

**SUPREME COURT OF ARKANSAS**

No. CR-09-929

VINCE DWAYNE GREER  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** April 12, 2012

APPEAL FROM THE GRANT  
COUNTY CIRCUIT COURT  
[CR 2007-80, HON. PHILLIP H.  
SHIRRON, JUDGE]

AFFIRMED.

**PER CURIAM**

Appellant Vince Dwayne Greer appeals the denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). For reversal, appellant argues that the circuit court erred in dismissing his petition without a hearing and without written findings of fact. Appellant also raises several ineffective-assistance-of-counsel claims. We affirm the denial of postconviction relief.

A Grant County jury found appellant guilty of internet stalking of a child and sentenced him to sixteen years' imprisonment. The court of appeals affirmed appellant's conviction in *Greer v. State*, CACR 08-32 (Ark. App. Sept. 17, 2008) (unpublished), and we denied his petition for review. *Greer v. State*, CR 08-1166 (Ark. Nov. 20, 2008) (per curiam). Appellant filed a petition for postconviction relief in the circuit court, alleging that his defense counsel rendered ineffective assistance for failing to present the defense of entrapment; to make proper motions for directed verdict; to present any witnesses in the guilt phase; to properly cross-examine witnesses; and to subpoena the records of an internet provider. The

State filed a response to appellant's petition, requesting a denial of appellant's petition. Without a hearing, the circuit court denied the petition and entered an order, which stated, "The court finds the petition should be denied for the reasons set forth in the response to the petition filed January 23, 2009." From that order, appellant brings his appeal.

As a threshold matter, appellant argues that the circuit court erred in dismissing his petition for postconviction relief and contends that, without a hearing, the circuit court should have provided written findings of fact and conclusions of law. Rule 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *See Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999) (citing *Bohanan v. State*, 327 Ark. 507, 939 S.W.2d 832 (1997) (per curiam)). When it dismisses a Rule 37.1 petition without an evidentiary hearing, 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." Ark. R. Crim. P. 37.3(a); *see Rodriguez v. State*, 2010 Ark. 78 (per curiam). Without such specific findings, there can be no meaningful review because, on review, we determine whether the findings are supported by a preponderance of evidence, and, unless the findings are clearly erroneous, they will be affirmed. *See Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). If the circuit court fails to make such findings, it is reversible error, except in cases where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *See Rodriguez*, 2010 Ark. 78; *see also Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). It is not incumbent on this court to scour the record in a Rule 37.1 appeal to determine if the petition is wholly

without merit when there are no written findings. *Reed*, 375 Ark. 277, 289 S.W.3d 291. When no hearing is held, that is the circuit court's function. *See id.* Here, appellant's claims, which are discussed below, are wholly without merit and present no impediment to our review. Thus, on this issue, we conclude the circuit court did not err by denying his Rule 37.1 petition without making written findings or conducting a hearing. *See Rodriguez*, 2010 Ark. 78.

On appeal, appellant asserts that counsel was ineffective for failing to present the defense of entrapment; to call appellant as a witness; to call certain witnesses; to cross-examine witnesses in an effective manner; to subpoena the records from an internet provider; and to make a proper directed-verdict motion. Assertions of ineffective assistance of counsel must be examined in light of the criteria set out in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must show first that counsel's performance was deficient in that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial the outcome of which cannot be relied on as just. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

For the first point on appeal, appellant argues that his trial counsel was ineffective for failing to understand the entrapment defense, and as a result, the circuit court erred in refusing his proffered entrapment instruction. Specifically, appellant contends that trial counsel did not realize that appellant could deny the allegations and simultaneously claim entrapment.

Consequently, appellant claims that counsel decided not to call him as a witness at trial to admit the allegations. Appellant asserts that, as a result, the jury would not have convicted him if it had been instructed on entrapment.

