

SUPREME COURT OF ARKANSAS

No. CR 11-102

MARIO SCOTT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 12, 2012

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT, NO.
CR-07-1150, HON. JODI RAINES
DENNIS, JUDGE

AFFIRMED.

PER CURIAM

Appellant Mario Scott was charged in the Jefferson County Circuit Court with capital murder, and pursuant to a negotiated plea agreement, he pled nolo contendere to a reduced charge of first-degree murder. In exchange for the plea, the State recommended, and the circuit court imposed, a sentence of 300 months' incarceration to run consecutively to time that he was already serving in the Arkansas Department of Correction. During the plea hearing, the court informed appellant that he would have to serve the entirety of the 300-month sentence due to his prior felony convictions.

Subsequently, appellant filed in the circuit court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010), alleging ineffective assistance of counsel and asserting that the trial court was without jurisdiction to sentence appellant because it violated his Due Process and Sixth Amendment rights. The petition was denied without a hearing, and appellant timely filed the instant appeal from the trial court's order. We find no error, and we affirm.

This court does not reverse a denial of postconviction relief unless the circuit court's

findings are clearly erroneous. *Strain v. State*, 2012 Ark. 42 (per curiam) (citing *Reed v. State*, 2011 Ark. 115 (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. *Id.*

When a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to Rule 37.1 are those that allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. See *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam); *French v. State*, 2009 Ark. 443 (per curiam). There is no distinction between guilty pleas and pleas of nolo contendere for purposes of Rule 37.1. See *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996). Thus, we will only address appellant's ineffective-assistance-of-counsel claims and his argument that the trial court erred in dismissing appellant's Rule 37.1 petition without holding an evidentiary hearing. Appellant's due-process claim is not cognizable under Rule 37.1.

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 U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was effective. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007). Under the two-pronged *Strickland* test, a petitioner making 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. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007). In doing so, the claimant must overcome a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Cummings v. State*, 2011 Ark. 410 (per curiam) (citing *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007)). As to the second prong of the test, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Cummings*, 2011 Ark. 410 (citing *Gonder v. State*, 2011 Ark. 248, 382 S.W.3d 674 (per curiam)).

Appellant's first ineffective-assistance claim alleges that trial counsel failed to adequately investigate appellant's case or to prepare for trial, and that this failure by counsel resulted in appellant's pleading guilty. According to appellant, trial counsel visited with him no more than four times prior to trial, with each visit lasting no more than ten to fifteen minutes, and "it was clear that [counsel] had not investigated the case, nor [did he have] a working knowledge of the State's case-in-chief." Furthermore, appellant alleges, had counsel properly investigated the case, he would have discovered that three of the State's witnesses had pending felony charges and were testifying against appellant in exchange for dismissal or reduction of the charges, and there was a lack of evidence linking appellant to the murder. Finally, appellant avers that counsel failed to "inform [appellant] of the trial strategy" or inquire as to appellant's "thoughts of how he should be defended."

To establish prejudice under *Strickland* and demonstrate ineffective assistance of counsel, an appellant who has pled guilty must demonstrate a reasonable probability that, but for counsel's errors, he would not have so pled and would have insisted on going to trial. See *Cummings*, 2011 Ark. 410. Appellant's petition does not meet this burden. Appellant claims only that counsel's alleged failure to prepare left appellant with a "lack of confidence" in

counsel, and, when the State made the 300-month plea offer, this lack of confidence caused appellant to conclude that the offer was better than facing a potential life sentence if he went to trial on the capital-murder charge. Because appellant does not allege that he would not have pled guilty had counsel correctly investigated or prepared more thoroughly, appellant cannot establish prejudice based on this argument. See *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990). The trial court's denial of relief on this point was therefore not clearly erroneous.

Appellant's second claim is that counsel was ineffective for failing to object to the trial court's determination that the 300-month sentence was required to run consecutively to the sentence that appellant was already serving at the time of his guilty plea. Appellant argues that there is no statutory requirement for consecutive sentences in this situation and that, had counsel challenged this, appellant would have been able to start his 300-month sentence immediately.

However, appellant cannot establish prejudice under *Strickland*. To establish prejudice, appellant must demonstrate a reasonable probability that, had counsel objected to the consecutive-sentences requirement, appellant would not have pled guilty and would have insisted on a trial. Appellant cannot meet this burden because he pled guilty knowing that he would be sentenced to serve the full 300-month sentence after completing his prior sentence. Because appellant cannot show prejudice on this claim, it cannot support relief under Rule 37.1. See generally *Carter v. State*, 2010 Ark. 231 (per curiam) (holding that petitioner was entitled to no relief on an argument where he could not show prejudice); *State v. Smith*, 368

Ark. 620, 249 S.W.3d 119 (2007) (reversing circuit court’s grant of postconviction relief where petitioner could not show prejudice as a matter of law). Thus, the circuit court’s denial of relief on this point was not clearly erroneous.

Appellant’s final argument on appeal is that the circuit court erred in denying his petition for postconviction relief without holding an evidentiary hearing, because his allegation of ineffective assistance could only be established through witness testimony.

Under Rule 37.3, a circuit court may dismiss a petition without holding a hearing “if the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief.”¹ Ark. R. Crim. P. 37.3(a). Appellant’s ineffective-assistance claims failed because he did not demonstrate, or even allege, that he would not have pled guilty absent the alleged errors by counsel. Without some showing of prejudice as required by *Strickland*, it was conclusive on the face of appellant’s petition under this rule that no relief was warranted, and the trial court did not err in failing to hold an evidentiary hearing on the ineffective-assistance claims. See *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

In addition to the claims discussed above, appellant argued in his original petition and on appeal that the trial court was without jurisdiction to impose a sentence following appellant’s guilty plea. While he couches this argument in jurisdictional terms, his actual basis for the argument concerns alleged error by the court in accepting the guilty plea pursuant to

¹If a petition is dismissed without a hearing, the circuit 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). The circuit court made the required findings in the instant case.

Arkansas Rule of Criminal Procedure 24.6 (2010). This claim is not cognizable in a petition under Rule 37.1. See *Goodman v. State*, 2011 Ark. 438 (per curiam); *Miller v. State*, 2011 Ark. 114 (per curiam).

Because appellant failed to demonstrate prejudice as to any of the ineffective-assistance claims that he raised, the circuit court's denial of postconviction relief was not clearly erroneous.

Affirmed.