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SUPREME COURT OF ARKANSAS

No. CR11-660

KEVIN BANKS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 11, 2013 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR 2008-857] HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE AFFIRMED.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Kevin Banks appeals an order of the Pulaski County Circuit Court denying his petition for postconviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. For reversal, appellant argues that the circuit court erred because his trial counsel failed to interview, subpoena, and call three alleged alibi witnesses in his defense at trial. We have jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(8) (2012). We affirm the circuit court's ruling.

In 2007, Little Rock police officers responded to a drive-by shooting and found Antoine Jones holding his girlfriend's six-year-old daughter, Kamya Weathersby, who had been shot and later died. The State charged appellant with one count of capital murder and four counts of committing a terroristic act in connection with the shooting. Lea Ellen Fowler represented appellant at trial, and appellant presented a general denial as a defense. Prior to trial, appellant advised Fowler that certain alibi witnesses could testify that he was not present

at the crime scene when the offense occurred. However, the defense did not present the testimony of these witnesses. On September 18, 2008, a Pulaski County jury found appellant guilty of capital murder and four counts of committing a terroristic act. For these convictions, the jury sentenced him to concurrent terms of life imprisonment without parole and 480 months' imprisonment enhanced by a consecutive term of 180 months' imprisonment for the use of a firearm. Subsequently, the circuit court entered its order reflecting the jury's verdict. This court affirmed appellant's convictions and sentence in *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341.

On May 21, 2010, appellant filed a Rule 37 petition, alleging ineffective assistance of counsel. In his petition, he alleged that (1) trial counsel failed to interview, subpoena, and call certain witnesses at trial; (2) trial counsel failed to investigate the facts and circumstances giving rise to the charges filed against appellant; and (3) trial counsel failed to file motions to ensure that appellant received a fair trial. The State responded that appellant failed to identify the potential witnesses, outline what their testimony would be, or specify how their testimony would have altered the outcome of the trial. The State also asserted that, while appellant complained that his trial counsel failed to investigate and to file motions that would have ensured a fair trial, he did not provide factual support for the allegation.

On January 19, 2011, the circuit court held a hearing on appellant's Rule 37 petition. At the hearing, Sonya Banks, appellant's mother, testified that three individuals, namely Roshundra Fairrow, Tonya Ward, and David Jones made statements prior to trial that appellant was not involved in the shooting accident. She testified that she conveyed this

information to Fowler but that Fowler never contacted these potential witnesses. Additionally, Lawrence Banks, appellant's father, testified that he believed Fowler never hired a private investigator and that two witnesses presented conflicting stories about whether his son participated in the crime. Lawrence lauded Fowler's efforts but also claimed that "some things slipped through" by her failure to subpoena these witnesses. Next, appellant testified that Fowler did not meet him until "we got to court." He stated that he believed that Fowler did not properly represent him and that she did not subpoena witnesses crucial to the outcome of his trial. Finally, Fowler, who testified for the State, explained that appellant had a "pretty extensive case file," and she spent approximately one hundred hours preparing for trial. During her testimony, Fowler explained her decision not to call each potential alibi witness.

Subsequently, on February 8, 2011, the circuit court entered an order, denying appellant's Rule 37 petition and finding that appellant failed to meet his burden on each ineffective-assistance claim. In its order, the circuit court ruled that trial counsel's performance did not fall below the objective standard because (1) the calling and questioning of witnesses is a matter of trial tactics beyond the scope of Rule 37; (2) substantial Rule 404(b) evidence provided overwhelming proof of appellant's guilt, and trial counsel demonstrated an in-depth knowledge of the facts and the Rule 404(b) evidence; and (3) trial counsel argued various motions to suppress and to exclude Rule 404(b) evidence. Appellant timely filed a notice of appeal.

For his sole point on appeal, appellant argues that the circuit court erred by denying appellant's Rule 37 petition. Specifically, appellant contends that trial counsel rendered

ineffective assistance by failing to interview, subpoena, or call three alibi witnesses, who allegedly were crucial to appellant's defense. Appellant asserts that if these witnesses had been called to testify at trial, then the outcome of his trial could have been different.

We will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous. *Charland v. State*, 2012 Ark. 246; *Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143; *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007); *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). We have stated, "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." *Williams*, 369 Ark. at 107, 251 S.W.3d at 292 (quoting *Howard*, 367 Ark. at 26, 238 S.W.3d at 31).

To prevail on a claim of ineffective assistance of counsel, appellant must prove that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Proof on the first component requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.*; *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999). Proof on the second component requires a showing that counsel's errors were so serious as to deprive appellant of a fair trial with a reliable result. *Id.* There must be a "reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In making this determination, this court must indulge in a strong presumption that trial

counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. If it is determined that counsel's performance was indeed deficient, this does not end the ineffective-assistance inquiry. Petitioner must also prove that the deficient performance prejudiced his defense. *Id.* at 687. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* at 693.

