

SUPREME COURT OF ARKANSAS

No. CR-11-36

LAQUINCE HOGAN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 23, 2013

APPEAL FROM THE LITTLE RIVER
COUNTY CIRCUIT COURT, CR-08-54,
HON. TOM COOPER, JUDGE

AFFIRMED.

PER CURIAM

The Arkansas Court of Appeals affirmed a judgment reflecting appellant Laquince Hogan's conviction for possession of cocaine with intent to deliver and possession of marijuana. *Hogan v. State*, 2010 Ark. App. 434. He filed a timely pro se petition in the trial court seeking postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2012). Following a hearing, the court entered an order that denied the petition, and appellant lodged this appeal. We affirm the denial of postconviction relief.

The general standard of review for an order that denies postconviction relief does not permit this court to reverse unless the trial court's findings are clearly erroneous. *Thompson v. State*, 2013 Ark. 179 (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.*

Appellant raises seven points on appeal, and he asserts error in the trial court's failing to find ineffective assistance of counsel in six of those points. In his final point on appeal, appellant asserts that the trial court's order did not comply with Arkansas Rule of Criminal

Procedure 37.3, in that it did not identify which part of the files or records the court relied on. The court's order, however, was sufficient under the Rule. The petition was not summarily dismissed without a hearing under Rule 37.3(a), and the trial court found that appellant had not met his burden of proof on the allegations in the petition. The order specifically listed appellant's claims in the petition that it addressed, and it referenced the witnesses at the hearing on the petition, noting that the court did not find appellant's testimony credible. The trial court provided written findings of fact and conclusions of law under Rule 37.3(c) that, in this case, were adequate for our review.

Appellant's first six points allege ineffective assistance of counsel based on his claims in the petition.¹ Appellant, however, did not obtain a ruling on each of the claims raised in the petition, and he had an obligation to do so. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (Where the trial court, in an order following a hearing, addresses some but not all claims in a Rule 37.1 petition, an appellant has an obligation to obtain a ruling on an omitted issue in order to preserve the issue for appeal.). Appellant appears to contend that the court was required by Rule 37.3 to address each claim in the petition, but, where the court did not summarily dispose of the petition under Rule 37.3(a), this court is precluded from addressing omitted issues on appeal. *Id.*

Appellant's first point on appeal alleges that the trial court erred in not finding that counsel failed to adequately investigate and prepare for trial. Within that point, appellant more

¹Appellant additionally alleged in his petition other claims, including improper contact with the jury, but he does not raise these other issues on appeal. Claims raised below but not argued on appeal are abandoned. *Hayes v. State*, 2011 Ark. 327, 383 S.W.3d 824 (per curiam).

specifically asserts that counsel, if adequately prepared, would have filed a motion to suppress the evidence obtained in a search conducted at appellant's home. Appellant proposes that the search should have been challenged because it exceeded the scope of the warrant, that the search warrant was overly broad, that the items seized did not fall within the plain-view or plain-feel exceptions, that any search conducted in relation to his arrest was pretextual, and that the evidence should have been excluded as fruit of the poisonous tree. The order denying postconviction relief did not provide a ruling on appellant's claim in the petition that counsel did not adequately prepare or investigate, but it did provide rulings on the claim that counsel was ineffective for failing to file a motion to suppress or object to the search.

In his petition, appellant asserted that the search warrant was not supported by an affidavit that stated sufficient probable cause. At the hearing on the petition, appellant contended that the motion to suppress was not sufficient because no written motion had been filed, but he did not put forward any basis on which counsel might have successfully challenged the search of his person or the home.

In the order, the trial court found that counsel had filed a motion to suppress but that the motion was unsuccessful. Counsel did not file a written motion, but did challenge the introduction of the evidence from the search of appellant's person at a pretrial hearing, arguing that appellant's arrest was not valid.

