Cite as 2011 Ark. 219

SUPREME COURT OF ARKANSAS

No. CR 11-411

SOUVANNY MINGBOUPHA
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered May 12, 2011

PRO SE MOTION FOR BELATED APPEAL OF ORDER [CIRCUIT COURT OF SEBASTIAN COUNTY, FT. SMITH DISTRICT, CR 2008-234, HON. STEPHEN TABOR, JUDGE]

MOTION DENIED.

PER CURIAM

In 2008, petitioner Souvanny Mingboupha was found guilty by a jury of rape and sentenced to 480 months' imprisonment. The Arkansas Court of Appeals affirmed. *Mingboupha v. State*, 2009 Ark. App. 709 (unpublished). Subsequently, petitioner timely filed in the trial court a verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied on March 16, 2010.

Petitioner did not file a notice of appeal within thirty days of the entry of the trial court's order as required by Arkansas Rule Appellate Procedure–Criminal 2(a)(4) (2010). Now before us is petitioner's motion to proceed with a belated appeal of the court's order.

Petitioner bases the motion on the claim that the circuit clerk did not promptly send him a copy of the court's order denying relief as required by Arkansas Rule of Criminal Procedure 37.3(d), and that the failure to do so entitles him to pursue a belated appeal.

Regardless of whether petitioner received prompt notice that his petition had been denied, we deny the motion for belated appeal because it is clear that petitioner could not prevail on appeal. *See Sparacio v. State*, 2010 Ark. 335 (per curiam).

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 appeal is without merit. *Kelley v. State*, 2011 Ark. 175 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Sparacio*, 2010 Ark. 335; *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (citing *Pierce v. State*, 2009 Ark. 606 (per curiam)).

The claims for postconviction relief advanced by petitioner in his Rule 37.1 petition were all centered on the unreliability of the evidence that petitioner had raped the child who was the victim in his case. He contended that the child had given inconsistent statements and that his attorney had failed to pursue those statements. He further asserted that when the child attempted to withdraw the statements, she was coerced into testifying against him by threats from the Arkansas Department of Human Services that she would become a foster child. Finally, he alleged that his attorney failed to raise the issue of Sue Stockton's influence over the victim and her coercion of the victim. Stockton, a registered nurse and certified sexual-assault examiner, who examined the victim, gave testimony of the physical evidence of sexual assault.

The unsubstantiated claims were not sufficient to warrant postconviction relief under Criminal Procedure Rule 37.1. There is a strong presumption that trial counsel's conduct falls

within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam). Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, nor do they warrant granting postconviction relief. *Kelley*, 2011 Ark. 175; *Delamar*, 2011 Ark. 81; *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156, 362 S.W.3d 910. We have repeatedly held that conclusory claims are insufficient to sustain a claim of ineffective assistance of counsel. *Reed v. State*, 2011 Ark. 115 (per curiam); *Wormley v. State*, 2011 Ark. 107 (per curiam); *Delamar*, 2011 Ark. 87.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam)). 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. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910; *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

In an appeal from a trial 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 United States Supreme Court in *Strickland v.*

Washington, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Miller v. State*, 2010 Ark. 114. Under the two-pronged *Strickland* test, a petitioner raising 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 to the United States Constitution. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam). As to the second prong of *Strickland*, the claimant must demonstrate that counsel's deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *See id.* Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Ewells*, 2010 Ark. 407, at 3. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Petitioner fell short of establishing that he was denied effective assistance of counsel at trial.

To the extent that petitioner's claims could be considered challenges to the admissibility or sufficiency of the evidence adduced at trial, assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Lee v. State*, 2010 Ark. 261 (per curiam); *see also Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Rule 37.1 does not permit a direct attack on a judgment or permit a petition to function as a substitute for an appeal. *Frost v. State*, 2010 Ark. 440 (per curiam); *Hill v. State*, 2010 Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). The sole exception lies in claims raised in a timely petition that are sufficient to void the

judgment and render it a nullity. *Polivka*, 2010 Ark. 152, 362 S.W.3d 918. Appellant did not contend, much less establish with factual substantiation and legal authority, that any claim of trial error raised in the petition was sufficient to void the judgment in his case. Likewise, those allegations challenging the sufficiency of the evidence were not cognizable under Rule 37.1 petitions and should have been raised at trial and on the record on direct appeal. *Mills v. State*, 2010 Ark. 390 (per curiam).

Motion denied.