Cite as 2011 Ark. 226

SUPREME COURT OF ARKANSAS

No. CR 11-290

BENJAMIN D. CARTER, JR. Appellant v. STATE OF ARKANSAS Appellee	**Opinion Delivered** May 19, 2011 PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF [UNION COUNTY CIRCUIT COURT, CR 2008-482, HON. HAMILTON H. SINGLETON, JUDGE] APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2008, appellant Benjamin D. Carter, Jr., was found guilty by a jury of possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, possession of drug paraphernalia, simultaneous possession of drugs and a firearm, and maintaining a drug premises. He was sentenced to life imprisonment and a $25,000 fine on the cocaine-possession charge, twenty years and a $25,000 fine on the marijuana-possession charge, forty years on the simultaneous-possession charge, twenty years and a $10,000 fine on the paraphernalia charge, and twelve years and a $10,000 fine on the drug-premises charge. The sentences were ordered to be served consecutively. This court affirmed. *Carter v. State*, 2010 Ark. 293, 367 S.W.3d 544.

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 (2010). The

petition was denied. Appellant lodged an appeal here and now seeks by pro se motion an extension of time to file his brief-in-chief.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, 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 proceed where it is clear that the appellant could not prevail. *Kelley v. State*, 2011 Ark. 175 (per curiam); *Lewis v. State*, 2011 Ark. 176 (per curiam); *Mitchem v. State*, 2011 Ark. 148 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Kelley*, 2011 Ark. 175; *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. *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).

With respect 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.*

As his grounds for relief, appellant listed a series of allegations of ineffective assistance of counsel, which were entirely conclusory in nature in that there was no factual substantiation

to demonstrate how counsel's conduct specifically prejudiced the defense. The assertions were: counsel's representation began a mere forty-five days before trial; counsel was merely a person who happened to be a lawyer; counsel had an affinity for illicit drug use and acquired felony drug charges after appellant's trial; counsel's decision to base appellant's defense on total innocence created a conflict of interest between him and his codefendant, and counsel should have moved for separate trials; counsel interviewed no witnesses; counsel took the State's case at face value and did no investigation; counsel failed to conduct any meaningful adversarial challenge as shown by his lack of zealous cross-examination of the State's witnesses; counsel's opening statement was lacking in direction; counsel abdicated appellant's defense to the co-defendant's attorney.

As stated, appellant failed to offer factual substantiation for the allegations sufficient to make a showing of prejudice to the defense. He did not explain how the defense was affected by the fact that counsel became his attorney only forty-five days before trial or what witnesses were available that should have been called and what those witnesses' testimony would have been. He further failed to show what information an investigation or more zealous cross-examination could have uncovered that would have benefitted the defense or how counsel's "affinity" for drugs affected the defense. Conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Kelley*, 2011 Ark. 175; *Delamar v. State*, 2011 Ark. 87 (per curiam); *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam).

To prevail on a claim of ineffective assistance of counsel due to a conflict of interest, a defendant must demonstrate the existence of an actual conflict of interest that affected counsel's performance, as opposed to a mere theoretical division of loyalties. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not further demonstrate prejudice in order to obtain relief, but, in the absence of an actual conflict, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* Even in those situations that are inherently fraught with potential conflict, such as those where an attorney represents multiple defendants, the defendant asserting a claim of conflict must show that counsel actively represented conflicting interests by a showing of how the conflict actually prejudiced his defense. *Id.*; *see also Wormley v. State*, 2011 Ark. 107 (per curiam). Appellant made no demonstration here that counsel, through his failure to move for severance of the defendants, created conflicting interests or prejudiced appellant's defense. A court need not consider an argument, even a constitutional one, when a claimant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003)).

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Mitchem*, 2011 Ark. 148. A court is not required to research or develop arguments contained in a petition for postconviction relief. *See Eastin*,

2010 Ark. 275; *see also Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Appellant here did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard.

Appeal dismissed; motion moot.