Further, we have stated that the decision of trial counsel to call a witness is generally a matter of trial strategy that is outside the purview of Rule 37.1. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001). Trial counsel must use her best judgment to determine which witnesses will be beneficial to his client. *Id.* When assessing an attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate. The fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not in itself proof of counsel's ineffectiveness. *Id.* Nonetheless, such strategic decisions must still be supported by reasonable professional judgment. *Id.* Even if a decision proves unwise, matters of trial tactics and strategy are not grounds for postconviction relief. *Id.*

We now turn to appellant's allegations of ineffective assistance for Fowler's alleged failure to call certain alibi witnesses. In the case at bar, Sonya Banks alleged that Roshundra Fairrow, Tonya Ward, and David Jones made statements prior to trial that appellant was not

involved in the shooting accident. Banks testified that Fairrow would have testified that appellant was not the shooter. However, according to Fowler, she chose not to call Fairrow because she had outstanding warrants for her arrest; she was reluctant to testify for fear of being arrested; she would not appear credible before a jury; and she did not have Fairrow's contact information for subpoena purposes. Next, Fowler testified that Tonya Ward, Sonya Banks's sister, was a crucial alibi for Marqus Smith, appellant's half-brother and accomplice to the murder. Fowler testified that Ward claimed Smith and his girlfriend were at her house on the night of the murder. However, according to Fowler, Ward did not wish to be subpoenaed and left the courthouse when she knew that Fowler would call her to testify. Lastly, Fowler testified that David Jones, an inmate with appellant at the Pulaski County Detention Center, would have testified that he lived down the street from the victim, that he drove to the scene of the murder, and that appellant and his brothers were not present on the night of the offense. Fowler testified that she contacted Jones's attorney, but his counsel advised her that she could not interview Jones. Fowler testified that she advised appellant and his family that she could not ethically call Jones, whose attorney would likely advise Jones not to testify at trial.

Here, the record conclusively shows that trial counsel made tactical decisions not to call Fairrow, Ward, or Jones as potential alibi witnesses in appellant's case. Rather than demonstrating a lack of reasonable judgment, Fowler's decision not to proffer these witnesses' testimony demonstrated a well-reasoned choice regarding trial strategy. In light of the factual circumstances surrounding these three witnesses, Fowler protected appellant from their

questionable credibility or criminal histories. Where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then such a decision is not a proper basis for relief under Rule 37.1. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840. For these reasons, we conclude that Fowler's performance was not deficient. As a result, prejudice is not an issue in this case. *See Dansby v. State*, 347 Ark. 674, 66 S.W.3d 585 (2002) (holding that when trial counsel's performance was not deficient, this court need not consider or address the prejudice prong of *Strickland*). Therefore, we hold that the circuit court's decision was not clearly erroneous. Accordingly, we affirm the circuit court's denial of appellant's petition for postconviction relief.

Affirmed.

BAKER, J., concurs.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I cannot agree that a trial counsel's decision not to investigate, interview, subpoena, or call to testify alibi witnesses who were identified for her constitutes "a well-reasoned choice regarding trial strategy." Mr. Banks's mother, who functioned as a volunteer investigator in this case, identified three alibi witnesses, Roshundra Fairrow, Tonya Ward, and David Jones, and provided their names to Mr. Banks's trial counsel, Lea Ellen Fowler. However, Fowler neither subpoenaed nor called these witnesses to testify. In asserting that it was trial strategy, the majority glosses over the fact that Fowler did not call *any* witnesses, or put on any type of a case.

Fowler's excuses for her inaction were flimsy at best. According to Fowler, she could

not find a mutually convenient time to interview Roshundra Fairrow, although Fairrow appeared on local TV and was screaming that she knew what went on. Despite Fowler having never spoke to Fairrow, Fowler somehow "learned" that Fairrow did not want to be involved because of "legal problems." Fowler said that Fairrow's "sketchy" "criminal issues" "concerned" her that she would not be "credible." Fowler actually talked with—but never formally interviewed—Tonya Ward, who is Mr. Banks's aunt. Ward was present at hearings and at the trial, but, according to Fowler, said she did not want to be subpoenaed, so Fowler never got a subpoena. Fowler stated that she intended to call Ward, but Ward "disappeared." While Fowler's recollection may be accurate, it is not substantiated by the trial transcript. Fowler did, however, subpoena Ward for a severed trial of Mr. Banks's alleged accomplice. Finally, Fowler never spoke to David Jones, supposedly because Jones's attorney did not give her permission.

In *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), the Supreme Court, quoting *Strickland v. Washington*, noted that "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. 668 (1984). However, the *Wiggins* court held that inadequate investigation where clear leads are present falls below the objective standard of reasonableness. *Id.* This is precisely the situation we have before us. Fowler was given three potential alibi witnesses. She did not even speak to two of them—obviously no investigation is inadequate investigation. Moreover, when she encountered what she assumed was their reluctance to testify, she never subpoenaed any of these witnesses.

By any measure this a tragic case. Occupants of an automobile sprayed a home with more than fifty bullets. The victim, six-year-old Kamy Weatherby, was killed by several stray rounds while she slept in her bed. Justice demands that the perpetrator be punished severely. However, I know from reading the trial transcript that Mr. Banks was convicted based on his "confession" to his cell mate, who was being held on a rape charge, the presence of shell casings in Mr. Banks's home that were of the same caliber fired in the drive-by shooting, and through testimony that, while Mr. Banks was incarcerated, he ordered a "hit" on a potential witness. Interestingly enough, most of the State's witnesses had much more unsavory pasts than the witnesses that the majority has praised Fowler for rejecting.

Strickland requires that the petitioner establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A "reasonable probability" is a showing sufficient to undermine confidence in the outcome. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). Given the fact that Mr. Banks's trial counsel failed to investigate, subpoena, and present several alibi witnesses, I simply cannot share the majority's confidence in the outcome of Mr. Banks's trial.

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