the possibility of confusion of issues. *Id.* at 554, 987 S.W.2d at 662; *see also* 2 *McCormick on Evidence* § 293 (John W. Strong ed., 4th ed. 1992).

A second treatise concurs with McCormick's analysis:

> "Where the physician who made the diagnosis testifies, or where another with firsthand knowledge testifies, admitting reports reflecting difficult, elaborate, or unusual diagnoses seems easier to justify. Without such testimony, risks of confusing the issue or misleading the jury are likely to justify exclusion under [Federal Rules of Evidence] 403." Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 8.45 (1995) [(citing *Raycraft v. Duluth, Missabe and Iron Range Ry. Co.*, 472 F.2d 27 (8th Cir. 1973) (proper exercise of discretion by circuit court to exclude complex diagnostic reports when author not available for cross-examination))].

Lovell, 336 Ark. at 555, 987 S.W.2d at 662.

Wright maintains that the circuit court did not attempt to balance its discretion against the relevant rules of law because trial counsel "failed to" or "purposely did not" object to the entry into evidence the medical reports without Dr. Sales's presence. Wright

acknowledges that the medical records at issue fall within both the Hospital Records Act and Rule 803(6), but he contends that the mere fact that a piece of evidence falls within an exception to the rule against hearsay does not equate to automatic admissibility. *See id.* at 556, 987 S.W.2d at 663 (affirming a circuit court's exclusion of hospital records that were otherwise admissible under Rule 803(6)).

Wright argues that the above-cited cases support his proposition that the medical report in question should—and would—have been excluded as inadmissible under Rule 403 had trial counsel objected to the admission of the medical report into evidence because Dr. Sales was not available to testify and be cross-examined. Specifically, he notes that the report contained difficult matters of interpretation of complex medical terminology; a central dispute (and an essential element of the offense charged); and conclusions regarding the extent of the victim's injuries (none of which was explained to the jury). Moreover, Wright had no opportunity to cross-examine the medical witness who authored the report.

Although it is unknown why neither side originally called Dr. Sales to testify, Stanley's testimony from the Rule 37 hearing indicated that he felt there was no evidentiary basis on which to exclude the medical records because prior to trial the defense had a copy of them and knew the information contained therein, and therefore, under the Hospital Records Act there was not an objection to be made.

Wright also challenges the fact that not only did Prosecutor DeProw introduce the inadmissible medical report into evidence without the testimony of Dr. Sales, but he also read portions of the report in open court in front of the jury—essentially substituting himself

for a witness who had direct knowledge and could render factual support and explanation of the contents of the report. Wright maintains that in so doing, DeProw effectively became a witness for the State and underwrote his own credibility. He suggests that his actions also violated Arkansas Rule of Professional Conduct 3.7 (2022) in that a prosecutor should never cast himself in the role of both a prosecutor and a witness. Wright urges that doing so was reversible error. *See Turner v. State*, 2018 Ark. App. 55, at 15, 38 S.W.3d 227, 239.

Moreover, Wright argues that trial counsel's failure to object to the medical reports left the jury with the task of deciphering the unexplained medical reports on its own. Wright states that the probative value of the medical report was substantially outweighed by the danger of unfairness in the absence of cross-examination.

With regard to the strength of the State's case, as trial counsel's sworn testimony at the Rule 37 hearing revealed: "Without the report the state could not have proven its case." Accordingly, a large part of the State's case rested on the medical report that was inadmissible without the author present to testify and be subjected to cross-examination.

We hold that trial counsel was not ineffective for failing to object to the admission of the medical records. The circuit court specifically found that the admission of the medical records was a trial tactic to allow trial counsel to argue during closing arguments that the victim was intoxicated, although the blood-alcohol test results indicated only trace amounts of alcohol. Additionally, the court found that Wright "provided no proof at all that counsel erred or was ineffective on his behalf." We agree that Wright's justification defense, coupled with the suggestion that Painter was intoxicated on the basis of the blood-alcohol test

contained in the medical records, was clearly a matter of trial strategy that is unassailable under *Strickland*. *See, e.g.*, *Howard*, 367 Ark. at 36, 238 S.W.3d at 38–39.

Trial counsel "took full advantage of the opportunity" to argue to the jury that Painter was intoxicated, presumably to suggest that he was the aggressor and Wright was justified in defending himself with a knife. *Wright*, 2019 Ark. App. 364, at 8, 584 S.W.3d at 715. Consequently, defense counsel's strategy does not constitute grounds for finding ineffective assistance of counsel. *See, e.g.*, *Howard*, 367 Ark. at 36, 238 S.W.3d at 38–39.

