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SUPREME COURT OF ARKANSAS

No. CR 10-197

KEVIN W. PAYTON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 12, 2011 PRO SE MOTIONS TO FILE BELATED REPLY BRIEF, TO DISMISS CRIMINAL CASE, FOR CHANGE OF VENUE ON APPEAL, OF ILLEGAL SEARCH AND SEIZURE, OF SENTENCE REDUCTION, AND OF RIGHT TO EVIDENTIARY HEARING [APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT, CR 2007-1022, HON. JODI RAINES DENNIS, JUDGE] APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

Appellant Kevin W. Payton was convicted of one felony count of rape and one misdemeanor count of tampering. He was also found to be a habitual offender pursuant to Arkansas Code Annotated § 5-4-501 (Supp. 2007), and he was sentenced for the rape conviction to 660 months' incarceration in the Arkansas Department of Correction with one year in county jail for the misdemeanor conviction to run concurrently. The Arkansas Court of Appeals affirmed. *Payton v. State*, 2009 Ark. App. 690.

Appellant subsequently filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010), which was denied without a hearing.

Appellant appealed from the order denying relief. On June 21, 2010, appellant tendered his reply to the appellee's brief, but appellant's reply brief was five days late and was therefore not filed by our clerk. Appellant was informed that he would have to file a motion to file a belated reply brief, which he did. Appellant then filed five additional pro se motions, which were styled as motions "to dismiss criminal case," "for change of venue from Jefferson County on My Appeal," "of illegal search and seizure," "of sentence reduction," and "of right to evidentiary hearing."

These motions, as well as appellant's motion to file a belated reply brief, are now before this court. However, because it is clear that appellant could not prevail if his appeal were allowed to go forward, we dismiss the appeal, and appellant's pending motions are 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. *See Sims v. State*, 2011 Ark. 135 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam); *Grissom v. State*, 2009 Ark. 559 (per curiam).

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 (per curiam); *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. *Ewells*, 2010 Ark. 407, at 2. 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, at 2-3, 361 S.W.3d 840, 844. 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).

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*.

In his original Rule 37.1 petition in the trial court, appellant argued that he received ineffective assistance of counsel through counsel's failure to call "certain proffered defense witnesses," to "investigate the state's witnesses and there [sic] motives for testimony given at the trial," and "by using the fruit of discovery to adequately prepare at trial to adversarily [sic] test the state's case." Additionally, appellant argued that his privilege against self-incrimination had been violated by "the methods used by the Detectives Hubanks [and] Buffkin to gain a written confession;" that there was prosecutorial misconduct vis-a-vis the prosecutor's failure to provide evidence that appellant's written confession was coerced; and that appellant was actually or constructively denied counsel, which he attempted to support with facts contained in a brief filed with the Rule 37.1 petition.

The trial court denied the petition without a hearing, finding that appellant had failed to provide facts to support his allegations. The court noted that appellant had, for example, failed to name any of the potential witnesses that counsel arguably should have called or to state what the substance of the witnesses' testimony would have been. Similarly, the court found that appellant failed to specify what methods were used by the police to obtain his confession or to explain what exculpatory evidence was allegedly withheld by the prosecution. Regarding the claims of ineffective assistance of counsel, the trial court determined that appellant had failed to meet his legal burden of showing that, but for counsel's errors, the jury's decision would have been different.

Appellant's claims of ineffective assistance of counsel were, essentially, that trial counsel

failed to call certain witnesses, failed to properly investigate the prosecution's witnesses, failed to properly prepare for trial, and failed to object to the sufficiency of the evidence. As the trial court noted, appellant's Rule 37.1 petition did not name a single witness that the defense should have called. Appellant also did not state what a more thorough investigation of the prosecution's witnesses might have shown, he did not explain in what way trial counsel was unprepared for trial, and he offered nothing to suggest that a challenge to the sufficiency of the evidence would have been successful.

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *See Viveros v. State*, 2009 Ark. 548 (per curiam). Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, and such statements and allegations will not warrant granting postconviction relief. *See Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156, 362 S.W.3d 919. A court is not required to research or develop arguments contained in a petition for postconviction relief. *Hawthorne v. State*, 2010 Ark. 343 (per curiam) (citing *Eastin*, 2010 Ark. 275); *see also Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Appellant here simply did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard.

The remainder of the appellant's allegations consist entirely of conclusory allegations of prosecutorial misconduct and other trial errors. Claims of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Hawthorne*, 2010 Ark. 343

(citing *Lee v. State*, 2010 Ark. 261 (per curiam)); *see also Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Our postconviction rule does not permit a direct attack on a judgment or substitute for an appeal. *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 v. State*, 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. An argument with no citation to authority or convincing argument in its support that cannot be sustained without further research on the part of the court is not well taken. *Hawthorne*, 2010 Ark. 343; *see Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003)).

Based on all of the foregoing, we cannot say that the trial court's denial of postconviction relief was clearly erroneous. Thus, it is clear that appellant could not prevail if his appeal were allowed to go forward. We therefore dismiss the appeal, and appellant's motions are moot.

Appeal dismissed; motions moot.