

SUPREME COURT OF ARKANSAS

No. CR 09-318

LARRY DONNELL REED
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 17, 2011

PRO SE APPEAL FROM PULASKI
COUNTY CIRCUIT COURT, CR
2006-1776, HON. BARRY SIMS,
JUDGE

AFFIRMED.

PER CURIAM

On July 6, 2006, appellant Larry Donnell Reed entered a guilty plea to a charge of robbery and was sentenced to five years' supervised probation, forty hours of community service to be completed within one year, and a \$500 fine. Appellant's terms of probation included a \$25 monthly supervision fee. This probation was revoked on October 30, 2006, at which time appellant was again sentenced to the same term of probation, community service, and fine.

Appellant's probation was revoked a second time on September 17, 2007, for failure to report to his probation officer and failure to pay the required fees. Following a revocation hearing, the court sentenced appellant to 240 months' incarceration in the Arkansas Department of Correction ("ADC"). The court of appeals affirmed. *Reed v. State*, CACR 07-1244 (Ark. App. Apr. 23, 2008) (unpublished). Appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010), and the court denied this petition without a hearing.

Now before us is appellant's appeal from the trial court's denial of postconviction relief. On appeal, appellant asserts two claims that he raised in his original Rule 37.1 petition to the trial court—ineffective assistance of counsel and violation of due process—as well as a claim that the trial court lacked jurisdiction to revoke appellant's probation and sentence him to a term of years in the ADC. 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 a 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 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. *Smith v. State*, 2010

Ark. 137, at 2-3, 361 S.W.3d 840, 844. 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. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam).

As to the second prong of *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. *See id.* 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.*

In his original petition to the trial court, appellant argued that counsel was ineffective in failing to: (1) notify appellant of changes to the revocation petition prior to the hearing, (2) tell the court that someone in appellant's family was present in the courtroom with the \$75 that appellant owed in unpaid probation fees, (3) inform the court that the revocation petition was not signed by appellant's probation officer, (4) argue that appellant was unconstitutionally detained due to a clerical mistake, and (5) move for dismissal on the basis that the revocation hearing was not held within the required time. In its order denying relief on appellant's petition, however, the trial court only directly addressed the fifth claim—that counsel should

have moved to dismiss the revocation petition because the hearing on the petition was not held within sixty days as required by Arkansas Code Annotated § 5-4-310 (b)(2) (Repl. 2006).

The circuit court's order stated:

Court records indicate that the revocation warrant was served on July 31, 2007, and the revocation hearing was held on September 17, 2007. The revocation hearing was held forty-nine days (49) after the serving of the revocation petition on the defendant. Therefore, Defendant's allegation that counsel was ineffective due to his failure to set on [sic] a motion to dismiss is without merit and DENIED.

Neither appellant's original Rule 37.1 petition nor his arguments on appeal offer any support for appellant's allegation that he was served with the original petition on June 30, 2007; he merely states this alternative date as fact, without even providing so much as a copy of the petition that he was served with. Because appellant failed to provide any factual substantiation to demonstrate that the circuit court's determination of the date of service was incorrect, appellant has stated no ground to warrant postconviction relief based on counsel's failure to move for a dismissal of the petition. We have repeatedly held that conclusory claims are insufficient to sustain a claim of ineffective assistance of counsel. *Ewells*, 2010 Ark. 407 at 5 (citing *Joiner v. State*, 2010 Ark. 309 (per curiam)).

Moreover, even if it were assumed, *arguendo*, that appellant is correct in his June 30, 2007 date of service, he still would have been entitled to no relief on this point. Appellant concedes in his brief that his arrest on May 11, 2007, was for failing to complete a day-work sentence imposed by a different court for traffic-related charges, meaning that appellant was

in jail for a charge unrelated to the acts contained in the State's probation revocation petition. We have held that, because the purpose of the sixty-day limitation period is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing, that limitation loses its meaning when, as here, the defendant is already in custody on another charge. See *Bilderback v. State*, 319 Ark. 643, 893 S.W.2d 780 (1995); see also *Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994). In sum, the circuit court's ruling on this point was not clearly erroneous.

As to the other four points raised by appellant as bases for his ineffective-assistance claim, we note that the circuit court did not provide rulings as to each of appellant's contentions. It is the obligation of an appellant to obtain a ruling from the trial court in order to preserve an issue for appellate review. *McCraney*, 2010 Ark. 96, 360 S.W.3d 144; *Beshears v. State*, 340 Ark. 70, 72, 8 S.W.3d 32, 34 (2000); see *Howard v. State*, 367 Ark. 18, 31, 238 S.W.3d 24, 35 (2006). Arkansas's rules of procedure provide an avenue for an appellant to obtain a ruling from the trial court should the court fail to rule on an issue in its initial order. Ark. R. Crim. P. 37.3 (2009); see *Beshears*, 340 Ark. at 73, 8 S.W.3d at 34. Failure to obtain a ruling precludes our review of that argument on appeal. *Beshears*, 340 Ark. at 72, 8 S.W.3d at 34; *Huddleston v. State*, 347 Ark. 226, 230, 61 S.W.3d 163, 167 (2001).

Appellant's second argument is that he was denied his due process guarantees under the Fourteenth Amendment to the United States Constitution because he was not given prior notice of the amended petition for revocation that was the subject of his revocation hearing

and because the trial court did not include in the record information regarding when appellant was served with the petition, which appellant claims is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As with the bulk of appellant's claims of ineffective assistance of counsel, however, appellant failed to get a ruling on this claim from the trial court. We are therefore precluded from addressing the issue on appeal. *Beshears*, 340 Ark. at 72, 8 S.W.3d at 34.

For his last point on appeal, appellant argues that the trial court was without jurisdiction to sentence him to a term of 240 months' imprisonment once it had previously sentenced him to five years' probation, a fine, and community service. While appellant did not raise this issue below, we have stated that a trial court's loss of jurisdiction over a defendant is always open, cannot be waived, and can be questioned for the first time on appeal. *Pike v. State*, 344 Ark. 478, 40 S.W.3d 795 (2001). Nevertheless, appellant's contention is without merit.

Under Arkansas law, if a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation. Ark. Code Ann. § 5-4-309(d). If a court revokes a suspension or probation, the court may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty. Ark. Code Ann. § 5-4-309(g)(1). Appellant was originally placed on probation after he pleaded guilty to robbery, a Class B felony. *See Ark.*

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Code Ann. § 5-12-102. The statutory sentencing range for a Class B felony is “not less than five (5) years nor more than twenty (20) years” in the Arkansas Department of Correction. Ark. Code Ann. § 5-4-401(a)(3). The trial court therefore acted wholly within its statutory jurisdiction when it revoked appellant’s probation prior to the end of his probationary period and sentenced him to twenty years’ imprisonment. Appellant’s argument on this point was incorrect and did not warrant postconviction relief.

Based on all of the foregoing, the trial court’s denial of postconviction relief was not clearly erroneous, nor was the trial court without jurisdiction to impose appellant’s 240-month sentence. The trial court’s order is therefore affirmed.

Affirmed.