

ARKANSAS SUPREME COURT

No. CR 08-203

WILLIAM L. STIVERS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 22, 2009

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
LONOKE COUNTY, CR 2006-429,
HON. LANCE L. HANSHAW, JUDGE]

MOTION TREATED AS MOTION FOR
BELATED BRIEF; APPEAL
DISMISSED; MOTION MOOT.

PER CURIAM

In 2007, appellant William L. Stivers entered a plea of nolo contendere to rape of a person less than fourteen years of age, and to fifty-four counts of distributing, possessing or viewing matters depicting sexually explicit conduct involving a child. He was sentenced to an aggregate term of 240 months' incarceration. Subsequently, appellant filed in the trial court a verified pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition, and appellant has lodged a pro se appeal here from the order.

Now before us is appellant's pro se motion to file a belated appeal. Appellant's appeal was timely lodged here, but his brief-in-chief was untimely tendered along with the instant motion. The motion is thus treated as a motion to file a belated brief. As appellant could not be successful on appeal, the appeal is dismissed and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

As a preliminary matter, we address the timeliness of appellant's Rule 37.1 petition filed in the circuit court below. In light of the circumstances here, we find that appellant did file the Rule 37.1 petition in a timely manner.

The record on appeal and exhibits to appellant's motion show that the clerk of the court received appellant's Rule 37.1 petition prior to the expiration of the ninety-day time limitation imposed by Arkansas Rule of Criminal Procedure 37.2(c).¹ The clerk nevertheless refused to file the petition until the trial court had ruled on appellant's motion for leave to proceed *in forma pauperis*. The petition was eventually filed on September 26, 2007, which was the same day that the court granted the pauper motion, and outside of the ninety-day limitation.

Recently, in *White v. State*, 373 Ark. 415, ___ S.W.3d ___ (2008) (per curiam), we addressed the timely filing of a notice of appeal from the denial of a Rule 37.1 petition. In *White*, we held that “[w]hether the appellant is determined to be a pauper or not, . . . the circuit clerk may not decline to promptly file a notice of appeal concerning a denial of postconviction relief under Rule 37.1.” 373 Ark. at ___, ___ S.W.3d at ___.

This holding likewise applies when a criminal defendant is attempting to file a petition for postconviction relief where the time limits for filing the petition are jurisdictional in nature. *See Jackson v. State*, 369 Ark. 207, 252 S.W.3d 133 (2007) (per curiam) (holding that a circuit court can not grant relief on an untimely Rule 37.1 petition.) Thus, a circuit court clerk may not decline to file,

¹The judgment in this matter was entered on June 15, 2007, and the ninetieth day thereafter was September 13, 2007. Appellant claims in the instant motion that the Rule 37.1 petition was originally filed on September 5, 2007, but that the file-mark date was subsequently covered. While there is no direct proof of the petition initially being filed on that date, attached to appellant's motion as an exhibit is a letter from the clerk to appellant dated September 13, 2007. In the letter, the clerk stated that additional documents were needed from appellant before she would be able to file mark the Rule 37.1 petition. It is clear from the clerk's letter that the Rule 37.1 petition was received on or before September 13, 2007, and thus timely filed.

or delay the filing of, a Rule 37.1 petition while awaiting the trial court's decision of whether to grant or deny leave to proceed *in forma pauperis* in the matter.

We now turn to the claims made in appellant's Rule 37.1 petition. Therein, appellant listed four points for relief, including allegations of ineffective assistance of counsel. Under the standard for showing ineffectiveness, appellant must prove that 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).

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). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Such conclusory statements cannot be the basis of postconviction relief. *Jackson v. State, supra*.

In the first point for postconviction relief, appellant made a number of allegations. He complained that he was prejudiced because his first attorney withdrew from representing him and forced him to be represented by a second attorney who was unfamiliar with his case. Under the *Strickland* test, the routine withdrawal and substitution of counsel does not in itself support a claim for ineffectiveness. The burden remained on appellant to show a deficient performance by counsel and prejudice to appellant's defense that were caused by the withdrawal or substitution. *Id.* Appellant did not state facts to demonstrate that either prong of the *Strickland* test was met, and he was not entitled to relief based on this conclusory allegation. *Id.; Nelson v. State, supra*.

