

# SUPREME COURT OF ARKANSAS

No. CR 09-374

TYWAN WINSTON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** June 16, 2011

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT , CR  
2006-3399, HON. WILLARD  
PROCTOR, JR., JUDGE

AFFIRMED.

## PER CURIAM

Appellant Tywan Winston appeals an order denying his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011). The petition concerned a judgment, previously affirmed by this court, that reflected appellant's conviction on a charge of capital murder and his sentence of life imprisonment without parole. *See Winston v. State*, 372 Ark. 19, 269 S.W.3d 809 (2007). The petition for postconviction relief alleged ineffective assistance of counsel. Appellant's sole claim in the pending matter asserts error in the trial court's finding that trial counsel was not ineffective for failing to obtain an independent mental-health evaluation or for failing to pursue a defense of involuntary intoxication rather than raising self-defense. We affirm.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Payton v. State*, 2011 Ark. 217 (per curiam); *Flowers v. State*, 2010 Ark. 364, 370 S.W.3d 228 (per curiam); *Dunlap v. State*, 2010 Ark. 111 (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. *Payton*, 2011 Ark. 217; *Hawthorne v. State*, 2010 Ark. 343 (per curiam); *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam).

We assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Shipman v. State*, 2010 Ark. 499 (per curiam). Under the *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. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel’s performance fell below an objective standard of reasonableness. *Miller v. State*, 2011 Ark. 114 (per curiam).

In addition, in order to meet the second prong of the test, the petitioner must show that counsel’s deficient performance prejudiced petitioner’s defense so that he was deprived of a fair trial. *Id.*; *see also Mitchem v. State*, 2011 Ark. 148 (per curiam). A claimant must show that there is a reasonable probability that the fact-finder’s decision would have been different absent counsel’s errors. *Delamar v. State*, 2011 Ark. 87 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

A court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and a claimant 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. *Kelley v. State*, 2011 Ark. 175 (per curiam) (citing *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam)). Where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then counsel's decision is not a basis for relief under Rule 37.1. *Anderson v. State*, 2010 Ark. 404, 373 S.W.3d 876 (per curiam); *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam).

Appellant intertwines the two alleged errors by counsel in his argument, that counsel failed to obtain an independent mental evaluation and that counsel chose a strategy of self defense over involuntary intoxication. Appellant appears to assume that an independent mental evaluation would have lent support either to some finding of mental disease or defect at the time of the crime or to a basis for involuntary intoxication. He did not contend that appellant was not competent to stand trial, but alleged that he was either highly intoxicated or delusional at the time of the incident. Appellant failed to carry his burden to demonstrate that either of counsel's decisions was not supported by reasonable professional judgment or that appellant was prejudiced as a result.

At the hearing on the Rule 37.1 petition, counsel testified that he had discussed retaining an expert to perform an independent mental evaluation of his client, but did not do so. He believed his client was competent, and, after reviewing the report from the state

hospital, he decided that an independent review was not warranted.<sup>1</sup> Although counsel later became aware of certain issues with the state hospital's adherence to standards, he testified that he was not aware of any issues in that regard at the time of appellant's trial. Counsel testified that he did not consider presenting a defense of involuntary intoxication or that his client was reacting to delusions at the time of the incident because he believed the jury would be more inclined to hand down a harsher sentence if they heard the instructions that would accompany that type of defense. He also expressed concern that his client would have to show that he did not voluntarily ingest some intoxicant in order to be successful in that regard, referencing PCP, it appears as an example of an intoxicant that could cause the behavior. If he was unsuccessful, and the jury concluded that appellant voluntarily took something like PCP, then counsel was concerned that the result would be quite harsh.

Appellant provided no potential basis, available at that time, on which counsel should have challenged the conclusions in the report or his client's competency. He did not suggest any admissible evidence that might have been provided in an independent report to support a defense of involuntary intoxication or that appellant may have suffered from delusions, and he did not demonstrate that retaining an expert would have actually produced a report providing that evidence. Appellant did not show that counsel's decision not to seek an

---

<sup>1</sup> We note that the report is not included in the record before us. The report was not admitted as evidence during the Rule 37.1 proceedings, and it is not included within the record on direct appeal. The burden is on the party asserting error to bring up a sufficient record on which to grant relief. *Barnes v. State*, 2011 Ark. 153 (per curiam); *Shipman v. State*, 2010 Ark. 499 (per curiam); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

independent psychological evaluation fell outside of the wide range of reasonable professional conduct.

Moreover, appellant did not show that obtaining another evaluation would have provided any different result from that in the state hospital report. The burden is entirely on the claimant to provide facts that affirmatively support his or her claims of prejudice; neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption, and such statements and allegations will not warrant granting postconviction relief. *Payton*, 2011 Ark. 217. Here, appellant provided no factual substantiation to support his claims. He pointed to no specific evidence that would have been produced if another examination were conducted.

As to counsel's decision to pursue self defense as his defense to the charges, trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy. *Flowers v. State*, 2010 Ark. 364, 370 S.W.3d 228 (per curiam). Counsel articulated reasonable concerns about pursuing an involuntary intoxication defense.

There was testimony and other evidence introduced at trial from which the jury could infer that appellant had kicked in the victim's door shortly before the stabbing. The autopsy indicated that the victim had not consumed alcohol. That evidence strongly undercut appellant's testimony that, after he came to the apartment, the victim gave him alcohol and marijuana. Considering the evidence available to the state, counsel did not act outside the bounds of reasonable professional judgment in making a decision to select a defense that he

Cite as 2011 Ark. 264

thought would provide the most mitigating circumstances for his client. Nor did appellant demonstrate that there was a reasonable probability that the outcome of the trial would have been any different had trial counsel presented a defense of involuntary intoxication. The trial court did not clearly err in ruling that counsel was not ineffective.

Affirmed.