

SUPREME COURT OF ARKANSAS

No. CR-10-716

JOE ANTHONY SIMMONS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 9, 2012

PRO SE APPEAL FROM THE
WASHINGTON COUNTY CIRCUIT
COURT, CR 2007-2359, HON.
WILLIAM A. STOREY, JUDGE

AFFIRMED.

PER CURIAM

Appellant Joe Anthony Simmons appeals the denial of his petition for postconviction relief from his conviction in 2008 on drug-related charges and failure to appear. Appellant's sole point on appeal is that the trial court erred in finding that trial counsel was not ineffective for failing to object to the restraints used on appellant during his jury trial or for failing to request an instruction ordering the jury not to consider those restraints in their deliberations. Because there was no clear error in the trial court's findings, we affirm.

Appellant appealed his conviction and the judgment reflecting an aggregate sentence of 720 months' incarceration with 360 months' suspended sentence. The Arkansas Court of Appeals affirmed. *Simmons v. State*, 2009 Ark. App. 705. Appellant then filed a timely, verified petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011). One of the claims of ineffective assistance in the petition¹ asserted that trial counsel should have objected to the use of a stun belt as a restraint and that counsel should have requested

¹Appellant raised other claims in the petition below, but claims not argued on appeal are abandoned. *Hayes v. State*, 2011 Ark. 327, 383 S.W.3d 824 (per curiam); *Anderson v. State*, 2010 Ark. 404, 373 S.W.3d 876 (per curiam).

a jury instruction concerning the restraint. Following a hearing, the trial court denied the petition in an order that provided findings of fact and conclusions of law. Concerning the claim at issue, the trial court found that the stun belt was not visible to the jury, that the belt was not used to shock appellant during the trial, and that the belt did not prevent appellant from assisting counsel. The trial court set out conclusions of law that stated that appellant had failed to show either deficient performance by counsel or a reasonable probability that the decision reached would have been different absent the alleged errors.

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); *Flowers v. State*, 2010 Ark. 364, 370 S.W.3d 228 (per curiam); *Dunlap v. State*, 2010 Ark. 111 (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. *Payton*, 2011 Ark. 217; *Hawthorne v. State*, 2010 Ark. 343 (per curiam); *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam).

Our standard of review requires that we assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fernandez v. State*, 2011 Ark. 418, 384 S.W.3d 520 (per curiam). Under the *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. *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Id.*

In order to meet the second prong of the test, the petitioner must show that counsel's deficient performance prejudiced petitioner's defense so that he was deprived of a fair trial. *Montgomery v. State*, 2011 Ark. 462, 385 S.W.3d 189. Concerning the prejudice requirement, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In order to demonstrate prejudice for a failure to object, appellant must have submitted facts to support the proposition that counsel could have raised a specific, meritorious argument and that failing to raise that specific argument would not have been a decision supported by reasonable professional judgment. *Jones v. State*, 2011 Ark. 523 (per curiam). Appellant did not identify any meritorious argument that counsel might have made to have prevented use of the stun belt.

When determining whether a particular physical restraint is justified, a trial court may take such steps as are reasonably necessary to maintain order in the courtroom, and restraints are not per se prejudicial. *Holt v. State*, 2011 Ark. 391, 384 S.W.3d 498. A defendant must affirmatively demonstrate prejudice, and we will not presume prejudice when there is nothing in the record to indicate what impression may have been made on the jurors or where the appellant did not offer any proof of prejudice. *Id.*

Due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007) (citing *Deck v. Missouri*, 544 U.S. 622 (2005)). The Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court

determination that they are justified by a state interest specific to a particular trial. *Holt*, 2011 Ark. 391, at 11, 384 S.W.3d at 506 (quoting *Deck*, 544 U.S. 622). The key prejudice in such instances stems from the fact that the restraints are visible to the jury.

Appellant alleged that he was so intimidated by the stun belt that he was unable to assist counsel because he was afraid to communicate or move suddenly. But counsel testified at the Rule 37.1 hearing that appellant did not appear intimidated and passed him a number of notes with comments concerning the evidence. Appellant admitted that the stun belt was not visible to the jurors and that he was not shocked by the stun belt during the trial. He testified competently during the trial, and there is nothing in the record to indicate that the jury observed any visible evidence of the restraint. We cannot say that the trial court was clearly erroneous in finding that the stun belt was not visible or that appellant was not prevented in assisting counsel. We agree with the trial court's conclusion that appellant failed to demonstrate prejudice to support the claim that counsel was ineffective for failing to object on the basis of the restraint.

The trial court made no specific factual findings concerning any alleged failure to request a jury instruction, but appellant could not have been prejudiced if the jury was unaware of the stun belt. Any instruction that called attention to the restraint would have been prejudicial. The trial court's general conclusion that appellant failed to demonstrate prejudice was appropriate concerning this allegation as well. Because there was consequentially no clear error in the trial court's findings and its conclusion that trial counsel was not ineffective, we affirm the court's order denying postconviction relief.

Affirmed.