Appellant also generally contended that counsel failed to question potential trial witnesses

or investigate possible trial defenses to the charges.² This argument was tantamount to arguing that counsel failed to properly investigate the charges against appellant before advising him about various options to proceed. Claims of ineffective assistance of counsel are based upon a showing of facts, and appellant failed to establish a factual basis for a deficient performance that resulted in actual prejudice to him. *Nelson v. State, supra; Jackson v. State, supra*. Postconviction relief will not be granted to appellant based on these conclusory allegations. *Id.*

Regarding the second trial counsel, appellant claimed that she informed him that because his case was not winnable, he would receive a better result by accepting a plea offer from the prosecutor. This argument alluded to appellant's being coerced to accept the offer.³ Where a case involves an allegation of ineffectiveness in relation to a guilty or nolo contendere plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered the plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). Appellant's petition did not contain any corroborating facts showing that, but for the second counsel's allegedly deficient advice, he would not have entered a plea of nolo contendere. *Id; Jackson v. State, supra; Nelson v. State, supra*. Appellant is therefore not entitled to relief on this point.

In the second point, listed as Ground One, appellant contended that counsel failed to

²The wording of appellant's petition failed to articulate in some instances whether the ineffective assistance claims involved first counsel or second counsel, or both. Regardless of which counsel appellant intended to direct the allegations, appellant failed to set out any meritorious claims in the petition.

³In the trial court, appellant filed a motion for a transcript of Rule 37.1 proceedings, but sought therein to directly challenge the nolo contendere plea. As the judgment had been entered and appellant had been sentenced at the time he filed that motion, he could no longer avail himself of the procedure to set aside the plea of nolo contendere pursuant to Arkansas Rule of Criminal Procedure 26.1. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006). His remedy was limited to a Rule 37.1 petition. *Id.*

“procure” material defense witnesses.⁴ Appellant was unclear in this point as to his underlying claim. If appellant meant to argue that counsel failed to ensure the witnesses’ attendance at trial, no trial was conducted and the argument had no factual underpinning.

If appellant intended to argue that counsel failed to interview certain witnesses about their proposed testimony before advising him, he would be required to demonstrate facts that supported his contention that he would not have entered a nolo contendere plea but for counsel’s actions. *Jones v. State, supra*. However, the petition was devoid of facts supporting a claim that counsel’s advice was deficient regarding this testimony, or that appellant relied upon counsel’s allegedly deficient advice to his detriment. *Id; Jackson v. State, supra; Nelson v. State, supra*. In addition, while appellant did set out the proposed testimony of the potential witnesses, he did not explain whether the testimony was admissible into evidence, how much weight it might have been given by the factfinder, how the testimony would have been beneficial to his defense, or how it might have impacted whether he entered a nolo contendere plea. *Camargo v. State, supra*. This argument stated no basis for postconviction relief.

In the third point, described as Ground Two, appellant posited that the pictures for which he was charged with possessing were tainted, and averred that counsel failed to “explain” that the photographs would have been inadmissible at trial. As support for finding that the pictures would have been suppressed, he argued that several people had possession of the pictures before they were seized by the police, thereby breaking the chain of custody. He further claimed that the pictures were taken by the police without his consent, did not portray sexual conduct involving minors, and would

⁴In the petition, appellant named Carrie Stivers, Danny Dennis and “several other” witnesses as material defense witnesses. He also summarized the nature of Ms. Stivers’ and Mr. Dennis’ proposed testimony.

have been suppressed as fruit of the poisonous tree.

Despite being couched in terms of a claim of ineffectiveness, it appears that appellant was making a direct argument for suppression. Evidentiary issues do not present a claim that is cognizable in a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Arguments of this nature constitute a direct attack on the judgment and thus cannot be raised in a postconviction proceeding. *Camargo v. State, supra*.

To the extent that appellant intended to complain that counsel was ineffective by failing to seek suppression of the photographs prior to entry of appellant's plea, appellant presented no citations to authority or convincing argument in support of the several conclusory bases for suppression. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003). Counsel was not ineffective for failing to make an argument that is meritless. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

Finally, in the fourth point, appellant argued that his arrest was illegal and unconstitutional. He maintained that the police had no legal right to question him and tricked him into returning to work from his home for questioning. He claimed that his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated.

The determination of whether appellant's arrest was illegal would have been an evidentiary matter taken up at trial had appellant not entered into a plea agreement to the charges. Evidentiary issues concern direct attacks on a judgment, and do not form the proper basis for a collateral attack under Rule 37.1. *Johnson v. State, supra; Camargo v. State, supra*.

To the extent that appellant intended to complain that counsel was ineffective by failing to seek suppression of his arrest prior to entry of appellant's plea, appellant presented no citations to

authority or convincing argument in support of the several conclusory constitutional violations as bases for suppression. *Weatherford v. State, supra*. Counsel was not ineffective for failing to make an argument that is meritless. *Greene v. State, supra*.

Motion treated as motion for belated brief; appeal dismissed; motion moot.