

SUPREME COURT OF ARKANSAS

No. CR12-431

PATRICK LAVELL DAVIS
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 14, 2013

PRO SE MOTIONS FOR EXTENSION
OF TIME IN WHICH TO FILE BRIEF
AND TO SUPPLEMENT RECORD
[HOT SPRING COUNTY CIRCUIT
COURT, 30CR 09-209, HON. CHRIS E
WILLIAMS, JUDGE]MOTIONS TO SUPPLEMENT
RECORD GRANTED IN PART,
DENIED IN PART, AND MOOT IN
PART; APPEAL DISMISSED; MOTION
FOR EXTENSION OF TIME MOOT.

PER CURIAM

In 2012, appellant Patrick Lavell Davis filed in the trial court a timely pro se petition under Arkansas Rule of Criminal Procedure 37.1 (2012) that challenged a judgment, affirmed by the Arkansas Court of Appeals, reflecting his conviction on multiple charges—three counts of breaking or entering, two counts of theft of property valued at less than \$500, and one count of theft of property valued at \$500 or greater but less than \$2500—and imposing an aggregate sentence of 480 months' incarceration. *See Davis v. State*, 2011 Ark. App. 561. Following a hearing on the merits, the trial court denied the petition, and appellant lodged this appeal.

After appellant lodged the record in this court, the circuit clerk tendered a supplemental record that included a transcript of the hearing on the Rule 37.1 petition.

Appellant then filed a motion for an extension of time in which to file his brief and five other motions, all five of which indicated an intention to supplement the record.

The first of the five motions to supplement clearly references the supplemental record tendered by the circuit clerk as the item with which appellant would supplement the record. The second motion references the same supplement and other documents that appear to be copies of cited constitutional amendments and cases. The third references the supplement and a number of items that are included in the record of appellant's direct appeal. It also contains what appears to be some argument concerning the merits of some of the issues in the Rule 37.1 petition and attaches a copy of a portion of the information filed in appellant's case, along with some statements that appear to have been made in response to appellant's requests to other circuit clerks for copies of any convictions in those courts. The fourth motion seeks to supplement the record, but it does not specifically identify any items to be included in the record. Instead, that motion requests appointment of counsel. It also includes arguments expanding on, or otherwise concerning the merits of, some issues from the proceedings on the Rule 37.1 petition, and it attaches the same items as the previous motion along with some additional statements from circuit clerks. The fifth and final motion to supplement prays that "the pleading be supplemented in the record." This motion also fails to identify any specific documents to be included in the record, and it appears to request that appellant be permitted to supplement the claims in his Rule 37.1 petition with additional arguments.

To the extent that appellant's motions to supplement the record request that the tendered supplemental record be included in the record before this court, we grant the

request. The more complete record of the hearing and proceedings in the court below are clearly relevant to our review of the proceedings. We deny appellant's request to supplement the record with items from the record on direct appeal and certain cited authorities because those items are contained within public records of which this court may take judicial notice. *See Lowe v. State*, 2012 Ark. 185, at 3, ___ S.W.3d ___, ___ (per curiam) (citing *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997) (per curiam)). Supplementing the record with those documents is therefore unnecessary. The statements from various circuit clerks that appellant would appear to request be included in the record and the new arguments on some of the claims in his petition that he would present are not items that may be considered in our review on appeal. This court has long and consistently held that it cannot, in the exercise of its appellate jurisdiction, receive testimony or consider anything outside of the record below. *Lowe*, 2012 Ark. 185, ___ S.W.3d ___. We therefore deny appellant's further requests to supplement the record.

The remaining requests in appellant's motions, those for appointment of counsel and for an extension of time in which to file his brief, are made moot because, in the course of our review of the supplemented record to consider appellant's motions, it has become clear that appellant cannot prevail on appeal. 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. *Id.*

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Tornavacca v. State*, 2012 Ark. 244, ___ S.W.3d ___. 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 this case, the trial court found that appellant had failed to present proof to support each of his claims. Those findings were not clearly erroneous, and, regarding some of the claims, the issues were simply not cognizable in proceedings on a Rule 37.1 petition.

