Cite as 2011 Ark. 296

SUPREME COURT OF ARKANSAS

No. CR 09-716

TEDDY LEE CLARKS
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered July 27, 2011

PRO SE APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, CR 2006-4245, HON. HERBERT T. WRIGHT, JR., JUDGE

AFFIRMED.

PER CURIAM

Appellant Teddy Lee Clarks appeals the denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). He makes two arguments in his pro se brief on appeal: (1) that the circuit court erred in concluding that the record conclusively showed the postconviction relief was not warranted due to ineffective assistance of counsel and (2) that the circuit court denied him fundamental fairness and meaningful access to the courts in violation of the federal and state constitution. We find no error that warrants a reversal and affirm.

In May 2007, appellant was convicted of two counts of rape following a jury trial in Pulaski County Circuit Court. His convictions were affirmed by the Arkansas Court of Appeals, which rejected appellant's challenge to the denial of his continuance at trial so that he could pursue his own DNA testing and expert evidence to counter the State's DNA proof. *Clarks v. State*, CACR 07-1041 (Ark. App. Sept. 10, 2008) (unpublished). Appellant filed a

timely pro se Rule 37.1 petition claiming ineffective assistance of counsel as to procuring DNA testing and other claims. The circuit court denied relief on each claim, and appellant filed his notice of appeal.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1 (2009). 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. *Id*. In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *Id*.

For his first point on appeal, appellant asserts that the circuit court erred in denying his petition for postconviction relief on the basis of ineffective assistance of counsel because his defense counsel should have sought a second independent DNA test and forensic expert testimony to prevent, or at least rebut, the admission into evidence by the State of DNA test results showing that appellant was the father of the fourteen-year-old victim's unborn child; that defense counsel failed to adequately investigate the administrative policies and procedures with regard to the collection, storing, and testing of the State's biological evidence; and that defense counsel failed to make appropriate objections regarding limitations on DNA evidence when the State's expert witnesses testified.

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. *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46; *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910; *see Jammett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that the deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). With respect to the requirement that prejudice be established, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Sparkman*, 373 Ark. 45, 281 S.W.3d 277.

The decision of whether or not to call a witness is generally a matter of trial strategy that is outside the purview of Rule 37.1. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001). Trial counsel must use his or her best judgment to determine which witnesses will be beneficial to his client. *Id.* When an allegation rests on whether a witness should have been called, it is incumbent on the petitioner to name the witness, provide a summary of the

testimony, and establish that the testimony would have been admissible into evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). When assessing an attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not in itself proof of counsel's ineffectiveness. *Nelson*, 344 Ark. 407, 39 S.W.3d 791. Nonetheless, such strategic decisions must still be supported by reasonable professional judgment. *Id*. Moreover, the manner of questioning a witness is by and large a very subjective issue about which different attorneys could have many different approaches. *Id*. Even if a decision proves unwise, matters of trial tactics and strategy are not grounds for postconviction relief. *Id*.

Here, appellant has failed to demonstrate that the circuit court erred in denying his claims for postconviction relief based on ineffective assistance of counsel. Defense counsel's decision not to seek further DNA testing after the State's tests indicated a match to appellant was a strategic decision that normally would not support an ineffective-assistance claim. Further, appellant has not identified a particular witness or a summary of the testimony such a witness would provide. Regardless, as the circuit court noted in its order denying postconviction relief, a second independent DNA test would not have excluded from evidence the State's DNA test results showing that appellant impregnated the victim, nor would a second test have prevented the victim's own testimony that she had been raped

twenty times by appellant. This court has held that a victim's testimony alone provides sufficient evidence to support a rape conviction. *Helton v. State*, 325 Ark. 140, 924 S.W.2d 239 (1996). The circuit court also correctly noted that nothing in the record indicated any improper handling, collection, or storage with regard to the State's DNA testing and that the manner of questioning a witness is a matter of trial tactics and strategy that are not grounds for postconviction relief. Lastly, even if this court reached the conclusion that appellant's counsel was deficient, appellant failed to show a reasonable probability of a different outcome where the victim testified and her testimony alone was sufficient to support appellant's convictions.

For his second point on appeal, appellant maintains that he was denied the opportunity for discovery and a hearing to advance his postconviction claim in circuit court. He is mistaken that this point supports reversal. The circuit court need not hold a hearing on a Rule 37.1 petition when "the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief." Ark. R. Crim. P. 37.3(a) (2011). However, the trial court must "make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings." *Id*. Here, the circuit court made specific written findings regarding appellant's postconviction claims and noted the evidence from the record upon which it relied. Furthermore, even if the circuit court had not made specific written findings, we could affirm in the absence of an adequate order where the record before this court conclusively shows that the petition is without merit. *Carter v. State*, 342 Ark. 535,

29 S.W.3d 716 (2000). As outlined earlier, appellant's petition advances no meritorious position. Finally, appellant was not entitled to discovery to pursue his Rule 37.1 claim for relief. *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005); *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

Affirmed.