Cite as 2011 Ark. 410

SUPREME COURT OF ARKANSAS

No. CR 10-101

JOHN CUMMINGS
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 6, 2011

PRO SE APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, CR 2008-1549, HON. WILLARD PROCTOR, JR., JUDGE

AFFIRMED.

PER CURIAM

In September 2008, appellant John Cummings entered a negotiated plea of nolo contendere to a charge of first-degree murder for which he was sentenced to a term of twenty-eight years in prison. Thereafter, appellant filed a timely petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). After a hearing, the circuit court denied the petition, finding that appellant did not receive ineffective assistance of counsel with regard to providing information to him about parole eligibility. Appellant brings this appeal. We affirm.

We have frequently held that, where, as here, a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to Rule 37.1 are those that allege that the plea was not made voluntarily and intelligently or that it was entered without effective assistance of counsel. *See Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam); *French v. State*, 2009 Ark. 443 (per curiam); *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). 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 U.S. 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. *French*, 2009 Ark. 443; *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam). This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Jamett*, 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. *Id.*; *Anderson v. State*, 2009 Ark. 493 (per curiam).

Under the two-pronged *Strickland* test, a petitioner making 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 U.S. Constitution. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007). In doing so, the claimant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

As to the second prong of the test, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Gonder v. State*, 2011 Ark. 248, 382 S.W.3d 674 (per curiam); *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). An appellant who has pled guilty normally will have considerable difficulty in proving any prejudice as his plea rests upon his admission in open court that he did the act with which he was charged. *Gonder*, 2011 Ark. 248, 382 S.W.3d

674; *Cox v. State*, 299 Ark. 312, 722 S.W.2d 336 (1989). To establish prejudice and prove that he was deprived of a fair trial due to ineffective assistance of counsel, an appellant who has pled guilty must demonstrate a reasonable probability that, but for counsel's errors, he would not have so pleaded and would have insisted on going to trial. *Buchheit v. State*, 339 Ark. 481, 6 S.W.3d 109 (1999) (per curiam) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

In this appeal, appellant contends that he did not enter his guilty plea voluntarily and intelligently and that he received ineffective assistance of counsel because his attorney did not explain the ramifications of Act 1805 of 2001, which is codified as Arkansas Code Annotated section 16-93-609 (Repl. 2006). Pursuant to this statute, appellant is not eligible for release on parole because he was previously convicted of first-degree battery, a violent felony offense. Appellant maintains that, had he known that he must serve 100% of his twenty-eight-year sentence, he would not have pled guilty.

This court has held that there is no constitutional requirement for defense counsel to inform his client about parole eligibility and that the failure to impart such information does not fall outside the range of competence demanded of attorneys in criminal cases. *See Buchheit v. State*, 339 Ark. 481, 6 S.W.3d 109 (1999) (per curiam); *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986). In *Buchheit*, we acknowledged the decision *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990), where the Eighth Circuit granted Hill's habeas corpus petition on the ground that counsel made positive misrepresentations regarding parole eligibility and that counsel's assurances induced Hill's acceptance of the negotiated plea. Distinguishing *Hill*, we concluded that Buchheit's counsel was not ineffective for failing to advise the defendant that he would

be required to serve 70% of his sentence under Arkansas Code Annotated section 16-93-611, because counsel made no representations regarding parole eligibility. As applied here, appellant's claim is only that his counsel did not inform him that he would not be eligible for parole. Appellant makes no assertion that his counsel made a positive misrepresentation about parole eligibility, and he does not contend that his decision to plead guilty hinged upon any representation made by his counsel. As such, the circuit court did not clearly err in denying appellant's petition.

Affirmed.