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Cite as 2012 Ark. 142

SUPREME COURT OF ARKANSAS

No. CR11-406

WILLIAM MACK EUBANKS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 5, 2012 APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT [NO. CR1995-147] HONORABLE RUSSELL ROGERS, JUDGE AFFIRMED.

JIM HANNAH, Chief Justice

William Mack Eubanks appeals an order of the Franklin County Circuit Court denying his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. Eubanks asserts that the circuit court erred because his trial counsel was ineffective for failure to challenge his prosecution based on speedy trial and for failure to mount a constitutional challenge to the pedophile exception recognized by this court under Arkansas Rule of Evidence 404(b). We find no error and affirm. Eubanks was convicted of rape and sentenced to life imprisonment. *See Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2011).

The effectiveness of counsel is assessed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

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on as having produced a just result." *Strickland*, 466 U.S. at 686.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The petitioner bears the burden of overcoming a presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Howard v. State*, 367 Ark. 18, 32, 238 S.W.3d 24, 35 (2006). Petitioner must identify specific acts and omissions that, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Isom v. State*, 2010 Ark. 495, at 2, 370 S.W.3d 491, 494. 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. *State v. Brown*, 2009 Ark. 202, at 8, 307 S.W.3d 587, 593.

Eubanks first asserts that the circuit court erred in excusing counsel's failure to assert Eubanks's right to a speedy trial. Eubanks's first trial on November 15 and 16, 2006, resulted in a mistrial. At the hearing on Eubanks's Rule 37 petition, the State argued that he had been brought to trial the first time within 320 days of his arrest. Eubanks agreed that he had been brought to trial within one year. The following discussion took place at the hearing:

> COUNSEL FOR EUBANKS: I approached it in a slightly different way, but came within a day of that.

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THE COURT: Three twenty or three twenty-one? Okay.

COUNSEL FOR EUBANKS: Which either way it doesn't matter, --

THE COURT: All right.

COUNSEL FOR EUBANKS: -- I mean, because it's not 365.

There is no issue on speedy trial with respect to the first trial.

Where a defendant is retried following a mistrial, the time for trial begins to run from the date of the mistrial. Ark. R. Crim. P. 28.2(c) (2006). Eubanks's retrial commenced on March 20, 2008, 491 days after the mistrial.

> If a defendant is not brought to trial within the requisite time, Rule 30.1 of the Arkansas Rules of Criminal Procedure (2011) provides that the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Once the defendant establishes that the trial is or will be held outside the applicable speedy-trial period, [he] has presented a prima facie case of a speedy-trial violation, and the State then has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. On appeal, we conduct a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules.

Sullivan v. State, 2012 Ark. 74, at 3, 386 S.W.3d 507, 511 (citation omitted). Eubanks moved for and was granted a continuance from October 4, 2007, to March 20, 2008. This constituted a delay of 168 days attributable to Eubanks. *See* Ark. R. Crim. P. 28.3(c). Subtracting this period of delay from 491 days means that Eubanks's trial commenced on day 323. Because he was brought to trial within one year from the date of the mistrial there is no violation of his right to a speedy trial. *See* Ark. R. Crim. P. 28.1(c). Therefore, the circuit court was not clearly erroneous and, we affirm its conclusion that Eubanks failed to show that his trial counsel was ineffective for failure to assert a violation of his right to a

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speedy trial.

Eubanks next asserts that trial counsel was ineffective for failure to make a constitutional challenge to the use of the pedophile exception in admission of evidence. This court recently reaffirmed application of the exception, stating that "[t]his court's precedent has recognized a 'pedophile exception' to this rule, whereby evidence of similar acts with the same or other children is allowed to show a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship." *Hendrix v. State*, 2011 Ark. 122, at 7–8. We therefore cannot conclude that the failure to make a constitutional challenge to an established evidentiary rule constitutes an error so serious that "counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Affirmed.

John Wesley Hall, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.