

Cite as 2011 Ark. 411

# SUPREME COURT OF ARKANSAS

No. CR 10-602

ERNEST DEAN WADE  
APPELLANT

v.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered      October 6, 2011

PRO SE APPEAL FROM THE  
WASHINGTON COUNTY CIRCUIT  
COURT, CR 2007-2434, HON.  
WILLIAM A. STOREY, JUDGE

AFFIRMED.

## PER CURIAM

Appellant Ernest Dean Wade appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). In 2008, appellant was convicted, as an accomplice and habitual offender, of possession of drug paraphernalia with intent to manufacture methamphetamine and was sentenced to 360 months' imprisonment. He appealed, and the Arkansas Court of Appeals affirmed. *Wade v. State*, 2009 Ark. App. 560. In 2009, appellant filed his petition for postconviction relief in the trial court, and, after a hearing on the petition, the court denied the relief sought. We affirm.

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Reed v. State*, 2011 Ark. 115 (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.*



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We assess the effectiveness of counsel under the 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 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.* In addition, the petitioner must show that counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel’s performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense. *Id.* 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. *Carter v. State*, 2011 Ark. 226 (per curiam).

In his initial petition, appellant asserted four allegations of ineffectiveness, in that his trial counsel (1) failed to seek evidence and statements of witnesses; (2) failed to establish through his father’s testimony that he had previously used drugs on the day of his arrest; (3) ignored exculpatory evidence; (4) failed to challenge his ability for rational thought. In addition, he supplemented his original petition, alleging that trial counsel (1) failed to obtain his presence at omnibus hearings and (2) failed to question the store clerks from whom the paraphernalia was purchased to establish the actual purchaser. Because it is clear that



appellant's assertions lacked any merit, we cannot say that the circuit court erred in denying his petition.

Appellant initially asserts that his trial counsel was ineffective in failing to call witnesses. He claims that, had his counsel called the store clerks from whom the drug paraphernalia was purchased, his counsel could have established that he did not purchase the items found. He further maintains that witnesses could have established that the stop of the vehicle in which he was riding was illegal and that he was not "rational" at the time of his arrest. Finally, he takes issue with his counsel's failure to call the driver of the vehicle to testify. It is incumbent on the petitioner who claims ineffective assistance based on failure to call a witness to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Shipman*, 2010 Ark. 499. In order to demonstrate prejudice, appellant was required to establish that there was a reasonable probability that, had counsel performed further investigation and presented the witness, the outcome of the trial would have been different. *Id.*

Here, whether appellant actually purchased the drug paraphernalia is simply irrelevant, as he was charged and convicted of being an accomplice to *possession* of drug paraphernalia. Furthermore, he failed to name any of the witnesses who he claims would have established the illegality of the vehicle stop<sup>1</sup> or that he was irrational at the time of his arrest, nor did he establish what testimony could have been extracted from the driver of the vehicle that would

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<sup>1</sup>We note that the legality of the stop was established in appellant's direct appeal. *Wade*, 2009 Ark. App. 560.



have been beneficial to his defense. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice that denied the petitioner a fair trial. *Smith v. State*, 2010 Ark. 137 (per curiam). The decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, itself, proof of counsel's ineffectiveness. *Id.* Appellant failed to make either showing required under *Strickland*. Accordingly, we affirm the circuit court's finding that counsel was not ineffective on these bases.

Appellant next argues that his counsel was ineffective for failing to establish, through his father's testimony, his drug use on the day he was arrested. However, appellant failed to summarize what the testimony would have been or how it would have changed the outcome of his trial. Where a petitioner has failed to make such a showing, this court will not grant postconviction relief for ineffective assistance of counsel. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). We therefore affirm the circuit court's denial of relief on this point.

Appellant further asserts that his trial counsel ignored exculpatory evidence. However, he failed to specifically identify the exculpatory evidence, which he alleges was ignored.<sup>2</sup> Conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Carter*, 2011 Ark. 226.

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<sup>2</sup>While appellant does mention that exculpatory evidence would show that he did not purchase the drug paraphernalia, such evidence would be irrelevant where appellant was charged and convicted of being an accomplice to possession, as already noted.



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For his fourth allegation, appellant asserts that his counsel was ineffective for failing to challenge his ability for rational thought. Indeed, the record reflects that appellant underwent a forensic evaluation in 2008 wherein Dr. Robin Ross found that, at the time of examination, he lacked the capacity to assist effectively in his own defense and that, at the time of the examination, he had a mental disease—specifically, psychotic disorder, not otherwise specified, most likely due to methamphetamine use—and suffered from methamphetamine and cannabis dependence as well as antisocial personality disorder. However, subsequent to that evaluation, appellant was admitted to the forensic unit of the Arkansas State Hospital on a not-fit-to-proceed commitment order. Following a second evaluation, appellant was found to have the capacity to understand the proceedings against him and assist effectively in his own defense, to have no mental disease, and to have the capacity to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of the law, and he was diagnosed as suffering from amphetamine and cannabis abuse, as well as antisocial personality disorder.

At the hearing on appellant’s petition, his trial counsel testified that she considered calling Dr. Ross on appellant’s behalf, but ultimately did not do so based on her professional judgment that his diagnoses—specifically antisocial personality disorder and his methamphetamine dependence—might be more detrimental than beneficial, considering that he was charged with a drug offense. 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



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there was a witness or witnesses who could have offered testimony beneficial to the defense is not in itself proof of counsel's ineffectiveness. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). While the decision of whether to call an expert witness is generally a matter of trial strategy, such strategic decisions must still be supported by reasonable professional judgment, pursuant to the standards set forth in *Strickland. Id.* The circuit court found that trial counsel's decision not to call certain witnesses were tactical decisions that were part of trial counsel's trial strategy. We agree with the circuit court's finding, as the record clearly demonstrates that trial counsel's decision not to call any witnesses regarding appellant's mental status was based on reasonable professional judgment. We therefore affirm the circuit court's finding on this point.

Appellant finally avers that trial counsel was ineffective for failing to obtain his presence at omnibus hearings. He contended that several hearings were held without his knowledge, consent, or participation. In essence, appellant is asserting a violation of his due-process rights; however, we have consistently held that such claims are not cognizable in a Rule 37.1 petition. *Miller v. State*, 2011 Ark. 114 (per curiam). Thus, we cannot say that the circuit court was clearly erroneous in denying relief on this point.

Because appellant did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard or otherwise show that he was entitled to postconviction relief under Rule 37.1, we affirm the circuit court's order.

Affirmed.