

SUPREME COURT OF ARKANSAS

No. CR 12-202

MICHAEL LEE COWAN

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 24, 2012

PRO SE MOTIONS FOR EXTENSION OF BRIEF TIME AND FOR PHOTOCOPYING AT PUBLIC EXPENSE [PRO SE APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 09-314, HON. JAMES O. COX, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

Appellant Michael Lee Cowan was convicted of two counts of sexual assault in the second degree and was sentenced as a habitual offender to 960 months' imprisonment. The Arkansas Court of Appeals affirmed. *Cowan v. State*, 2010 Ark. App. 715. Appellant subsequently filed a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010), which the circuit court denied without a hearing.

Appellant alleged on appeal that his counsel refused to allow him to testify. We found that appellant supported his claim with facts sufficient to render his allegations more than conclusory. We held that the trial court erred in denying appellant's petition for post-conviction relief without a hearing. *See Cowan v. State*, 2011 Ark. 537 (per curiam). Therefore, we remanded for an evidentiary hearing to determine whether counsel had indeed prevented appellant from testifying at trial. *Id.* The evidentiary hearing was held, and the circuit court entered an order denying postconviction relief. Appellant timely filed an appeal from that order.

Now before us are appellant's motions for extension of time in which to file his brief-in-chief and for photocopying at public expense of the transcript from the circuit court's evidentiary hearing. Because it is clear that appellant could not prevail if his appeal were allowed to proceed, the appeal is dismissed. An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Lowe v. State*, 2012 Ark. 185 (per curiam) (citing *Watson v. State*, 2012 Ark. 27 (per curiam)); *Riddell v. State*, 2012 Ark. 11 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Croft v. State*, 2010 Ark. 83 (per curiam). The motions are accordingly moot.

In its order denying relief, the circuit court held that counsel's advice to appellant not to testify at trial was a matter of trial strategy. The trial court found that appellant's testimony as a whole was disingenuous and without credibility. However, the trial court found that counsel's testimony that he had only advised appellant not to testify due to appellant's ten prior felony convictions to be plausible and believable.

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *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.* 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 United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not

ineffective. *Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___ (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that the deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair trial. *Reese v. State*, 2011 Ark. 492 (per curiam).

In cases where a petitioner claims ineffective assistance based on allegations that trial counsel prevented him or her from testifying at trial, and trial counsel denies the allegations, we have held that we defer to the circuit court's superior position to resolve credibility issues. *Lockhart v. State*, 2011 Ark. 396 (per curiam) (citing *Smith v. State*, 2010 Ark. 137, ___ S.W.3d ___). The circuit court was entitled to resolve the credibility issue in favor of counsel's competence, and this court defers to such credibility determinations. *Anderson v. State*, 2011 Ark. 488, ___ S.W.3d ___ (citing *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004)).

Because the circuit court found that trial counsel only advised appellant not to testify, and counsel did not prevent appellant from testifying, this case presents a situation analogous to *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988) (per curiam). In *Robinson*, we held that counsel's advice that a defendant should not testify was purely one of trial strategy, as was the defendant's ultimate decision not to testify, and that ineffective-assistance claims based on counsel's advice in such situations were not cognizable under Rule 37.1. *Id.*

Inasmuch as his argument is not cognizable in a Rule 37.1 petition, it is clear that appellant could not prevail on this argument if his appeal were allowed to proceed. *Lowe*, 2012 Ark. 185. Therefore, we dismiss the appeal, and appellant's motions are moot.

Appeal dismissed; motions moot.