

SUPREME COURT OF ARKANSAS

No. CR-10-808

BRIAN K. HEARD A/K/A BRYAN K.
HEARD
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 16, 2012

APPEAL FROM THE CALHOUN
COUNTY CIRCUIT COURT, NOS.
CR 2007-30, CR 2008-15, HON.
MICHAEL R. LANDERS, JUDGE

AFFIRMED.

PER CURIAM

Appellant Brian K. Heard, who is also known as Bryan K. Heard, brings an appeal of the denial of his pro se petition for postconviction relief from two judgments entered in 2009 on a number of drug-related charges. Appellant, now represented by counsel, raises a single point on appeal, alleging error in that the trial court should have found that appellant's guilty plea was coerced and that trial counsel was ineffective. There was no clear error in the trial court's findings, and we affirm.

The two judgments reflect that appellant entered negotiated guilty pleas to a total of four counts of delivery of a controlled substance as to various drugs and that eleven other charges in the two cases were nolle prossed. The plea agreement indicated that appellant was sentenced by the court in a separate hearing, and the sentences imposed were to run consecutively for an aggregate sentence of 1200 months' incarceration for both judgments.

Appellant filed a timely, verified, pro se petition under Arkansas Rule of Criminal

Procedure 37.1 (2011) that raised five claims for postconviction relief.¹ In the first of those claims, appellant alleged that trial counsel had strongly urged him to enter a guilty plea and throw himself on the mercy of the court. He went on to assert that counsel had failed to properly advise him of the amount of time to which he could have been sentenced; that counsel's advice was unprofessional and unreasonable; and that counsel provided faulty advice that, in counsel's experience, appellant would receive less than the fifty years offered by the State if the court imposed a sentence without that recommendation.

At the postconviction-relief hearing, appellant, then represented by counsel, testified that his attorney had sent a letter to appellant's mother stating that additional fees would be charged for counsel's representation if appellant's case went to trial. Appellant testified that he had no more money with which to pay counsel and had no choice but to enter a guilty plea. In his testimony, appellant indicated that counsel had not advised him that the court could stack the sentences. He stated that, if he had realized that he could get one hundred years, he would have insisted on going to trial. Appellant testified that he had to make the decision because the court had denied his motion to suppress evidence. Appellant stated that the prosecutor had been offering fifty years when appellant hired counsel and that counsel had promised to work the offer down to fifteen years. On appeal, appellant contends that counsel's actions coerced him into accepting the plea agreement, and that, but for counsel's unethical conduct and errors, he would not have entered a guilty plea.

The burden is on the petitioner to prove his allegations for postconviction relief.

¹Any claims that appellant raised in the petition below but did not argue 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).

Henson v. State, 2011 Ark. 375 (per curiam). We do not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Id.* 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 made. *Id.*

With the exception of claims that present an indirect attack on the judgment or that allege fundamental error relating to a separate sentencing proceeding, cognizable claims where a defendant pleads guilty are limited to those asserting that the petitioner's plea was not entered intelligently and voluntarily upon advice of competent counsel. *Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (per curiam). We assess the effectiveness of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Biddle v. State*, 2011 Ark. 358 (per curiam). 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.* In order for a defendant to show that he was specifically prejudiced by counsel's deficient assistance prior to, or during the entry of, the defendant's guilty plea, the defendant must show that a reasonable probability exists that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Id.*

In the order denying postconviction relief, the trial court found that appellant made "an independent decision" to reject the State's offer for a plea agreement recommending a fifty-year sentence. The court further found that appellant presented no witnesses at the sentencing hearing and offered no basis for the court to grant leniency. The trial court

concluded that the sentence was not unreasonable or unconstitutional.²

Appellant asserts on appeal that the trial court should have found that appellant's plea was coerced because counsel demanded additional money for a jury trial and that appellant had no choice but to enter the guilty plea. In finding that appellant's plea was "independent," it appears that the trial court concluded that appellant's plea was not coerced as a result of his attorney's demand for additional money. The court was under no obligation to find that appellant's testimony, even if undisputed, was credible concerning this issue.

The trier of fact is free to believe all or part of any witness's testimony. *Hoyle v. State*, 2011 Ark. 321, 388 S.W.3d 901 (per curiam). Conflicts in testimony are for the fact-finder to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Id.* Here, the court concluded that appellant was not credible in his testimony to establish that he would not have entered guilty pleas in the two cases if counsel had not pressured him by requesting more money for a trial.

That conclusion appears well founded. Appellant's other testimony made it apparent that he considered his chances at trial after unsuccessfully moving to suppress evidence and that he was strongly influenced by the amount of time offered by the prosecution. Appellant's original claim in his petition did not reference counsel's letter or other demand for additional

²The State contends in its brief that appellant has provided an insufficient record upon which to affirm because it does not contain a record of the plea hearing. The trial court did not, however, otherwise reference the plea hearing, indicate that it had considered some aspect of what occurred during the plea hearing, or otherwise appear to base its findings and conclusions for the single issue on information contained in the plea hearing. In this particular instance, the issues are such that we can conduct our review without a record of those proceedings.

money, and his focus was clearly on the length of the sentence he would receive rather than whether he should admit his guilt.

If appellant did not provide credible evidence to support his claim that he was coerced and would not have entered a guilty plea had counsel provided effective assistance, then he did not meet his burden to show prejudice from any deficient performance on the part of trial counsel. Accordingly, we hold that the trial court did not err in denying postconviction relief and affirm the court's order.

Affirmed.