Moreover, Wright failed to provide proof that the medical records were inadmissible under Rule 403 or that he suffered prejudice as a result of their admission. *See, e.g.*, *Cunningham v. State*, 2013 Ark. 304, at 8, 429 S.W.3d 201, 208. He failed to show that the outcome of the trial would have been different had the records not been admitted, especially considering that Painter testified as to the extent of his injuries at trial. *Wright*, 2019 Ark. App. 364, at 2–3, 584 S.W.3d at 713. Accordingly, the circuit court did not clearly err when it found that Wright failed to put on any proof that counsel erred or was ineffective.

B. Denial of Right to Confrontation Guaranteed by the Sixth Amendment

Wright next argues that his trial counsel's failure to enter a contemporaneous objection to the entry into evidence of Dr. Sales's medical report also denied him his constitutional right to confrontation. Wright believes this argument presents a case of first impression in that a medical report is nontestimonial and not subject to the Sixth Amendment's Confrontation Clause. *See Dickey v. State*, 2016 Ark. 66, 483 S.W.3d.287 (citing *Davis v. Washington*, 547 U.S. 813 (2006)). However, when Prosecutor DeProw read

excerpts of the medical report into the record in open court, Wright submits that DeProw became a witness for the prosecution, and those excerpts from the medical report became testimonial. Wright maintains that when Prosecutor DeProw read from the medical report in open court, his Sixth Amendment right to confront and cross-examine adverse witnesses attached. *See Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)).

This holding has been codified at Ark. Code Ann. § 16-93-307(c)(1), which states: "the defendant's right to counsel and to confront and cross examine an adverse witness unless the court finds good cause for not allowing confrontation." Wright claims that he was denied his Sixth Amendment right to effective assistance of counsel because he was denied his right to confrontation and cross-examination of an expert witness who could have explained the medical report.

Wright urges that the Confrontation Clause denial was not harmless. *See Ryan v. State*, 2016 Ark. App. 105, 484 S.W. 3d. 689 (Sixth Amendment right to confront witnesses is subject to harmless error analysis). He claims the denial here was not harmless as indicated during the Rule 37 hearing, where trial counsel gave the following sworn testimony:

DEPROW: As a criminal defense attorney or a practitioner of criminal law opinion, what was the relevance of the medical records of Mr. Painter describing the extent of his injuries?

TRIAL COUNSEL: It was something the State had to prove in order to make Battery One. They would have had to prove the serious physical injury. They had to have medical proof in order to satisfy the definition of Battery One.

DEPROW: Would you agree they were relevant to that proceeding?

TRIAL COUNSEL: Correct, yes.

Wright argues that from that colloquy it is "easily gleaned" that, but for the medical report in evidence and the reading of the excerpts in open court before the jury[3], the State would not have been able to prove all the essential elements of the charged offense of battery in the first degree. Accordingly, he submits that the improprieties were so egregious that they fatally infected the proceedings, rendering Wright's entire trial fundamentally unfair and that the admitted evidence was clearly prejudicial.

We disagree. Consistent with the first issue, we hold that the circuit court did not commit reversible error in finding that trial counsel was not ineffective for failing to object when Prosecutor DeProw read from the admitted medical records. The circuit court specifically ruled that Wright failed to put on any proof that counsel erred or was ineffective in this regard. Wright failed to provide the circuit court any convincing argument or authority in support of his contention that the prosecutor was acting as a witness by reading records that already had been admitted into evidence without objection. *See, e.g.*, *Cunningham*, 2013 Ark. 304, at 8, 429 S.W.3d at 208.

Defense counsel is not ineffective for failing to make a meritless objection. *See, e.g.*, *Flemons v. State*, 2016 Ark. 460, at 16, 505 S.W.3d 196, 208. The Confrontation Clause simply does not bar a prosecutor from reading from evidence during closing argument. *See,*

[3]We note that the reading of the excerpts occurred during counsel's closing argument.

e.g., *Tyler v. State*, 2021 Ark. App. 23, at 7, 616 S.W.3d 663, 667. Moreover, while the circuit court's ruling on this issue is admittedly vague, we affirm if the circuit court reached the right result, even if it was for the wrong reason. *See, e.g.*, *id.* Because the prosecutor's reading from the admitted evidence did not violate the Confrontation Clause, any potential objection is meritless and not a basis for granting postconviction relief.

Affirmed.

GRUBER and BARRETT, JJ., agree.

Noah Douglas Wright, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.