

SUPREME COURT OF ARKANSAS

No. CR-12-1061

KENDALL CLIFTON NICKELSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered June 6, 2013

APPELLANT'S PRO SE MOTION FOR
EXTENSION OF TIME TO FILE BRIEF
[ASHLEY COUNTY CIRCUIT
COURT, 02CR-10-92, HON. SAM
POPE, JUDGE]APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2011, appellant Kendall Clifton Nickelson was found guilty by a jury of aggravated robbery and theft of property. An aggregate term of 1080 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Nickelson v. State*, 2012 Ark. App. 363, ___ S.W.3d ___.

Subsequently, appellant timely filed in the trial court a pro se verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2012). The trial court denied the petition, and appellant has lodged an appeal in this court from the order. Now before us is appellant's motion for extension of time to file his brief-in-chief.

As it is clear from the record that appellant could not prevail if the appeal were permitted to go forward, the appeal is dismissed, and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Burks v. State*, 2013 Ark. 198 (per curiam); *Davis v. State*, 2013 Ark. 118 (per curiam).

In his petition, appellant contended that he was not afforded effective assistance of counsel and that there were a number of errors in his trial. With respect to the claims of trial error, the claims did not state a basis for granting a Rule 37.1 petition. Allegations of trial error that could have been raised at trial and on the record on direct appeal are not cognizable in Rule 37.1 proceedings. *Webb v. State*, 2013 Ark. 153 (per curiam); *Davis*, 2013 Ark. 118; *Lewis v. State*, 2013 Ark. 105 (per curiam); see also *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 allegations of ineffective assistance of counsel, appellant raised the following claims: (1) counsel denied him a copy of his motion for discovery, and, thus, he was unable to point out facts and statements to prove his innocence; (2) counsel allowed him to be found guilty of aggravated robbery when there was no evidence that he had a weapon; (3) counsel failed to move for a change of venue; (4) counsel failed to investigate and address the rules on contemporaneous objections and raised an erroneous claim of plain error on direct appeal that was rejected by the appellate court; (5) counsel failed to investigate the facts surrounding the charges and consult with him; (6) counsel made mistakes in trial strategy, including the decision about whether he should testify; (7) counsel failed to investigate the credibility of the State's witnesses, and challenge as hearsay the statements of the police regarding the events before the offenses were committed. Appellant concludes that counsel's errors, individually

and taken as a whole, established that counsel was ineffective.

Claims of ineffective assistance of counsel 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); *Walton v. State*, 2012 Ark. 269 (per curiam). The effectiveness of counsel is assessed under the two-pronged 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, 383 S.W.3d 367 (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, 394 S.W.3d 294 (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. *Abernathy 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).

When considering an appeal from a circuit court's denial of a Rule 37.1 petition on the ground of ineffective assistance of counsel, the sole question presented is whether, based on the totality of the evidence under the standard set forth in *Strickland*, the circuit court clearly erred in holding that counsel's performance was not ineffective. *Pennington*, 2013 Ark. 39; *Jackson v. State*, 2013 Ark. 19 (per curiam); *Anderson v. State*, 2011 Ark. 488, 385 S.W.3d 783; *Biddle v. State*, 2011 Ark. 358 (per curiam). A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective

standard of reasonableness and that this deficient performance prejudiced the defense. *Heard v. State*, 2012 Ark. 67 (per curiam).

Appellant did not provide any factual substantiation for his conclusory claims that counsel was ineffective. He did not state what information further investigation by counsel or consultation with appellant could have uncovered, on what grounds counsel could have raised a better defense to aggravated robbery, why a change of venue was needed, or on what basis a change of venue could have been obtained. Likewise, with respect to the other claims of ineffective assistance of counsel, there was no showing that counsel committed any specific error that prejudiced the defense because appellant did not specify with facts how the defense was prejudiced. The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims that counsel's conduct prejudiced him under the standards set out in *Strickland. Webb*, 2013 Ark. 153.

To the extent that any of appellant's allegations touched on trial strategy, the allegations did not warrant postconviction relief as none demonstrated that any specific decision by counsel could be considered anything other than a simple decision on the strategy to be pursued by the defense. Decisions of mere trial strategy are outside the purview of a Rule 37.1 proceeding. See *Lacy v. State*, 2013 Ark. 34, ___ S.W.3d ___.

Appellant's statement that counsel failed to show that he was not guilty of aggravated robbery because there was no proof he had a weapon was, in essence, an argument that the evidence was insufficient to sustain the judgment. Rule 37.1 does not provide a means to challenge the sufficiency of the evidence merely because the petitioner has raised the challenge

in the guise of an allegation of ineffective assistance of counsel. *Norris v. State*, 2013 Ark. 205, ___ S.W.3d ___ (per curiam); *Scott v. State*, 2012 Ark. 199, ___ S.W.3d ___.

Finally, appellant's assertion that counsel's errors, taken as a whole, amounted to ineffective assistance of counsel did not warrant postconviction relief. The concept of cumulative error is not recognized in Rule 37.1 proceedings when assessing whether a petitioner was afforded effective assistance of counsel. *Glaze v. State*, 2013 Ark. 141 (per curiam); see *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002) (holding that it was reversible error for the trial court to consider cumulative error in assessing claims of effective assistance of counsel).

Appeal dismissed; motion moot.

Kendall Clifton Nickelson, pro se appellant.

No response.