In making a determination on a claim of ineffective assistance of counsel, this court considers the totality of the evidence. *Adams v. State*, 2013 Ark. 174, ___ S.W.3d ___. Our standard of review requires that 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.* To prevail on a claim of ineffective assistance of counsel under this test, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Banks v. State*, 2013 Ark. 147. The burden is entirely on a petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support a claim of prejudice. *Thompson*, 2013 Ark. 179. Conclusory statements cannot be the basis of postconviction relief. *Id.*

A petitioner seeking postconviction relief on a claim of ineffective assistance that is based on the failure of counsel to make a motion or objection must show that counsel could have made a successful argument in order to demonstrate the prejudice required under the test. *Lowe v. State*, 2012 Ark. 185, ___ S.W.3d ___ (per curiam). Appellant abandoned the only basis that he asserted below with which counsel might have challenged the search warrant, and he now proposes a number of new arguments not presented below as possible bases to challenge the warrant. Appellant cannot raise new arguments concerning the basis for the challenge on appeal. *See Cowan v. State*, 2011 Ark. 537 (per curiam). Regardless of the merit of appellant's asserted new potential bases to challenge the search, the trial court did not err in finding that, concerning the claim that was presented in appellant's petition and at the postconviction-relief hearing, appellant failed to carry his burden to demonstrate prejudice. We affirm on this first point because appellant does not demonstrate clear error in the trial court's ruling.

In appellant's second point on appeal, he asserts error in the trial court's failure to find ineffective assistance for counsel's failure to investigate or call any of the potential witnesses that

appellant provided to him. To the extent that appellant may have raised this issue below, he failed to obtain a ruling on it in the order denying postconviction relief. Furthermore, appellant presented no proof at the hearing sufficient to demonstrate prejudice on this issue. Where a petitioner alleges ineffective assistance of counsel concerning the failure to call witnesses, it is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Adams*, 2013 Ark. 174, ___ S.W.3d ___.

Appellant's third and fourth points on appeal also assert claims on which appellant failed to obtain a ruling. Appellant asserts that counsel was ineffective because counsel failed to object to evidence of other drug charges and because counsel failed to object to a witness that appellant alleges the State had failed to disclose to counsel. There was no ruling in the order on the two issues, and we affirm on these two points, as well.

Appellant's fifth point asserts error in the trial court's failure to find that counsel was ineffective for failing to preserve for appeal a motion for mistrial. During the trial, counsel moved for a mistrial premised on an assertion of improper testimony by the State's witnesses relating to the amount of cocaine seized and the witnesses' comparisons of this case to prior drug cases. On direct appeal, the court of appeals held that the issue was not preserved for appeal because the motion was not timely. *Hogan*, 2010 Ark. App. 434. The trial court found in its order on the Rule 37.1 petition that the motion for mistrial had been made and denied.

Even if the motion for mistrial had been made earlier, we agree that appellant failed to establish that the motion would have been successful. A mistrial is a drastic remedy that should

be granted only when justice cannot be served by continuing the trial. *Jones v. State*, 2012 Ark. 38, 399 S.W.3d 411. The circuit court has the sound discretion to decide whether to grant a mistrial, and this decision will not be overturned absent a showing of abuse or upon manifest prejudice to the complaining party. *Id.*

In this case, the trial court declined to grant the motion on the basis that trial counsel had also elicited favorable testimony from one of the witnesses about the comparative amount of cocaine in relationship to that witness's experience in other cases. There was, in addition, a substantial amount of other evidence, aside from the contested testimony, that supported the allegation of appellant's intent to deliver the cocaine. We have held that a mistrial should be employed only when an error is so prejudicial that justice cannot be served by continuing the trial and when the error cannot be cured by an instruction to the jury. *Zachary v. State*, 358 Ark. 174, 188 S.W.3d 917 (2004). The error here was not so prejudicial to merit a mistrial and would have been cured by an instruction to the jury. The trial court was not therefore clearly erroneous to find that appellant had failed to meet his burden of proof on this point.

In his sixth point on appeal, appellant alleges that counsel was ineffective for failing to object to appellant's sentence on the basis that the State did not amend the information to include the habitual-offender charge and for failing to challenge the State's proof of his prior convictions. Appellant did not raise these arguments in his petition, and he received no ruling on the issue. Appellant contends that he raised the claim below, and he points to a claim of failure of counsel to challenge an illegal sentence. His claim on the issue below, however, was founded on a different argument that asserted a different basis to challenge the sentence.

As already noted, a petitioner must establish a meritorious basis on which counsel could have objected in order to demonstrate prejudice and succeed on a claim of ineffective assistance. *Lowe*, 2012 Ark. 185, ___ S.W.3d ___. Appellant is limited to the scope and nature of his argument below, and he cannot raise new arguments on appeal. *Cowan*, 2011 Ark. 537. We must therefore affirm on appellant's final claim of ineffective assistance, and we accordingly affirm the order denying postconviction relief.

Affirmed.

Laquince Hogan, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.