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SUPREME COURT OF ARKANSAS

No. CR-10-971

JIMMY LEE FROST APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered**: November 11, 2010 PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF [CIRCUIT COURT OF DREW COUNTY, NO. CR 2007-219] HON. SAMUEL B. POPE, JUDGE APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2008, appellant Jimmy Lee Frost was found guilty by a jury of attempted first-degree murder, committing a terroristic act, and being a felon in possession of a firearm. He was sentenced as a habitual offender to 276 months' imprisonment. The Arkansas Court of Appeals affirmed. *Frost v. State*, 2010 Ark. App. 163.

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied. Appellant lodged an appeal here and now seeks by pro se motion an extension of time to file the appellant's brief.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, 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. *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State,* 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

Appellant contended in his petition that he was denied by the trial court his right to the attorney of his choosing.[1] He stated that he had fired his retained attorney, but the court forced him to accept representation by that attorney and, in doing so, manifested its bias toward appellant. He further alleged that he was not ready for trial and that he had been told by counsel that he would get a change of venue.

Appellant did not explain how the defense was prejudiced by any decision of the court or otherwise point to any specific conduct by the court or counsel that affected the defense. He further failed to explain the assertion that he was not ready for trial or the grounds on which counsel could have based a motion for change of venue. In short, the allegations contained in the petition were conclusory in nature, lacking any factual substantiation on which a finding of ineffective assistance of counsel could be based.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set

[1]While the right to counsel is grounded in the Sixth Amendment to the United States Constitution and is also guaranteed by art. 2, section 10 of the Arkansas Constitution, the right to counsel of one's choosing is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003); *Clements v. State*, 306 Ark. 596, 817 S.W.2d 194 (1991).

forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Watkins*, 2010 Ark. 156 (citing *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (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*. Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Under *Strickland*, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id*.

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *See Viveros v. State*, 2009 Ark. 548 (per curiam). Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, nor do they warrant granting postconviction relief. *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156. A court is not required to research or develop arguments contained in a petition for postconviction relief. *See Eastin*, 2010 Ark. 275; *see also Britt v. State*, 2009 Ark. 569, 349

S.W.3d 290 (per curiam). Appellant here did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard.

With respect to appellant's assertion of bias on the part of the court in declining to permit appellant to retain new counsel, claims of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Lee v. State*, 2010 Ark. 261(per curiam); *see also Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Our postconviction rule does not permit a direct attack on a judgment or permit a petition to function as a substitute for an appeal. *Hill v. State*, 2010 Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). The sole exception lies in claims raised in a timely petition that are sufficient to void the judgment and render it a nullity. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. Appellant did not contend, much less establish with factual substantiation and legal authority, that any claim of trial error raised in the petition was sufficient to void the judgment in his case. An argument with no citation to authority or convincing argument in its support that cannot be sustained without further research on the part of the court is not well taken. *See Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003)).

Appeal dismissed; motion moot.