

SUPREME COURT OF ARKANSAS

No. CR 12-61

ELVIS THACKER

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 10, 2012

APPELLANT'S PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF [SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 2010-977, CR 2010-1006, HON. J. MICHAEL FITZHUGH, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2011, appellant Elvis Thacker entered a plea of guilty to attempted capital murder and kidnapping. An aggregate sentence of 360 months' imprisonment was imposed.

Subsequently, 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). The trial court denied the petition, and appellant has lodged an appeal in this court from the order.

Appellant now seeks by pro se motion an extension of time to file his brief-in-chief. 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. 432 (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); *Meraṡ v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

Appellant alleged in his petition that his attorney was ineffective in that counsel failed to do the following: contest the search that led to appellant's arrest; move for change of venue; file a motion asking that the judge who was to take his plea recuse; challenge the kidnapping charge on the ground of insufficient evidence; inform appellant of the evidence against him. Appellant also contended that counsel violated attorney-client privilege by speaking with him at the detention facility where he was being held while police officers were present.

When a judgment is entered on a plea of guilty, with the exception of certain issues that appellant did not raise in his petition, cognizable claims are limited to those asserting that the petitioner's plea was not entered intelligently and voluntarily on advice of competent counsel. *Sandoval-Vega v. State*, 2011 Ark. 393, ___ S.W.3d ___ (per curiam). Here, appellant did not allege that he would not have entered his plea except for some error of counsel, and he did not contend that the plea was not intelligently and voluntarily entered. Appellant's claim that the evidence was not sufficient to support the kidnapping charge was not a cognizable claim under

Rule 37.1 because such challenges are a direct attack on the judgment.¹ *Jones v. State*, 2011 Ark. 523 (per curiam); *Delamar v. State*, 2011 Ark. 85 (per curiam). A petitioner who entered a plea of guilty waived his right to challenge the sufficiency of the evidence. *See Henson v. State*, 2011 Ark. 375 (per curiam).

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)). A defendant assumes a heavy burden in asserting that counsel's advice was lacking in competence. *Id.* (citing *United States v. Cronin*, 466 U.S. 648 (1984)). A defendant whose conviction is based upon a plea of guilty normally will have difficulty in proving any prejudice since his plea rests upon his admission in open court that he did the act with which he was charged. *McMann v. Richardson*, 397 U.S. 759 (1970); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984) (citing Ark. R. Crim. P. 24.6); *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982). The burden is on the appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

The appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby

¹The order entered in the Sebastian County Circuit Court, Fort Smith District, denying appellant's petition for postconviction relief said that the kidnapping charge was not "charged in this district." The judgment-and-commitment order, however, reflects both the Fort Smith and the Greenwood Districts in the heading. In any event, the allegation contained in the Rule 37.1 petition concerning the sufficiency of the evidence to sustain the kidnapping charge was not cognizable under the rule, and, thus, appellant did not state a ground on which postconviction relief could be afforded to him. Appellant did not allege, and the record does not support, a claim that the Sebastian County Circuit Court was without jurisdiction to accept his plea on the kidnapping charge.

waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). As appellant's claims of ineffective assistance of counsel were issues that could have been settled at trial, had appellant not elected to plead guilty, and as he did not allege that he would not have entered the plea absent some error by counsel, he did not overcome the presumption that his plea was entered voluntarily with the advice of competent counsel.

With respect to the assertion that his attorney violated the concept of attorney-client privilege, appellant did not state what information was overheard or that he would not have entered a guilty plea had the police officers not overheard his discussions with counsel. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *Jones*, 2011 Ark. 523; *Payton v. State*, 2011 Ark. 217 (per curiam). While a fundamental claim that would render the judgment in a criminal case void can be considered under Rule 37.1 after a plea of guilty is entered, even fundamental claims must be supported by facts to demonstrate that a fundamental right was denied to a particular petitioner under the facts of his or her case. *See Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984). Appellant did not meet his burden of demonstrating that his plea should be vacated under Criminal Procedure Rule 37.1.

Appeal dismissed; motion moot.