Cite as 2011 Ark. 492

SUPREME COURT OF ARKANSAS

No. CR 09-956

Opinion Delivered November 17, 2011

RICKY J. REESE, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE CHICOT COUNTY CIRCUIT COURT, CR 2005-69, HON. DON GLOVER, JUDGE

AFFIRMED.

PER CURIAM

Appellant Ricky J. Reese, Jr., was convicted in the Chicot County Circuit Court of capital murder and of being a felon in possession of a firearm. He was sentenced to an aggregate term of life imprisonment without the possibility of parole. This court affirmed. *Reese v. State*, 371 Ark. 1, 262 S.W.3d 604 (2007). Appellant subsequently filed in the trial court a petition seeking postconviction relief on grounds of ineffective assistance of counsel pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007). After a hearing, the circuit court denied the petition. Appellant now brings this appeal, claiming error in the circuit court's decision. We affirm.

Prior to his trial, appellant moved to suppress his confession, asserting that it was involuntary because he had been drinking alcohol and using drugs prior to giving his statement to the police. The circuit court denied the motion, and we upheld that decision on appeal. *See id.* In his Rule 37.1 petition, appellant contended that he received ineffective assistance of counsel at trial and on direct appeal because his counsel on both occasions did not raise the issue that the State had failed to produce all material witnesses to his confession, as required by *Smith*

v. State, 254 Ark. 538, 494 S.W.2d 489 (1973), and its progeny. In denying appellant's petition, the circuit court found that counsel's performance was not deficient because any objection to the State's failure to present the testimony of an officer who was a witness to his confession would have been unavailing. In this regard, the trial court ruled that, although the officer did not testify, the State satisfied its obligation to "produce" all material witnesses to the confession because the officer was present at the suppression hearing and was sworn in as a witness. The circuit court also found that, in any event, appellant had failed to demonstrate prejudice because appellant failed to proffer the substance of what the officer's testimony would have been had he testified at the suppression hearing.

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. *Clarks v. State*, 2011 Ark. 296 (per curiam).

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). 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. *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. *Id.*

In this appeal, appellant contends that the trial court erred in denying his request for postconviction relief because of his counsel's failure to raise the material-witness rule at trial and on direct appeal. In *Smith*, we emphasized the familiar rule that an in-custody confession is presumed involuntary and that the burden is on the State to show that the statement was given voluntarily, i.e., freely and understandably made without hope of reward or fear of punishment. 254 Ark. 538, 494 S.W.2d 489. In keeping with that tenet, we adopted the rule that, whenever an accused offers testimony that his confession was induced by violence, threats, coercion, or offers of reward, then the State has a burden to produce all material witnesses who were connected with the controverted confession or to give adequate explanation for their absence. *Id.* at 542, 494 S.W.2d at 491. The State's burden to produce all material witnesses exists regardless of whether the defendant specifically raises the issue in the trial court or on appeal. *Brown v. State*, 347 Ark. 44, 60 S.W.3d 422 (2001). When the State fails to produce all material witnesses to the confession, we may employ a limited remand for the purpose of conducting a

new suppression hearing to allow all material witnesses to testify. *See id.*

Our case law makes clear that the requirement of producing all material witnesses is a necessary component of the State's burden of proof to show that a confession is voluntary. *See, e.g.*, *Brown*, 347 Ark. 44, 60 S.W.3d 422; *Bushong v. State*, 267 Ark. 113, 589 S.W.2d 559 (1979); *Smith v. State*, 256 Ark. 67, 505 S.W.2d 504 (1974). "It is no excuse that a defendant fails to call the material witnesses. That burden is clearly upon the State." *Bushong*, 267 Ark. at 118, 589 S.W.2d at 562. As this requirement is part of the State's burden of proof, we cannot agree with the trial court's conclusion that the State discharged its burden in this instance by merely securing the officer's presence at the suppression hearing.

We do agree with the circuit court, however, that appellant failed to demonstrate that counsel was ineffective. Trial counsel cannot be ineffective for failing to make an objection or argument that is without merit. *Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (per curiam). In this case, appellant failed to show that an objection to the prosecution's failure to produce witnesses based upon the rule in *Smith* would have been successful.

The rule is limited to occasions where an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward. *See Northern v. State*, 257 Ark. 549, 518 S.W.2d 482 (1975). The circumstances here did not fall within those strictures.

Appellant contested the admission of his statement, but he did so on the basis that he was so inebriated that he did not give his statement knowingly and voluntarily, not on any of the bases that invoke application of the rule in *Smith* and its progeny. At the suppression hearing, appellant testified had he had an argument with the police chief and that the chief "pulled his

little gun." Appellant did not, however, represent that his confession was in any way induced by that incident; rather, he maintained that he did not understand his rights because he had been drinking alcohol and had taken cocaine, and he pointed to the argument as an example of his intoxicated behavior.

The rule in *Smith* is applicable, as appellant contends, where the issue makes the witness testimony crucial for the trial court to fully evaluate the circumstances surrounding the statement. *See Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995). Where, as here, the issue turns on the amount of intoxicants ingested and the potential impact of those intoxicants on the defendant's judgment, eye-witness observations of the events leading up to the defendant's statement are simply not so crucial, and the rule is inapplicable. There was no need for the court to evaluate potentially coercive behavior by the police. An objection at trial or on appeal on the basis that the State had failed to meet its burden under *Smith* would not have been meritorious; because *Smith* was not applicable, counsel was not ineffective for failing to make the objection on that basis. Accordingly, we affirm the circuit court's decision denying postconviction relief.

Affirmed.