In his petition, appellant raised a number of claims of ineffective assistance of counsel and claims that inappropriate reference was made to his testimony in the prosecution's opening statement; that the jury panel was improper; that there was inappropriate communication with the jury during deliberation; that the evidence was insufficient; and that there was a lack of due process concerning the police stop, his apprehension near the crime scene, and the valuation of the stolen property. Claims challenging the sufficiency of the evidence, even if framed as an allegation of ineffective assistance of counsel, are a direct attack on the judgment and are not cognizable in Rule 37.1 petitions. *See Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___; *Lockhart v. State*, 2011 Ark. 461 (per curiam); *Delamar v. State*, 2011 Ark. 87 (per curiam); *see also Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143. Appellant's allegations of due-process violations and his other allegations not based upon ineffective assistance of counsel, with two possible exceptions noted below, were based upon alleged trial error that could have been raised on direct appeal and were not cognizable in Rule 37.1 proceedings. *See Watson v. State*, 2012 Ark. 27 (per curiam) (assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal); *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam) (allegations of trial error that could have been raised at trial or on

appeal may not be raised in Rule 37.1 proceedings). As to the remaining claims in the petition, appellant failed to demonstrate the requisite prejudice for relief under the rule, and the trial court's findings that appellant failed to provide needed evidence on the claims were not clearly erroneous.

Appellant alleged ineffective assistance of counsel on the bases that counsel failed (1) to object to references to his anticipated testimony in the prosecution's opening statement; (2) to object to the jury panel because two of its members, not seated on the jury rendering the decision, had been victims of the alleged crimes; (3) to object to the passing of notes between the court and the jury during deliberations or require that the notes be included in the record; (4) to communicate a plea offer; (5) to object to the habitual-offender evidence introduced and a mistake made by the prosecution in the original information regarding the previous convictions; and (6) to object to evidence introduced on the basis that a chain of custody had not been maintained. In order to establish a claim of ineffective assistance of counsel on any of these claims, appellant was required to prove that he was prejudiced by the alleged error.

Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Pennington v. State*, 2013 Ark. 39 (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). *Id.* 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. *Pennington*, 2013 Ark. 39 (citing *Abermathy v. State*, 2012 Ark. 59, 386 S.W.3d 477 (per curiam); *Kelley v. State*, 2011 Ark. 504; *Mitchem v. State*, 2011 Ark. 148 (per curiam)).

Appellant's first claim of ineffective assistance of counsel alleged error in counsel's failure to object during opening statements to comments by the prosecutor that appellant asserts were comments on the defendant's anticipated testimony. This issue was, however, raised and settled on direct appeal. The court of appeals concluded that no objection was necessary for its review if the comment was one referring to the defendant's failure to testify and that the comment was not such a reference. *Davis*, 2011 Ark. App. 561, at 4–5. If counsel had raised an objection to the comment on this basis, the objection would have failed. A petitioner does not demonstrate the requisite prejudice for a claim of ineffective assistance based on the failure to make an objection if he does not establish that counsel could have made a successful objection. *Lowe v. State*, 2012 Ark. 185, ___ S.W.3d ___ (per curiam); see also *Lambert v. State*, 2012 Ark. 150 (per curiam) (holding that, in order to carry his burden to demonstrate prejudice, a petitioner must show, when making a claim of ineffective assistance for failing to raise an objection or make an argument, that the objection or argument would have been successful if made).

Despite appellant's allegations to the contrary in his second and fifth claims of ineffective assistance of counsel, the record on direct appeal indicates that counsel did object

to the jury panel and to introduction of the habitual-offender evidence, and the objections were not successful. The issue of the jury panel was reviewed and affirmed by the court of appeals. *Davis*, 2011 Ark. App. 561, at 3–4. During the hearing on the Rule 37.1 petition, appellant asked counsel why he had not objected to the testimony by the members of the jury panel, but, to the extent that appellant may have contended that failure to object to the witnesses' testimony was ineffective assistance, he failed to provide a basis to support such an objection to the witness testimony or to offer any evidence of bias by a juror. Counsel opposed amendment of the information and introduction of the accurate habitual-offender evidence, but appellant provided no alternative basis on which counsel might have more successfully challenged the amendment of the information. It was obvious from appellant's testimony in the sentencing phase of the trial that he was familiar with the judgments that were introduced as evidence, and he provided no evidence that might have better challenged the evidence that was actually introduced at trial. Again, appellant established no prejudice in that he did not demonstrate that counsel might have successfully opposed the jury panel, testimony by the victims, or the introduction of the habitual-offender evidence. We cannot say that the trial court's conclusion that appellant presented no evidence in support of the claims was clearly erroneous.

