Cite as 2012 Ark. 215

SUPREME COURT OF ARKANSAS

No. CR 12-43

	Opinion Delivered May 17, 2012
JOE MCKINLEY JONES APPELLANT v. STATE OF ARKANSAS APPELLEE	APPELLANT'S PRO SE MOTIONS FOR EXTENSION OF TIME TO FILE BRIEF AND FOR APPOINTMENT OF COUNSEL [SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 02-1140, HON. STEPHEN TABOR, JUDGE] APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 2010, judgment was entered reflecting that appellant Joe McKinley Jones had been found guilty of having violated the conditions of a suspended sentence imposed on him in 2002. The Arkansas Court of Appeals affirmed the revocation of the suspended sentence. *Jones v. State*, 2011 Ark. App. 543.

In 2011, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), challenging the revocation order. The trial court denied the petition, and appellant has lodged an appeal in this court. Appellant now seeks by pro se motion an extension of time to file his brief-in-chief and appointment of counsel. As it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Perry v. State*, 2012

Ark. 98 (per curiam); *Riddell v. State*, 2012 Ark. 11 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Tucker v. State*, 2011 Ark. 543 (per curiam); *Jones v. State*, 2011 Ark. 523 (per curiam); *Eaton v. State*, 2011 Ark. 436 (per curiam); *Grant v. State*, 2011 Ark. 309 (per curiam); *Lewis v. State*, 2011 Ark. 176 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

On appeal from the revocation order, appellant argued that the trial court erred in denying his motion to exclude evidence seized in the search of his car. The court of appeals held that the exclusionary rule did not apply to revocation hearings unless the defendant demonstrated that the officers conducting the search acted in bad faith, an assertion not made on appeal.

Appellant alleged in his Rule 37.1 petition that his attorney was ineffective in that counsel failed to argue bad faith. The claim was not sufficient to establish ineffective assistance of counsel because appellant did not offer any basis on which a bad-faith argument could have been made at the revocation hearing or on appeal. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Perry*, 2012 Ark. 98; *Jones*, 2011 Ark. 523; *Payton v. State*, 2011 Ark. 217 (per curiam). Where a petitioner contends that his attorney should have raised an argument either at trial or on appeal, it is incumbent on the petitioner to establish that there was some meritorious ground for that argument. *See Jones*, 2011 Ark. 523. Counsel is presumed to be competent. *Branham v. State*, 292

Ark. 355, 730 S.W.2d 226 (1987) (citing *Rightmire v. State*, 275 Ark. 24, 627 S.W.2d 10 (1982)). Conclusory statements cannot overcome the presumption of counsel's competence. *Abernathy v. State*, 2012 Ark. 59, ___ S.W.3d ___ (per curiam).

Appellant also listed in the petition a number of other statements concerning his attorney's representation with no factual substantiation to support the general allegation that counsel's performance in the revocation proceeding was inadequate. He claimed that counsel failed to do the following: (1) object and defend against an uncertified police informant's testimony; (2) challenge the hearsay testimony of police; (3) challenge properly the illegal stop, search, and seizure; (4) challenge the "fact of an illegally imposed previously had term of imprisonment that was clearly brought to his attention and explained to same"; (5) object to the prejudice suffered at trial due to denial of defendant's motion to suppress. None of the allegations was sufficient to call into question counsel's competence because none was supported by any facts showing how petitioner was prejudiced by the alleged failures.

Petitioner concluded his petition with four statements, labeled "Grounds." The grounds were (1) evidence pursuant to an unconstitutional search and seizure; (2) evidence pursuant to an unlawful arrest; (3) denial of a fair and impartial trial and also direct appeal; (4) actual and constructive denial of counsel that was adequate for the trial and direct appeal. As with his prior claims, there was no explanation as to how the statements were related to the revocation proceeding.

With the first three statements that suggested assertions of trial error, there was also no showing of how the statements constituted a claim cognizable under Rule 37.1. Assertions

of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Lee v. State*, 2010 Ark. 261 (per curiam); *see also Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Rule 37.1 does not permit a direct attack on a judgment or permit a petition to function as a substitute for an appeal. *Frost v. State*, 2010 Ark. 440 (per curiam); *Hill v. State*, 2010 Ark. 102 (per curiam). The sole exception lies in claims raised in a timely petition that are sufficient to void the judgment and render it a nullity. *Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. The petition filed by appellant was not timely as to the original judgment of conviction entered in his case; the petition pertained to the revocation order only.

Again, the burden is entirely on the petitioner in a Rule 37.1 petition to provide facts to affirmatively establish that petitioner is entitled to postconviction relief. *Perry*, 2012 Ark. 98. Petitioner here did not meet that burden.

Appeal dismissed; motions moot.