

SUPREME COURT OF ARKANSAS

No. CR 11-55

SHELTON WORMLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 10, 2011

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE BRIEF [DREW
COUNTY CIRCUIT COURT, CR 2007-
184, HON. SAMUEL B. POPE, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2008, a jury found appellant Shelton Wormley guilty of manufacture of marijuana, possession of marijuana with intent to deliver, and possession of drug paraphernalia. Appellant received an aggregate sentence of 480 months' imprisonment. The Arkansas Court of Appeals affirmed the judgment. *Wormley v. State*, 2010 Ark. App. 474, 375 S.W.3d 726. Appellant timely filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010) that was denied. He lodged an appeal in this court and has now filed a motion for an extension of time in which to file his brief.

We need not consider the merits of appellant's motion because it is clear from the record that he cannot prevail on appeal. An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Croft v. State*, 2010 Ark. 83 (per curiam); *Crain v. State*, 2009 Ark. 512 (per curiam). Here, it is clear that neither of the two grounds for relief listed in appellant's petition

warranted relief.

Appellant included only two claims in the petition. The first asserted ineffective assistance of counsel for failure to adequately investigate or prepare for a hearing on a motion to suppress evidence obtained from a search of appellant's trailer. The second claim appeared to assert a conflict of interest on the part of trial counsel in that appellant's alleged counsel was an acting judge during the time that he represented appellant as a public defender. Neither of these two claims provided a basis for Rule 37.1 relief.

In his first claim, appellant alleged that counsel failed to prepare for the hearing by reviewing information provided by an investigator concerning one of the affiants whose affidavit formed a part of the basis upon which the search warrant was issued. Appellant alleged that the investigator had confirmed with the affiant that she worked for the issuing magistrate. He contended that, had counsel investigated further, he would have been able to show that the magistrate was not impartial, and the evidence would have been suppressed.

In order to prevail on any claim of ineffective assistance of counsel, a petitioner is required to demonstrate prejudice in that the alleged error would have impacted the outcome of the trial. *Moss v. State*, 2010 Ark. 284 (per curiam); see also *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam) (actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice). For a claim of ineffective assistance based on failure to investigate, a petitioner must describe how a more searching pretrial investigation would have changed the results of his trial. *McCraney v. State*, 2010 Ark. 96, 360 Ark. 144 (per curiam).

Appellant did not set forth facts in the petition to demonstrate that, had counsel performed further investigation, he could have presented any additional witnesses or evidence so as to change the results of the suppression hearing. He did not set forth any information concerning the details of the asserted employment relationship between the affiant and the magistrate that might have been presented. The petition contained only conclusory statements that counsel would have been able to show that the magistrate was not impartial. Such conclusory statements do not provide sufficient facts to support the allegation. *See Shipman v. State*, 2010 Ark. 499 (per curiam).

Appellant's second ground for postconviction relief was that trial counsel was also an acting judge. Appellant did not set out in the petition how counsel's representation of him while acting as a judge denied him a fair trial, and, to the extent that appellant was asserting a conflict of interest, he failed to state sufficient facts to support the claim.

To prevail on a claim of ineffective assistance of counsel due to a conflict of interests, a defendant must demonstrate the existence of an actual conflict of interest that affected counsel's performance, as opposed to a mere theoretical division of loyalties. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not further demonstrate prejudice in order to obtain relief, but in the absence of an actual conflict, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* Even in those situations that are inherently fraught with potential conflict, such as those where an attorney represents multiple defendants, the

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defendant asserting a claim of conflict must show that counsel actively represented conflicting interests by a showing of how the conflict actually prejudiced his defense. *Id.* Appellant made no demonstration here that counsel, through his judicial position, actively represented conflicting interests or that counsel's actions as a judicial officer prejudiced appellant's defense.

Because appellant failed to state facts in his petition that were sufficient to support grounds for relief under Rule 37.1, he cannot prevail on appeal. Accordingly, we dismiss the appeal and the motion is moot.

Appeal dismissed; motion moot.