

ARKANSAS SUPREME COURT

No. CR 07-984

BRENT EUGENE BELT
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 30, 2009

APPEAL FROM THE CIRCUIT COURT
OF CARROLL COUNTY, EASTERN
DISTRICT, CR 2004-95, HON. ALAN
D. EPLEY, JUDGE

AFFIRMED.

PER CURIAM

In 2005, appellant Brent Eugene Belt was found guilty by a jury of manufacturing methamphetamine, possession of methamphetamine and possession of marijuana, and sentenced to an aggregate term of 180 months' imprisonment. The Arkansas Court of Appeals affirmed. *Belt v. State*, CACR 06-105 (Ark. App. Oct. 4, 2006).

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1.¹ The trial court appointed counsel, and after a hearing, denied the petition. Appellant has lodged an appeal here from the order.²

¹On the same day, appellant also filed a pro se motion for leave to file an amended Rule 37.1 petition.

²On February 13, 2007, the trial court entered the first of two orders that denied relief under Rule 37.1. This order did not address the pro se motion for leave to file an amended Rule 37.1 petition, but disposed of all substantive issues except for a claim of ineffective assistance of counsel based on trial counsel's motions for directed verdict. The court set a hearing date for determination of that single issue. The trial court later appointed counsel, who filed an amended Rule 37.1 petition on April 19, 2007. After conducting a hearing, the trial court entered a second order on June 20, 2007. That order denied all Rule 37.1 relief and incorporated by reference the original order. It is from the latter order that appellant

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was 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. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant contends that the trial court erred in finding that trial counsel was not ineffective in representing him in the court below. This argument concerns motions for directed verdict made by counsel at the trial. Appellant also complains that the trial court erred in dismissing an amended Rule 37.1 petition filed by counsel after his appointment and by failing to consider the arguments contained therein.

The directed verdict motions made by trial counsel constitute the basis of appellant's ineffectiveness claim. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Flowers v. State*, 373 Ark. 127, ___ S.W.3d ___ (2008). The transcript of appellant's trial contained in the direct-appeal record shows that trial counsel moved for directed verdict at the close of the State's case, at the close of the defense's case and after the testimony of the State's rebuttal witness.³ The first motion for directed verdict was "based upon insufficient evidence to support the information, as filed." The subsequent motions made by counsel were similarly brief and general in nature. In the direct appeal, the court of appeals refused to address the sole issue of insufficiency of the evidence due to counsel's non-specific directed-verdict motions.

Under the standard for showing ineffective assistance of counsel, appellant must prove that brings the instant appeal.

³The record lodged in appellant's direct appeal is a public record which need not be incorporated into the record on the second appeal which stems from the same judgment of conviction. *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998) (per curiam).

counsel's performance was deficient and, as a result, appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

At the Rule 37.1 hearing, the trial court limited the inquiry to the issue of ineffectiveness related to the motions for directed verdict. In its order that denied postconviction relief, the trial court held that counsel's performance was deficient for failing to articulate the specific grounds to challenge the sufficiency of the evidence. The court nevertheless found that appellant did not suffer prejudice as a result of counsel's performance because substantial evidence supported the jury's verdict. In that order, the court outlined substantial evidence that supported the verdict.

Constructive possession of a methamphetamine lab ("meth lab"), a small camper-trailer and other items formed a vital aspect of the State's case against appellant. Appellant complains here that counsel failed in the directed verdict motions to list the factors that supported his contention that appellant did not have constructive possession of the meth lab or other evidence.⁴ He sums up his argument by stating, "Because the state had no direct evidence [that appellant has possession of the meth lab or trailer] and because the trial counsel failed to articulate factors [that] were very contradictory, the failure to argue those facts in the directed verdict motion substantially prejudiced Appellant."

⁴To support his claim that he did not have constructive possession of the meth lab or the trailer near the lab, appellant argues that the meth lab and trailer were in an open area, he did not own the property where the lab and trailer were located, the property was not gated, several other families lived in the immediate vicinity of the lab and trailer, his fingerprints were not found on the meth lab items, the trailer had missing windows and he did not show the usual signs of cooking meth when first questioned by the police. He also argues that he did not own the trailer, but this statement was contradicted by other testimony introduced at trial.

