

SUPREME COURT OF ARKANSAS

No. CR 08-1376

MARCUS LANCE RACKLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 2, 2010

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT, CR 2005-
26, HON. DAVID L. REYNOLDS,
JUDGE

REVERSED AND REMANDED.

PER CURIAM

Appellant Marcus Lance Rackley was convicted by a Faulkner County jury of more than three dozen charges stemming from his sexual abuse of his stepdaughter, and he received a cumulative sentence of 444 months' imprisonment. This court affirmed. *Rackley v. State*, 371 Ark. 438, 267 S.W.3d 578 (2007). Appellant subsequently filed in the trial court a timely, verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). No evidentiary hearing was held on the petition, and the trial court entered an order denying relief.

Appellant now brings this appeal of the trial court's order. As grounds for reversal, appellant argues that the trial court erred in denying relief on his petition without first holding an evidentiary hearing and in failing to make written findings of fact and conclusions of law as required under Arkansas Rule of Criminal Procedure 37.3(a).¹ We agree, and we reverse

¹Appellant filed a motion for reconsideration in the trial court in which appellant sought written findings and rulings on the omitted issues; we have specifically held that a

the order and remand to the trial court for further proceedings.

In his Rule 37.1 petition, appellant raised six allegations, arguing that trial counsel was ineffective due to counsel's simultaneous representation of appellant and appellant's wife, which created an actual conflict of interest that prejudiced appellant; counsel's failure to properly object to the admission of out-of-court statements made by appellant's wife; counsel's use of prescription medication during trial, which rendered his representation per se ineffective; counsel's failure to object to improper statements by the prosecuting attorney to jurors during voir dire; counsel's failure to comply with the witness-sequestration rules under the Arkansas Rules of Evidence; and counsel's failure to properly handle the issue of whether certain sexual messages sent to and from the victim could be admitted during trial.

The order dismissing appellant's Rule 37.1 petition reads in its entirety:

Comes before the Court this date the defendant, Marcus Lance Rackley on his PETITION For Rule 37. After review of the file and the response filed by the state February 12, 2008, the Court finds there is no evidence that the trial counsel's performance was ineffective. The burden is on the Petitioner to prove his allegations. Therefore the petition is denied.

We note two problems with this order: the trial court failed to make written findings with respect to any individual claim raised by appellant as required by Rule 37.3, and the trial

request that the trial court modify its order to include an omitted issue is not a request for a rehearing and does not violate Rule 37.2(d). See *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). The trial court apparently failed to act on this motion, and appellant filed a supplemental notice of appeal on October 27, 2008, in which appellant assumed that his motion for reconsideration was deemed denied by operation of law under Arkansas Rule of Criminal Procedure 33.3 (2010). The deemed-denied provision of Rule 33.3, however, is inapplicable to Rule 37.1 proceedings. See *Robbins v. State*, 2010 Ark. 312.

court's reasoning is incorrect as a matter of law.

Rule 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *See Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999) (citing *Bohanan v. State*, 327 Ark. 507, 510, 939 S.W.2d 832, 833 (1997) (per curiam)). Where it dismisses a Rule 37.1 petition without an evidentiary hearing, the trial court “shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court’s findings.” Ark. R. Crim. P. 37.3(a); *see Rodriguez v. State*, 2010 Ark. 78 (per curiam); *Bohanan v. State*, 327 Ark. 507, 939 S.W.2d 832. Without such specific findings, there can be no meaningful review because, on review, this court determines whether the findings are supported by a preponderance of evidence. *See Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). If the trial court fails to make such findings, it is reversible error, except in cases where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *See Rodriguez*, 2010 Ark. 78; *see also Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

It is not incumbent on this court to scour the record in a Rule 37.1 appeal to determine if the petition is wholly without merit when there are no written findings. *Reed*, 375 Ark. 277, 289 S.W.3d 291. When no hearing is held, that is the circuit judge’s function. *See id.* Based on our review of the face of appellant’s petition and the face of the record, we

cannot conclude that no relief is warranted. Each of appellant's first three arguments—that counsel was ineffective based on a conflict of interest, his failure to properly object to the admission of out-of-court statements, and his use of prescription medication—asserted a cause of action (ineffective assistance of counsel) that is cognizable under Rule 37.1, and appellant cited to relevant authority in support of those arguments. The trial court's failure to enter written findings is therefore reversible error. *Sanders*, 352 Ark. 16, 98 S.W.3d 35.

We also note that the trial court's assertion that appellant presented “no evidence that the trial counsel's performance was ineffective” and therefore did not satisfy his “burden . . . to prove his allegations” incorrectly states the law. A petitioner under Rule 37.1 has the burden of pleading “in concise, nonrepetitive, factually specific language” at least one cause of action that is cognizable under the rule, and he must plead facts that support his claim. *See* Ark. R. Crim. P. 37.1(b); *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004); *see generally* *Flowers v. State*, 2010 Ark. 364 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam)). It is in an evidentiary hearing that the petitioner faces the burden of supporting his allegations with evidence. *See* Ark. R. Crim. P. 37.3(c); *Johnson v. State*, 2009 Ark. 541; *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988). Indeed, to ask a petitioner to do so in his pleading would negate the need for an evidentiary hearing entirely.

For this reason, the trial court's lack of written findings as required by Rule 37.3(a) is reversible error, and we reverse the order of dismissal and remand for compliance with Rule

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37.3. It may well be that the circuit judge will want to hold a hearing on appellant's petition pursuant to Rule 37.3(c), following which he must make findings of fact and conclusions of law. *Reed*, 375 Ark. 277, 289 S.W.3d 921. If the trial court does not conduct a hearing and, instead, dismisses appellant's petition, the court shall make written findings for this court to review under 37.3(a) if appellant wishes to appeal from the order. *See id.* In either instance, the trial court shall enter rulings with respect to each of appellant's claims.

Reversed and remanded.