Cite as 2010 Ark. 470

SUPREME COURT OF ARKANSAS

No. CR 08-1417

JAMES MALCOLM JONES
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 2, 2010

APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, CR 2005-239, HON. GARY R. COTTRELL, JUDGE

AFFIRMED.

PER CURIAM

James Malcolm Jones appeals the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010). We find no error and affirm the trial court's decision to deny relief.

In 2006, a jury found appellant Jones guilty of possession of cocaine with intent to deliver and possession of drug paraphernalia and sentenced him to an aggregate term of 720 months' incarceration. The Arkansas Court of Appeals affirmed the judgment. *Jones v. State*, CACR 06-925 (Ark. App. Apr. 25, 2007) (unpublished). The court of appeals found that the sole point on appeal challenged the denial of a motion to suppress items from a search of appellant's car and that the issue was not preserved because it was not argued below. *Id.*

In his petition for postcoviction relief, appellant reasserted the same claim contesting the search of appellant's car, both as an independent constitutional claim and as the basis for a claim of ineffective assistance of counsel for failure to preserve the issue. The trial court denied relief, providing a ruling only on the issue of ineffective assistance, and that issue is the

only issue now raised on appeal.

The question to be resolved here is a narrow one. Appellant contends that counsel was ineffective for failure to preserve the issue of whether article 2, section 15 of the Arkansas Constitution requires an officer requesting consent for a search to advise the driver of an automobile that he has the right to refuse to consent to the search. The trial court found that counsel had no duty to raise that issue in order to preserve it and that appellant did not demonstrate that appellant was prejudiced by a failure to preserve the issue.

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, 370 S.W.3d 228 (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, 349 S.W.3d 290 (per curiam).

An appellant has the burden to prove his allegations for postconviction relief. *Viveros v. State*, 2009 Ark. 548 (2009) (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, 362 S.W.3d 918. Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first 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). With respect to the second prong of the test, 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.

In order to meet the second prong of the Strickland test under the circumstances presented here, appellant must have demonstrated that the argument that counsel failed to preserve would have had merit. *See Eastin v. State*, 2010 Ark. 275 (where the appellant argued that counsel had failed to preserve an issue for appeal, counsel was not ineffective where the appellant failed to demonstrate a basis upon which trial counsel could have presented a meritorious argument). Counsel is not ineffective for failing to make an argument that is meritless. *Travis v. State*, 2010 Ark. 341 (per curiam). The thrust of appellant's argument to this court is that, had the issue been preserved for appeal, ultimately appellant would have been successful in challenging the search before this court. We need not determine whether appellant would have been prejudiced in this case, however, because appellant failed to make the necessary demonstration as to the first prong of the *Strickland* test.

There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed

from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam). Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance under *Strickland* requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (per curiam). Trial counsel here clearly did fail to preserve the issue of the appropriateness of the vehicular search under the Arkansas Constitution. In order to evaluate counsel's conduct, we must therefore understand the circumstances of counsel's conduct at the time of trial, and a brief review of our cases relevant to the question at issue is instructive.

Appellant contends that trial counsel should have made an argument—one that he contends would have ultimately persuaded this court—that article 2, § 15 of the Arkansas Constitution mandates that the police inform the driver of a vehicle that he had a right to refuse consent to a search. Appellant points to the decision in *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), holding that officers who utilize the knock-and-talk procedure must inform a home dweller that he or she has the right to refuse consent to the search. *Brown*, 356 Ark. at 474, 156 S.W.3d at 732. The opinion in *Brown*, however, very specifically distinguished the bases of the holding from cases that involved the search of an automobile, rather than the search of a home, noting heightened expectation of privacy in the latter situation. *Brown*, 356 Ark. at 468–70, 156 S.W.3d at 728–29.

Prior to the suppression hearing in this case, we handed down *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005). In *Welch*, we held that the trial court, in refusing to extend the holding in *Brown* to the search of a vehicle, had correctly determined that our opinion in *Brown* was limited to warrantless searches of the home. *Welch*, 364 Ark. at 331, 219 S.W.3d at 159. The opinion noted that the defendant had provided no authority or convincing argument to cause this court to extend the holding in *Brown* to the search of a vehicle. *Id.* Appellant here contends that there is authority and convincing argument to extend the holding in *Brown* to the search of vehicles and that trial counsel should have preserved the issue for appeal.

Counsel cannot be deemed ineffective for not raising every novel issue which might conceivably be raised. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). This court made it clear in both *Brown* and *Welch* that good cause for an extension of the rule in *Brown* to vehicles will require something more than the mere recitation of the constitutional provision. In appellant's direct appeal, the court of appeals, after holding that the argument was not preserved, noted that *Welch* would have controlled and that it would have affirmed had it reached the issue. We conclude that the argument appellant contends that his attorney should have made to preserve the issue for appeal would have been sufficiently novel to require an objective standard setting a level of conduct well beyond the minimum threshold of reasonable professional judgment.

Under the circumstances and precedent as existed at the time of appellant's trial,

counsel's conduct did not fall outside the wide range of reasonable professional assistance. Counsel was not ineffective simply because he did not raise an argument that would have been largely against established precedent and would have required exceptionally thoughtful and extensive analysis. Because we hold that the trial court correctly determined that appellant did not satisfy the first prong of the *Strickland* test, we need not consider appellant's arguments concerning potential prejudice.

Affirmed.