

SUPREME COURT OF ARKANSAS

No. CR 11-97

BRUCE WADE PENNINGTON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 7, 2013

APPEAL FROM THE POINSETT
COUNTY CIRCUIT COURT, CR 08-252,
HON. RANDY F. PHILHOURS, JUDGE

AFFIRMED.

PER CURIAM

In 2008, the Poinsett County Prosecuting Attorney filed an information charging appellant Bruce Wade Pennington with capital murder in the death of Dorman Ray Cooper. On March 23, 2009, appellant entered a negotiated plea of guilty to first-degree murder and received a sentence of 420 months' imprisonment in the Arkansas Department of Correction. He filed a timely pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2012) that was denied by the trial court without a hearing. Now represented by counsel, appellant has lodged in this court an appeal of the order denying postconviction relief. We affirm the order because it is clear from the face of the Rule 37.1 petition that the allegations in the petition were without merit.

On appeal, appellant asserts that the trial court erred in denying relief without holding a hearing on the petition and without entering an order that provided written findings of fact. Arkansas Rule of Criminal Procedure 37.3 provides for summary disposition of petitions under Rule 37.1, and this court has interpreted Rule 37.3 as providing that an evidentiary hearing should be held unless it can be conclusively shown on the record or the face of the petition that

the allegations have no merit. *See Mitchell v. State*, 2012 Ark. 242. In the event that the trial court exercises its discretion to summarily dispose of a Rule 37.1 petition without a hearing, then Rule 37.3 requires the court to provide specific written findings identifying the portions of the record relied upon, and if the trial court fails to make those findings, it is reversible error, except in those 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 Charland v. State*, 2012 Ark. 246. Under the circumstances here, it is conclusive on the face of the petition that no relief was warranted.

Appellant set forth three claims for relief in the petition, each asserting ineffective assistance of counsel. In the first, appellant alleged that counsel was ineffective because he failed to investigate or develop a trial strategy, in that counsel failed to investigate a defense or mitigating evidence based upon testimony by an expert concerning appellant's psychiatric state when he admittedly killed Mr. Cooper. Appellant's second claim concerned counsel's failure to advise appellant concerning a viable defense strategy, again asserting that counsel failed to develop a viable defense. The third and final claim in the petition alleged that counsel incorrectly advised appellant about the possibility of parole before and during the entry of his plea.

Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Walton v. State*, 2012 Ark. 269 (per curiam). We assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Simmons v.*

State, 2012 Ark. 58 (per curiam); *Croy v. State*, 2011 Ark. 284, ___ 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. *Strain v. State*, 2012 Ark. 42, ___ S.W.3d ___ (per curiam). A claimant must satisfy both prongs of the test, and it is not necessary to determine whether counsel was deficient if the petitioner fails to demonstrate prejudice as to an alleged error. See *Abernathy v. State*, 2012 Ark. 59, ___ S.W.3d ___ (per curiam); *Kelley v. State*, 2011 Ark. 504; *Mitchem v. State*, 2011 Ark. 148 (per curiam).

In the context of pleas, a petitioner alleging ineffective assistance of counsel must show that the outcome of the plea process would have been different with competent advice. *Missouri v. Frye*, 132 S.Ct. 1399 (2012); see also *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). For a defendant who entered a guilty plea to prevail on a claim of ineffective assistance of counsel, he must establish prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have entered the plea and would have insisted on going to trial. See *Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___; see also *Hill v. Lockhart*, 474 U.S. 52 (1985). A petitioner under Rule 37.1 in those circumstances must allege some direct correlation between counsel's deficient behavior and the decision to enter the plea. *Scott*, 2012 Ark. 199, ___ S.W.3d ___. The burden is entirely on the petitioner to provide facts that affirmatively support the claims of prejudice. *Well v. State*, 2012 Ark. 308 (per curiam).

Appellant's petition failed to allege any facts to support a demonstration of prejudice concerning his claims. Not only did appellant fail to demonstrate that further investigation or

development of the case, if undertaken by counsel, might have been fruitful, but he did not plead any facts to demonstrate that counsel's alleged inaction, or counsel's alleged mistakes concerning the potential for parole, would have an impact on the ultimate decision to accept a plea rather than go to trial. Appellant's petition failed to contain facts to substantiate his claims of prejudice and was therefore without merit.

Affirmed.

Dana A. Reece, for appellant.

Dustin McDaniel, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.