

Cite as 2009 Ark. 246 (unpublished)

ARKANSAS SUPREME COURT

No. CR 08-249

DALLAS GENE ROY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 30, 2009

PRO SE APPEAL FROM THE
CIRCUIT COURT OF
INDEPENDENCE COUNTY, CR
2004-264, HON. JOHN DAN KEMP,
JR., JUDGE

AFFIRMED.

PER CURIAM

The Independence County Circuit Court, in a trial to the bench, found appellant guilty of first-degree murder and sentenced him to 420 months' imprisonment in the Arkansas Department of Correction. We granted a motion for rule on clerk. *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006) (per curiam). The Arkansas Court of Appeals affirmed. *Roy v. State*, CACR 06-652 (Ark. App. May 2, 2007) (unpublished). Through counsel, appellant timely filed a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 that was denied. Counsel withdrew and, now proceeding pro se, appellant appeals the order denying postconviction relief.

In his petition, appellant alleged ten instances of ineffective assistance of counsel. On appeal, appellant brings ten points in which he alleges the trial court erred for failure to find each of those asserted defects by trial counsel. We hold that the trial court was not clearly



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erroneous in finding that appellant failed to show ineffective assistance of counsel on each of the claims and affirm.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (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. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small*, 371 Ark. at 250, 264 S.W.3d at 515. Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). A petitioner making a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324



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(2007). As to the second prong of the test, the 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.*

In each of his points, with exception of the seventh point for reversal, appellant fails to provide an adequate record for this court to reach the merits of his claims. In each case, the trial court found that appellant had failed to demonstrate prejudice or error by counsel under the *Strickland* test and based the findings upon evidence presented at the hearing on the Rule 37.1 petition. The record does not include any transcript of that hearing. This court has repeatedly stated that it is the appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error, and where the appellant fails to meet its burden, this court has no choice but to affirm the trial court. *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005). We therefore affirm the denial of postconviction relief as to each of those points on that basis.

As to appellant's seventh point of error on appeal, appellant contends that trial counsel failed to adequately communicate with him or prepare a defense for trial. Appellant complained in his petition that counsel had not met with him sufficiently or discussed trial strategy with him and he reasserts that position on appeal. The order denying postconviction relief does not identify these specific claims. An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24



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(2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Accordingly, we affirm the denial of postconviction relief.

Affirmed.