

Cite as 2011 Ark. 114

SUPREME COURT OF ARKANSAS

No. CR 08-1357

RANDY MILLER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 17, 2011

APPEAL FROM UNION COUNTY
CIRCUIT COURT, CR 2005-56,
HON. CAROL ANTHONY, JUDGE

AFFIRMED.

PER CURIAM

Appellant was convicted by a jury of two counts of delivery of cocaine, for which he was sentenced to eighty years' incarceration in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed, holding that claims regarding the sufficiency of the evidence were not preserved for appellate review because trial counsel had failed to renew his motion for directed verdict at the close of all of the evidence. *Miller v. State*, CACR 06-888 (Ark. Ct. App. May 9, 2007) (unpublished). Appellant subsequently filed a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The trial court held a hearing on appellant's petition pursuant to Arkansas Rule of Criminal Procedure 37.3(c), following which the court entered an order denying relief.

Now before us is appellant's appeal from the trial court's denial of postconviction relief. On appeal, appellant asserts the same two claims that he raised in his original Rule 37.1 petition to the trial court—that his due process rights were violated because he was entitled to an appeal “on the merits,” which he did not receive due to trial counsel's errors, and that trial counsel was

ineffective for failing to preserve the issue of sufficiency of the evidence. We find no error, and we affirm.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (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. *Watkins v. State*, 2010 Ark. 156 (per curiam); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on the totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Ewells*, 2010 Ark. 407, at 2. Under the *Strickland* test, a claimant must first demonstrate that counsel's performance fell below an objective standard of reasonableness. *Smith v. State*, 2010 Ark. 137, at 2, 361 S.W.3d 840, 844. Secondly, under *Strickland*, the claimant must demonstrate that counsel's deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam). Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different

absent counsel's errors. *Ewells*, 2010 Ark. 407, at 3. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Appellant's arguments are essentially two sides of the same coin. His first claim is that his due process rights were violated because he was entitled to an appeal "on the merits," which he did not receive due to trial counsel's failure to preserve the issue of "sufficiency of the evidence." His second argument is that trial counsel was ineffective for failing to preserve the same issue, and appellant points to his inability to receive an appeal "on the merits" as proof of prejudice. Neither argument is persuasive.

With respect to appellant's due process claim, we have consistently held that such claims are not cognizable in a Rule 37.1 petition. *See, e.g., Wallace v. State*, 2010 Ark. 485 (per curiam); *Mills v. State*, 2010 Ark. 390 (per curiam); *Bell v. State*, 2010 Ark. 65, 360 S.W.3d 98 (per curiam). Moreover, we note that Arkansas Rule of Criminal Procedure 33.1(c) states that the "failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required . . . will constitute a waiver of any question pertaining to the sufficiency of the evidence." Application of the rules of criminal procedure to appellant's case can hardly be construed as depriving him of his due process rights. Thus, we cannot say that the trial court was clearly erroneous in denying relief on this point.

Regarding appellant's second point on appeal, he argues that the trial court incorrectly denied relief based on ineffective assistance of counsel. At trial, counsel made a proper motion for directed verdict at the close of the state's case but failed to properly renew that motion at

the close of all evidence. In such situations, when dealing with a postconviction motion based on ineffective assistance of counsel, we have previously explained that the question for the trial court is whether anything occurred between when the first motion was denied and the conclusion of all evidence that would have caused the court to grant the motion had it been properly renewed. *See Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). Once the trial court determines that no such event occurred, and thus no prejudice resulted from the failure to renew the motion, an appeal of that decision requires this court to review whether the evidence was sufficient for presentation to the jury. *See id.*

The trial court found that, even if trial counsel had preserved the issue, “the evidence of [appellant’s] guilt was overwhelming.” In support of this finding, the trial court pointed to the testimony of an informant regarding the drug transactions, the testimony of a narcotics officer who listened to the audio transmissions during the transaction and testified as to what occurred and how the evidence was secured, and a videotape that corroborated the testimony of both men. The trial court therefore held that there were ample factual issues to submit to the jury.

The record on appeal comports with the trial court’s statement of the evidence against appellant. During the trial, the informant narrated the events on the videotape as it was being played in open court, and he testified that he purchased the cocaine from appellant. He also wore an audio-video recorder to record the transactions. The narcotics officer testified that the informant was supposed to buy three grams in the first buy and roughly seven grams in

the second buy, and he returned to the officer with 4.8 and five grams, respectively. The videotape apparently corroborated much of the testimony of both men, though it is not clear that appellant was shown actually receiving money on the tape.¹ The only evidence presented by appellant in his defense was cross-examination of the narcotics officer in an effort to discount some of the officer's earlier testimony.

In sum, the totality of the evidence demonstrates that appellant was not prejudiced by trial counsel's failure to timely renew the directed-verdict motion. Had the motion been renewed, the trial court would have denied it, and, based on our review of the evidence, we conclude that there was in fact sufficient evidence for the case to proceed to the jury inasmuch as there was unequivocal testimony identifying the accused as the offender. *See Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997). This is because the testimony of one eyewitness is sufficient to sustain a conviction. *See id.*

Based on the foregoing, appellant failed to demonstrate that he was prejudiced by trial counsel's failure to renew the directed-verdict motion at the close of all evidence. While appellant was unable to directly appeal the issue of sufficiency of the evidence, there was

¹Appellant's entire argument regarding prejudice is based on what the videotape did or did not show and how the court of appeals might have viewed the evidence. In effect, he is arguing that the state presented insufficient evidence to *prove* the crimes charged. Such arguments are challenges to the weight and sufficiency of the evidence, which is a direct attack on the conviction itself and may not be raised in a petition for postconviction relief. *See Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988) (per curiam). The relevant inquiry here is not the weight or sufficiency of the evidence for conviction, but whether there was adequate evidence to support the trial court's determination that it would have denied the motion for directed verdict had the motion been properly renewed. *See Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997).

Cite as 2011 Ark. 114

substantial evidence to support the verdict. Thus, appellant failed to satisfy the second prong of *Strickland*, and trial counsel was accordingly not ineffective. The trial court's denial of relief was therefore not clearly erroneous, and we affirm.

Affirmed.