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SUPREME COURT OF ARKANSAS

No. CR10-934

STATE OF ARKANSAS APPELLANT V. JOE LESTER CANTRELL APPELLEE	**Opinion Delivered** October 27, 2011 APPEAL FROM THE PERRY COUNTY CIRCUIT COURT, NOS. CR2006-32, CR2008-14, HON. MARY SPENCER MCGOWAN, JUDGE REVERSED AND REMANDED.

KAREN R. BAKER, Associate Justice

The State of Arkansas appeals an order of the Perry County Circuit Court granting a new trial to appellee Joe Lester Cantrell based upon his claims of ineffective assistance of counsel in his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010).[1] In *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591, this court affirmed Cantrell's convictions and 145-year sentence for multiple crimes relating to the manufacture of methamphetamine and failure to appear. As this is a second or subsequent appeal, our jurisdiction of this Rule 37.1 appeal is properly in this court pursuant to Arkansas Supreme Court Rule 1-2(a)(7) (2011). We reverse and remand.

Following affirmance on direct appeal of his convictions, Cantrell filed a timely, verified, pro se Rule 37.1 petition, asserting ineffective assistance of counsel. Counsel was

[1]Because postconviction proceedings under Rule 37.1 are civil in nature, the State may appeal. *See, e.g.*, *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587.

appointed for Cantrell, and an amended petition was filed alleging seventeen instances of deficient performance by counsel at four stages: pretrial investigation, plea offer negotiations, trial, and direct appeal. Cantrell's petition asserted that both Deputy Public Defender Margaret Egan, trial counsel, and Clint Miller, appellate counsel, were ineffective.

The State filed a response, and the circuit court conducted a hearing on Cantrell's petition for postconviction relief. At the beginning of the hearing, the circuit court considered the motion to quash the subpoena issued for the testimony of Betsy Johnston, the deputy public defender first assigned to represent Cantrell. Johnston argued that because Cantrell's allegations of ineffective assistance of counsel were not made regarding her performance, she could not be compelled to testify because of attorney-client privilege. Cantrell invoked and refused to waive attorney-client privilege with respect to Johnston. The circuit court granted Johnston's motion to quash the subpeona.

As the hearing proceeded, Cantrell presented evidence from several witnesses, including his trial counsel, an expert criminal defense attorney, a former employer, a chaplain at the jail where Cantrell had been incarcerated, and Cantrell. The State did not present any witnesses but defended against the assertions of ineffective assistance of counsel through cross-examination. During the State's cross-examination of Egan, Cantrell again asserted attorney-client privilege. Sustaining Cantrell's objection, the circuit court precluded Egan from testifying about any conversations that she had with Johnston that had assisted her in preparing Cantrell's case for trial, or any conversations that Egan had with Cantrell where he discussed his communications with either Johnston or John Collins, an attorney that Cantrell consulted

to represent him but did not ultimately hire.

At the conclusion of the hearing, the circuit court took the matter under advisement and ultimately entered a lengthy written order. The court concluded that Cantrell had failed to present evidence regarding Clint Miller, his counsel on direct appeal, and denied relief on that claim. However, the court found that Egan had been ineffective in numerous respects and that Cantrell was prejudiced by the ineffective performance because the outcome of the trial "may" have been different but for trial counsel's errors. The circuit court granted Cantrell a new trial. This appeal followed.

In appeals of postconviction proceedings, this court will not reverse a circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). 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.* Additionally, a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of discretion. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 84 (2005). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004).

This court reviews postconviction claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The benchmark for judging a claim of ineffective assistance of counsel must be "whether counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 686. A petitioner attempting to demonstrate ineffective assistance of counsel must show first that counsel's performance was deficient. *Id*. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id*. This means that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, in that the decision reached would have been different absent the errors. *Id*.

The State presents two arguments for reversal of the order granting Cantrell a new trial. First, the State asserts the circuit court erred in finding that Cantrell had satisfied *Strickland's* prejudice prong. Second, the State contends that the circuit court abused its discretion in its rulings regarding Cantrell's refusal to waive attorney-client privilege at all as to Johnston, and his limited waiver of attorney-client privilege as to Egan.[2] Alternatively, the State argues that Cantrell's failure to waive privilege should have resulted in a denial of his claims of ineffective assistance of counsel and a dismissal of his petition.

In the underlying criminal proceeding, the Office of the Public Defender was appointed to represent Cantrell. Johnston was assigned and began representation of Cantrell on February 5, 2007. Seventeen months later, due to Johnston's personal health problems, Cantrell's case was reassigned to Egan. Egan's representation began three weeks before trial.

[2]As a subpoint, the State also argues that the trial court erred in precluding it from proffering alleged attorney-client privileged testimony. This subpoint is rendered moot by our resolution of the primary privilege issue.

Both of these individuals may have knowledge of facts relating to issues raised in Cantrell's Rule 37.1 petition.

In filing a petition under Rule 37.1, Cantrell argues that he was denied a fair trial because he did not receive effective assistance of counsel. By filing the petition, he put in controversy the professional conduct of counsel, and as a condition of pursuing that petition, he must waive all attorney-client privilege with respect to the issues raised in the petition. *See Jacobs v. State*, 253 Ark. 35, 484 S.W.2d 343 (1972) (holding in a postconviction proceeding that when a client asserts a breach of duty by his attorney, the attorney is no longer bound by his obligation of secrecy and may testify as to the facts).

Upon remand, if Cantrell refuses to waive the privilege, with respect to the issues raised in the petition, then the petition must be dismissed by the circuit court. If he wishes to proceed the privilege must be waived, with respect to the issues raised in the petition, as to any counsel with knowledge of facts relating to his allegations of ineffective assistance of counsel. The privilege is his to waive. *See Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986). As holder of the privilege, Cantrell must be given this choice: "If you want to litigate the [ineffective assistance of counsel] claim, then you must waive [the] privilege to the extent necessary to give your opponent an opportunity to defend against it." *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003). Cantrell cannot use the privilege as both a shield and a sword. *United States v. Workman*, 138 F.3d 1261 (8th Cir. 1998). The circuit court abused its discretion in allowing Cantrell to proceed in the absence of the necessary waiver. We therefore reverse and remand for further proceedings consistent with this opinion.

We address the State's remaining argument because it is likely to arise on remand if Cantrell elects to waive his privilege and proceed with his petition. Although the circuit court recited the correct test to be applied from *Strickland*, *supra*, the circuit court clearly erred in its application of the prejudice prong of that test.

The circuit court's findings with respect to prejudice are conclusory in nature and do not reflect that they were made while "consider[ing] the totality of the evidence before the judge or jury" as required by *Strickland*, 466 U.S. at 695. *Strickland* requires that "[i]n weighing the prejudice which accrued from an error by counsel, the totality of the evidence before the jury must be considered." *State v. Brown*, 2009 Ark. 202, at 11-12, 307 S.W.3d 587, 594. Additionally, the circuit court's findings do not reflect that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" as required by *Strickland*, 466 U.S. at 694. Rather, the circuit court's findings as to prejudice concluded only that the result "may" have been different. *Strickland* makes clear that "[i]t is not enough for the defendant to show that the errors had *some conceivable effect* on the outcome of the proceeding." *Strickland*, 466 U.S. at 693 (emphasis added). Therefore, under the express language of *Strickland*, the circuit court's use of the word "may" is not sufficient.

Reversed and remanded.

DANIELSON, J., concurs in the disposition.