Cite as 2011 Ark. 478

SUPREME COURT OF ARKANSAS

No. CR 10-143

REGINALD DARNELL RICHARDSON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 10, 2011 APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT, CR 2005-098, HON. LARRY CHANDLER, JUDGE AFFIRMED.

PER CURIAM

Appellant Reginald Darnell Richardson appeals from the denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007). For reversal, appellant argues that the trial court failed to hold a hearing on his petition. Appellant also asserts that trial counsel was ineffective for failing to object to a verdict form and for failing to object when appellant was not arraigned on an enhanced charge. We affirm.

Appellant was convicted of possession of cocaine with intent to deliver. Because the offense was committed within 1000 feet of a public-housing facility, appellant's sentence was enhanced pursuant to Arkansas Code Annotated section 5-64-411(a)(4) (Repl. 2005), and he was sentenced to a total of 360 months' imprisonment. Appellant timely appealed, and the Arkansas Court of Appeals affirmed. *Richardson v. State*, CACR 06-642 (Ark. App. Mar. 14, 2007) (unpublished). Appellant timely filed a Rule 37.1 petition, arguing that the verdict form used for the sentencing enhancement incorrectly asserted that he possessed cocaine "for sale" within

1000 feet of a public housing development rather than stating that he possessed cocaine "with intent to deliver." Appellant also contended that, because his trial counsel was under investigation for ethical violations, he was entitled to Rule 37.1 relief. Appellant then filed a document styled "Supplemental Pleading" and raised an additional argument concerning his consecutive sentences. Appellant also filed an amended Rule 37.1 petition, alleging that he was entitled to postconviction relief because he had never been arraigned on the enhancement statute and that the enhancement portion of his sentence should be voided. In response, the State argued that the amended petition did not assert any basis for postconviction relief. Subsequently, appellant filed a second amended petition, reasserting his argument that he was never arraigned on count two and adding that his counsel was ineffective for failing to seek dismissal of the enhancement charge or not objecting to appellant's being tried on the enhancement provision. By an order entered on October 22, 2009, the circuit court denied his petition. From this order, appellant brings his appeal.

For his first point on appeal, appellant argues that the circuit court erred by failing to hold a hearing on his Rule 37.1 petition. Rule 37.3(a) provides that, "[i]f the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings." We will affirm the denial of a Rule 37.1 petition, notwithstanding the circuit court's failure to make adequate written findings under Rule 37.3 in two circumstances: (1) where it can be determined from the record that the petition is wholly without merit; (2) where the allegations in the petition are such that it is conclusive on the face

of the petition that no relief is warranted. *Shaw v. State*, 2010 Ark. 112 (per curiam). In the present case, regardless of the sufficiency of the circuit court's findings in the order, we determine that appellant's argument is without merit. Here, the trial court examined the record, found appellant's ineffective-assistance-of-counsel claims without merit, entered written findings to that effect, and denied the petition without a hearing. For the reasons set forth below, we agree that the record conclusively shows appellant's allegations to be without merit, and we cannot say that the trial court's decision to render its order without a hearing was clearly erroneous. *Id.*

For the second point on appeal, appellant argues that his trial counsel was ineffective for failing to object to a wording error contained in one verdict form. Specifically, appellant contends that counsel failed to object to the words "for sale" in the second portion of the verdict form, AMC Crim. 2d 8301. Appellant asserts that the words "for sale" did not conform to the language in the information, instructions, or other verdict forms at trial.

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. 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.*

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 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *see Jamett 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.

Turning to appellant's argument, we note that AMI Crim. 2d 8301, the Stage One Standard Verdict Form, which states:

> If your verdict is guilty, you shall make the following determination:
> We, the Jury, find beyond a reasonable doubt that [appellant] possessed cocaine *for sale* within 1,000 feet of a publicly funded and administered multifamily housing development.

(Emphasis added.) At the bottom of the verdict form, the jury checked the "yes" box as to its finding on this issue.

Given this verdict form, we conclude that the use of the words "for sale" in the verdict form was harmless because the correct statutory language was consistently used throughout the other pleadings, instructions, and verdict forms. The jury was informed at trial, pursuant to the felony information, that appellant was charged with possession of cocaine with intent to deliver within 1000 feet of a public-housing development. Thus, any error on the part of counsel was harmless, and appellant failed to prove prejudice. *See Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999).

For the third point on appeal, appellant argues that his trial counsel was ineffective for failing to object to the circuit court's failure to arraign him on the enhanced charge of possessing cocaine within 1000 feet of a public-housing development.

When a defendant appears and announces that he is ready for trial, he or she waives formal arraignment. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006) (citing *Hill v. State*, 251 Ark. 370, 472 S.W.2d 722 (1971)). A failure to arraign is not reversible error if the record shows that the defendant received every right that he would have received if arraigned. *Id.* (citing *Hobbs v. State*, 86 Ark. 360, 111 S.W. 264 (1908)). Here, appellant was not prejudiced by the lack of a formal arraignment on the enhancement. Appellant received the same rights at trial as he would have had he been arraigned. Because appellant was tried on that charge, he waived formal arraignment by appearing and announcing that he was ready for trial. Further, appellant failed to prove that he suffered any prejudice by not being arraigned. Thus, we conclude that trial counsel was not ineffective for failing to object on this basis. *Id.* For these reasons, we hold that the circuit court properly denied appellant's petition for postconviction relief. Accordingly, we

affirm.

Affirmed.