Cite as 2010 Ark. 499

SUPREME COURT OF ARKANSAS

No. CR 09-550

SCOTTY JOE SHIPMAN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 16, 2010

PRO SE APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, CR 2006-315, HON. GRISHAM A. PHILLIPS, JR., JUDGE

AFFIRMED.

PER CURIAM

Appellant Scotty Joe Shipman appeals the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010). We find no error that merits reversal and affirm.

On July 19, 2007, a jury convicted appellant on one count of rape and sentenced him to 20 years' imprisonment. The Arkansas Court of Appeals affirmed the judgment. *Shipman v. State*, CACR 07-1130 (Ark. App. Apr. 30, 2008) (unpublished). Appellant timely filed a petition under Rule 37.1 raising a number of claims of ineffective assistance of counsel. The record does not indicate that a hearing was held, and the trial court's order provided written findings that referenced only the record and pleadings as a basis for the court's conclusions.

On appeal, appellant asserts error as to some of the trial court's findings. All arguments made below but not raised on appeal are abandoned. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007). Appellant contends that the trial court should have found that counsel's conduct fell below the required standard generally, that counsel did not conduct adequate

investigation, that counsel failed to investigate the medical evidence or call a physician expert witness to dispute testimony about potential DNA evidence, and that counsel failed to investigate the presence of an additional person in the home at the time of the crime. Appellant also asserts on appeal that the prosecution withheld evidence, that counsel failed to request a directed verdict on the basis that there was no DNA evidence, that counsel should have challenged an expert's qualifications, and that counsel was ineffective for failure to raise a speedy-trial violation.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Flowers v. State*, 2010 Ark. 364, ___ S.W.3d ___ (per curiam); *Dunlap v. State*, 2010 Ark. 111 (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. *Hawthorne v. State*, 2010 Ark. 343 (per curiam); *Britt v. State*, 2009 Ark. 569, ___ S.W.3d ___ (per curiam).

We assess the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hampton v. State*, 2010 Ark. 330 (per curiam); *Polivka v. State*, 2010 Ark. 152, ___ S.W.3d ___. Under the *Strickland* test, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Joiner v. State*, 2010 Ark. 309 (per curiam). In addition, the petitioner must show that counsel's deficient performance so

prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* 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. *Hampton*, 2010 Ark. 330.

There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. *Robertson v. State*, 2010 Ark. 300, ___ S.W.3d ___ (per curiam). The burden is entirely on the claimant to provide facts that affirmatively support his or her claims of prejudice; neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption, and they cannot form the basis of postconviction relief. *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). General assertions that counsel did not aggressively prepare for trial are not sufficient to establish an ineffective-assistance-of-counsel claim. *Goldsmith v. State*, 2010 Ark. 158 (per curiam).

In this case, appellant failed to provide factual substantiation to support his specific claims that counsel was ineffective for failure to investigate. Appellant did not raise in the petition the claim that the prosecution withheld evidence or the claim that counsel should have moved for a directed verdict based on the lack of DNA evidence. Issues raised for the first time on appeal, even constitutional issues, will not be considered because the circuit court never had an opportunity to make a ruling. *Johnson v. State*, 2009 Ark. 460 (per curiam) (citing *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005)). The remaining issues that

appellant raises on appeal were clearly without merit as raised in the petition because appellant did not state facts sufficient to demonstrate prejudice.[1]

Although appellant alleged that counsel failed to investigate the medical evidence or call a physician expert witness to dispute testimony about potential DNA evidence, and that counsel failed to investigate the presence of an additional person in the home at the time of the crime, appellant did not allege any specific evidence that could have been presented at trial if counsel had conducted an adequate investigation. While appellant asserted that counsel could have presented expert testimony to dispute the testimony about the lack of DNA evidence, the petition contained no reference to a particular witness who would so testify. Appellant did not state any information concerning the identity of the additional person that appellant claimed was in the house that counsel would have discovered if an adequate investigation were conducted. Appellant did not identify any evidence that could have been presented at trial to establish that there was another person present.

It is incumbent on the petitioner who claims ineffective assistance based on failure to call a witness to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Smith v. State*, 2010 Ark. 137, ___ S.W.3d ___ (per curiam). In order to demonstrate prejudice, appellant was required to establish that there was a reasonable probability that, had counsel performed further

[1]The State points out in its brief that appellant has not provided an adequate abstract of the record. Under our Rule 4-7, we could choose to require appellant to submit a new brief. Ark. Sup. Ct. R. 4-7(c)(3)(C) (2010). Because the issues turn on the adequacy of the claims raised in the petition, however, we choose not to do so.

investigation and presented the witness, the outcome of the trial would have been different. *See Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___. Appellant provided no more than conclusory statements in that regard.

Next, appellant claimed that counsel should have challenged the qualifications of the medical expert that testified at trial. Appellant contended that the doctor who testified did not have sufficient experience with accidental injuries of the type presented in this case. The record indicates that counsel did challenge the qualifications of the doctor to testify as an expert on abuse, and the court indicated that the State would be required to establish a foundation for any testimony on that issue. The court recognized the doctor as a medical expert only. Counsel questioned the doctor concerning his experience and familiarity with the type of injury presented during cross-examination. Appellant simply did not demonstrate that counsel failed to make an appropriate objection or that he was prejudiced by counsel's actions.

Finally, appellant alleged that counsel failed to object to violation of the speedy-trial rule. The trial court found that there were two periods during which the running of the period under Arkansas Rule of Criminal Procedure 28.1 (2009) was tolled. *See Flowers v. State*, 2010 Ark. 364, ___ S.W.3d ___ (per curiam) (entire time for any period resulting from continuances charged to the defendant are excluded from the deadline). The record before us is not adequate to determine the length of time for the two periods, although it does confirm an order for mental evaluation and a motion for continuance as referenced by the trial

court. The burden is on the party asserting error to bring up a sufficient record upon which to grant relief. *Meraz v. State*, 2010 Ark. 121 (per curiam); *Daniels v. State*, 2009 Ark. 607 (per curiam).

In any event, appellant's petition, in light of the two excluded periods on the record, did not demonstrate a meritorious objection that counsel could have presented on the question. Counsel is not ineffective for failing to make an argument that is meritless. *Johnson v. State*, 2009 Ark. 553 (per curiam). Accordingly, appellant must have stated a claim that was adequate to have established a violation, taking into account the periods excluded. Appellant does not now assert that the periods were not properly excluded. He simply restates his initial claim that his attorney should have objected at trial on the basis of the rule. In the petition, he merely stated the length of time he was incarcerated in the county jail awaiting trial.

Because appellant did not state a factual basis in the petition that would support his claims, the petition was without merit. The trial court was not clearly erroneous in denying the petition.

Affirmed.