In appellant's third claim of ineffective assistance, he alleged that counsel failed to object to the passing of notes between the court and the jury or to request that the notes be included in the record. The record on direct appeal does reflect that, during deliberations following the sentencing phase of the trial, the bailiff delivered a note from the jury that made

an inquiry of the court; that the court responded on the same paper after consulting the prosecutor, defense counsel, and the defendant; and that the note was made a part of the record. Appellant did not provide any evidence that this method of handling the jury's inquiry resulted in any prejudice to him. Although failure to comply with the statute gives rise to a presumption of prejudice, this court has held that a defendant may waive strict compliance and that an almost identical exchange was sufficient compliance with the requirements of Ark. Code Ann. section 16-89-125(e) (Supp. 2005) in *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). Appellant presented no evidence in the Rule 37.1 proceeding that would distinguish his case from *Atkinson* or demonstrate prejudice from the handling of the jury's question.

In his fourth claim of ineffective assistance, appellant alleged that counsel had failed to communicate a plea offer from the prosecution. In testimony at the hearing on the Rule 37.1 petition, trial counsel indicated that the prosecution had offered a five-year deal, and he admitted that he did not recall that he had specifically told his client the terms of the offer, other than that the prosecution had extended an offer that included jail time. Counsel also testified that the offer was withdrawn because, when appellant's habitual-offender status became known, the court advised that the deal would not be accepted by the court. Even if appellant had been made aware of and accepted the deal with the prosecution, he would not have been allowed to enter a plea on the terms offered. The trial court's findings confirmed this fact as credible, and, based on those factual findings, it was not clearly erroneous for the court to conclude that appellant had not established prejudice from the

alleged error in failing to communicate the plea offer.

In appellant's sixth and final claim of ineffective assistance, he alleged that counsel was ineffective because he failed to challenge the items displayed to the jury by the witnesses who testified that the items had been taken from their vehicles and returned to them by the police following appellant's arrest. The record on direct appeal makes it clear that the items at issue were not introduced into evidence.

Even if appellant's claim was that counsel should have raised an objection to the display of the items by the witnesses while on the stand, without first admitting the items into evidence, he could not demonstrate prejudice. The items could have been introduced as evidence, and an objection based upon chain of custody would not have been sustained. When an object is subject to positive identification, proof of chain of custody need not be conclusive. *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990) (citing *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986)). The items in this case were not interchangeable like drugs or blood samples, and the witness who displayed the item had knowledge of the item and had authenticated it. See Ark. R. Evid. 901(b)(1) (2012).

The trial court, in its order denying postconviction relief, appeared to also treat some of appellant's claims of ineffective assistance of counsel as independent claims of fundamental error. See *Springs*, 2012 Ark. 87, 387 S.W.3d 143 (noting that there is an exception to the general rule that a petition under Rule 37.1 does not provide a remedy when an issue could have been raised at trial or argued on appeal for those errors that are so fundamental as to render the judgment of conviction void or subject to collateral attack). In particular, appellant

appeared to allege that the issues concerning the jury panel and inappropriate communication with the jury were both ineffective assistance of counsel for a failure to object and independent claims of error by the court. We need not examine whether appellant made allegations sufficient to support a claim of fundamental error, however, because, as already discussed in this decision, or in the decision on direct appeal, those claims as raised would have required a demonstration of prejudice in order to support reversible error based on any allegation of fundamental error.¹

Because the trial court's findings in its order denying postconviction relief were not clearly erroneous, appellant cannot prevail on appeal. We accordingly dismiss the appeal, and appellant's remaining motions are moot.

Motions to supplement granted in part, denied in part, and moot in part; appeal dismissed; motion for extension of time moot.

Patrick Lavell Davis, pro se appellant.

No response.

¹Where the merits of a claim have been previously addressed and adjudicated, the conclusion of the court in one opinion becomes the law of the case on subsequent proceedings on the same cause, and the matter is *res judicata*. *Bliss v. Hobbs*, 2012 Ark. 315 (per curiam). The court of appeals addressed the issue of whether the jury panel had been tainted and found no error in the court's refusing to quash the entire jury panel. *Davis*, 2011 Ark. App. 561, at 3–4. As noted, appellant did not offer any additional evidence of bias to support a claim of prejudice.