As articulated, the ineffective-assistance contention raised by appellant is actually a challenge to the sufficiency of the evidence. By arguing the lack of direct evidence linking appellant to the meth lab and trailer, and the insufficiency of the circumstantial evidence presented by the State to support constructive possession, appellant attempts to revisit the issue of evidentiary sufficiency.

Appellant cannot rechallenge the weight and sufficiency of the evidence through an Rule 37.1 proceeding by framing his question as an allegation of ineffective assistance of counsel. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction, and is not a means for direct attack on the judgment or a substitute for an appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Appellant's argument constitutes a direct attack on the judgment and is not cognizable under Rule 37.1. *Weatherford v. State, supra*.

To the extent that this argument presents an actual ineffective-assistance-of-counsel claim, appellant fails to demonstrate that he suffered prejudice as a result of counsel's actions. The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Without such a showing, appellant fails to prove the prejudice prong of *Strickland, Id.* To prevail on this argument, appellant must demonstrate that trial counsel's motions for directed verdict would have been granted had the motions been articulated as appellant proposes. Appellant has not made such a showing.

Appellant complains that the state failed to produce direct evidence of appellant's constructive possession of the meth lab, but circumstantial evidence may constitute substantial evidence to support a conviction. *Flowers v. State, supra*. In denying the Rule 37.1 petition, the trial court summarized substantial evidence that supported the verdict, including circumstantial evidence

that appellant had constructive possession of the meth lab and other items. Appellant therefore failed to demonstrate prejudice because the state did not introduce direct evidence of constructive possession.

Appellant also argues in conclusory fashion that the trial court could have found that he did not have constructive possession of the meth lab based on several factors. These factors upon which appellant now relies were introduced at trial through various witnesses and made part of the record. Here, appellant fails to provide facts that establish that the trial court would have granted the motions for directed verdict if the factors had been articulated as a part of the directed-verdict motions. *Nelson v. State, supra*. As a result, he also fails to establish that he was prejudiced by counsel's actions.

In the second point on appeal, appellant contends that the trial court erred in denying the amended Rule 37.1 petition filed by postconviction counsel after his appointment. He also claims that the trial court erred in failing to consider the arguments contained in the amended petition. A circuit court's denial of leave to amend a Rule 37.1 petition is reviewed under an abuse-of-discretion standard.⁵ *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004).

Under Arkansas Rule of Criminal Procedure 37.2(e), a Rule 37.1 petition may be amended only with leave of court before the court acts on the petition. Here, the amended petition was filed after the trial court had entered the initial order that denied postconviction relief on February 13, 2007. The amended petition was not filed in accordance with Rule 37.2(e).

Appellant cites *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006), for the proposition that

⁵Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). In other words, we determine whether the trial court's decision was arbitrary or groundless. *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991).

allowing a Rule 37.1 petition to be amended is mandatory. Appellant's reliance on *Butler* is misplaced as that case does not simply hold that a Rule 37.1 petitioner becomes entitled to file an amended petition by merely filing a motion for leave to amend. Criminal Procedure Rule 37.2(e) unequivocally states that the court's decision to grant leave for a petitioner to file an amended petition is discretionary, and not mandatory.

Even if appellant had been granted leave of court to amend the petition, the amended Rule 37.1 petition filed by postconviction counsel was untimely filed⁶ and unverified.⁷ Therefore, the trial court had no jurisdiction to consider the amended Rule 37.1 petition or to address the issues raised there. Appellant fails to establish that the trial court abused its discretion when it did not consider the issues raised in appellant's amended Rule 37.1 petition.

Affirmed.

⁶Pursuant to Arkansas Rule of Criminal Procedure 37.2(c), if an appeal was taken from a criminal judgment of conviction, a petition under Rule 37.1 must be filed in the trial court within sixty days of the date the mandate was issued by the appellate court. Here, the mandate was issued by our court on October 24, 2006, and postconviction counsel's amended Rule 37.1 petition was filed on April 19, 2007, which was more than five months after the mandate was issued. Time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and if they are not met, a trial court lacks jurisdiction to consider a Rule 37.1 petition. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

⁷A petition for postconviction relief must be verified by the petitioner pursuant to Rule 37.1(c). If the petitioner is represented by counsel, counsel may not sign and verify the petition for him. *Collins v. State*, 365 Ark. 411, 231 S.W.3d 717 (2006). Here trial counsel signed the amended petition but did not obtain appellant's verification required under the rule.