As a general rule, counsel's advice to a defendant on whether to testify is a tactical decision, which is beyond the purview of an ineffective-assistance claim. See *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985). We note that the burden imposed by the affirmative defense of entrapment is likely to result in a defendant's testifying. See *Wilson v. State*, 261 Ark. 5, 545 S.W.2d 636 (1977). However, in the present case, trial counsel's alleged failure to call appellant is not per se ineffective assistance, particularly when appellant failed to allege what his testimony would have been if he had been called to testify. We have stated that a petitioner "must state specifically what the content of his testimony would have been and demonstrate that his failure to testify resulted in actual prejudice to his defense." *Isom*, 284 Ark. at 430, 682 S.W.2d at 758. Because appellant generally alleged that he would "take the stand and admit the allegations[,]” appellant did not overcome the presumption that he was prejudiced as a result of any alleged ineffective assistance of counsel. For these reasons, we hold that the circuit court properly denied relief on these grounds.

For the second point on appeal, appellant argued that his counsel was ineffective for failing to call two specific witnesses at trial. Appellant contends that Shamin A. Malik, M.D., and Rickey Phillips, two psychiatric professionals, "could have testified that he was not predisposed to commit the offense" because they "[b]oth had ruled out the possibility of [his] having any pedophile tendencies."

The objective in reviewing an assertion of ineffective assistance of counsel concerning

the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice that denied the petitioner a fair trial. *Woody v. State*, 2009 Ark. 413 (per curiam). It is incumbent on the petitioner who claims ineffective assistance based on failure to call a witness to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Shipman v. State*, 2010 Ark. 499 (per curiam). In order to demonstrate prejudice, appellant was required to establish that there was a reasonable probability that, had counsel performed further investigation and presented the witness, the outcome of the trial would have been different. *Id.* In this case, appellant claims that these witnesses would have testified that he was not predisposed to commit the offenses because of any alleged lack of pedophile tendencies. However, appellant failed to demonstrate a reasonable probability that their testimony would have changed the outcome of the trial. Thus, we conclude that appellant did not demonstrate actual prejudice.

For the third point on appeal, appellant argued that trial counsel was ineffective because he did not properly cross-examine the State's sole witness, the testifying officer, about the evidence surrounding the internet chat between appellant and the undercover officer posing as a young girl. Appellant claims that counsel should have subpoenaed the records from the internet provider to show the true contents of the conversation. Appellant further asserts that trial counsel failed to object to the introduction of these documents. We have stated that conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Kelley v. State*, 2011 Ark. 175 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *Eastin v. State*, 2010 Ark. 275. Here, as stated, appellant failed to offer factual substantiation for the

allegations sufficient to make a showing of prejudice to the defense. Appellant did not explain what additional cross-examination counsel should have conducted and fails to explain what portions of the documents were missing. Further, we have reviewed the transcript of the chat between appellant and the officer, and we conclude that no relief is warranted. *See Rodriguez*, 2010 Ark. 78 (noting that the record indicated why the petition was wholly without merit).

For the fourth point on appeal, appellant argues that trial counsel was ineffective for failing to make a proper motion for directed verdict, thereby barring any sufficiency-of-the-evidence claim, because the State failed to prove his age or that he acted knowingly. Appellant cannot rechallenge the weight and sufficiency of the evidence through a Rule 37.1 proceeding by framing his question as an allegation of ineffective assistance of counsel. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction; it is not a means for direct attack on the judgment or a substitute for an appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Appellant's argument constitutes a direct attack on the judgment and is therefore not cognizable under Rule 37.1. *Weatherford*, 363 Ark. 579, 215 S.W.3d 642. To the extent that this argument may present an actual ineffective-assistance-of-counsel claim, appellant fails to demonstrate that he suffered prejudice as a result of counsel's actions. The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Without such a showing, appellant fails to satisfy the prejudice prong of *Strickland*. *Id.* To prevail on this argument, appellant must demonstrate that trial counsel's motion for directed verdict would have been granted had the motion been articulated as appellant proposes. Appellant has failed to make such a showing.

Lastly, appellant asserts that the circuit court erred by denying his Rule 37.1 petition without allowing him to amend it. Here, the record is devoid of any requests by appellant to amend his petition. Further, he cites no authority that a circuit court has an obligation sua sponte to invite him to amend his petition before denying it. We will not consider an argument that presents no citation to authority or convincing argument. *See Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Therefore, for the foregoing reasons, we hold that the circuit court properly denied appellant's petition for postconviction relief. Accordingly, we affirm.

Affirmed.