

SUPREME COURT OF ARKANSAS

No. CR 10-715

JERRY DONALD SYKES
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 6, 2011

PRO SE APPEAL FROM THE
WASHINGTON COUNTY CIRCUIT
COURT, CR 2007-2162, HON.
WILLIAM A. STOREY, JUDGE

AFFIRMED.

PER CURIAM

A jury in Washington County found appellant Jerry Donald Sykes guilty of capital murder, kidnapping, robbery, and theft of property. As a consequence, he was sentenced to life in prison without the possibility of parole on the capital-murder charge, 240 months' imprisonment for kidnapping, a \$10,000 fine for the robbery charge, and a fine of \$8,000 on the theft-of-property charge. We affirmed. *Sykes v. State*, 2009 Ark. 522, 357 S.W.3d 882.

On December 31, 2009, appellant timely filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009), alleging ineffective assistance of counsel. After a hearing, the circuit court entered an order making written findings and denying appellant's petition. Appellant now appeals, arguing that the circuit court erred in finding that his counsel at trial was not ineffective.

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 the totality of the evidence, under the standard set forth by the United States Supreme Court in *Strickland v.*



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Washington, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Ewells v. State*, 2010 Ark. 407 (per curiam). 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, 361 S.W.3d 840 (per curiam). 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

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). 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



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committed. *Watkins v. State*, 2010 Ark. 156 (per curiam); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

At trial, the jury found that appellant tied up the victim, Sandra Stokes, and placed duct tape over her mouth, which in combination caused death by asphyxiation. Appellant also stole personal property from the victim and used her ATM card to obtain funds, which financed his flight to Mexico and, ultimately, Honduras, where he was apprehended.

As his first issue on appeal, appellant asserts that his counsel's performance was deficient because counsel failed to move for a directed verdict on the kidnapping and robbery charges. Further, he argues that separate convictions for capital murder, kidnapping, and robbery violated the right against double jeopardy and that his counsel was ineffective by not making that argument at trial. Although raised in appellant's petition, the trial court's order denying relief does not contain rulings by the trial court on these claims. It is the obligation of an appellant to obtain a ruling from the trial court in order to preserve an issue for appellate review. *Kelley v. State*, 2011 Ark. 175 (per curiam); *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Arkansas's rules of procedure provide an avenue for an appellant to obtain a ruling from the trial court should the court fail to rule on an issue in its initial order. Ark. R. Crim. P. 37.3 (2009); see *Beshears*, 340 Ark. 70, 8 S.W.3d 32. Failure to obtain a ruling precludes our review of that argument on appeal. *Huddleston v. State*, 347 Ark. 226, 230, 61 S.W.3d 163, 167 (2001).

Appellant next contends that his counsel was ineffective because, during voir dire and opening statements, counsel referred to drug charges that were pending against appellant at the time of the murder. Appellant argues that bringing up the charges branded him as a bad



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person before the jury. At the Rule 37.1 hearing, trial counsel testified that there were two reasons for mentioning the drug charges. First, he anticipated, until midtrial, that appellant would testify and that the purpose of mentioning the drug charges was to expose them before the prosecution cross-examined appellant about those charges. Counsel also explained that it was his trial strategy to advance the theory that appellant fled the country to avoid the pending drug charges, as opposed to escaping a murder charge. By way of further explanation, counsel stated that appellant had told him that the victim, who had guaranteed appellant's bond on the drug charges, agreed to be tied-up in hopes of not being held liable on the bond after appellant fled. Counsel stated that, to that end, he called the bondsman as a witness to testify that the victim was the guarantor on the bond and to establish that the victim had a motive for being tied up.

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. *Kelley v. State*, 2011 Ark. 175 (per curiam); *Anderson v. State*, 2010 Ark. 404, 373 S.W.3d 876. 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. *Croy v. State*, 2011 Ark. 284, 383 S.W.3d 367 (per curiam). Based on the record before us, the circuit court was not clearly erroneous in finding that the decision to inform the jury about appellant's pending drug



charges was one of trial strategy and in finding that the decision fell within the bounds of reasonable professional judgment. Thus we affirm the circuit court's ruling that counsel was not deficient in this regard.

As his last argument, appellant contends that counsel's performance was deficient due to the failure to present mitigating evidence during the sentencing phase of trial. However, after the prosecution rested, the following exchange occurred:

THE COURT: The defendant may call his first witness.

DEFENSE COUNSEL: Your Honor, may I approach the bench with my client?

THE COURT: You may.

DEFENSE COUNSEL: Your Honor, my client has informed me that he does not wish to call any sentencing witnesses. I would just like to put it on the record that I've advised him of his right to do so. But he declines to do so at this time.

THE COURT: All right. You understand that you have a right to present evidence in this stage of the trial?

DEFENDANT: I see no benefit in it.

THE COURT: All right. I just want to be sure you understand.

DEFENDANT: Thank you.

At the Rule 37.1 hearing, appellant's counsel testified that he was prepared to call appellant and his sister as witnesses but that appellant did not wish to testify and that appellant did not want to put his sister on the witness stand. Counsel explained that appellant saw no point in presenting any evidence because the jury's verdict of guilt on capital murder carried an automatic sentence of life without parole.¹

¹ The State did not seek the death penalty.



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As shown by the record of the trial and the record of the Rule 37.1 proceeding, the decision not to introduce any evidence in mitigation was of appellant's own making. Accordingly, the circuit court did not clearly err in finding no merit in appellant's claim of ineffective assistance of counsel.

Affirmed.