

SUPREME COURT OF ARKANSAS

No. CR 08-951

ROBERT MITCHEM
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 7, 2011

APPEAL FROM THE CIRCUIT
COURT OF CRAIGHEAD COUNTY,
CR 2004-323, HON. VICTOR L.
HILL, JUDGE

AFFIRMED.

PER CURIAM

A jury found appellant Robert Mitchem guilty of attempted rape and kidnapping and sentenced him to an aggregate term of 240 months' imprisonment. The Arkansas Court of Appeals affirmed. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006). Appellant timely filed through counsel a petition in the trial court seeking postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2007). After a hearing on the petition, the trial court denied relief, and appellant lodged this appeal. The trial court's findings below were not clearly erroneous, and we affirm the order denying postconviction relief.

On appeal, appellant raises two points. In the first, he asserts trial counsel was ineffective for failing to object to testimony from a police officer that referenced a photograph of appellant taken at the jail. Appellant asserts in his second point that trial counsel was ineffective for failing to pursue a motion to suppress a statement appellant made while in custody and preserve the issue for appeal. The trial court found that counsel made a strategic decision not to object to the testimony about the booking photograph and that appellant failed to demonstrate that he was prejudiced by counsel's failure to suppress the statement.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Shipman v. State*, 2010 Ark. 499 (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).

This court assesses the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wallace v. State*, 2010 Ark. 485 (per curiam). Under the *Strickland* test, a petitioner raising a claim of ineffective assistance must 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. *Id.* (citing *Joiner v. State*, 2010 Ark. 309 (per curiam)). In addition, 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 who would prevail on 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 v. State*, 2010 Ark. 330 (per curiam).

During appellant's trial, a police officer testified that he had interviewed the victim and that, after hearing her story, he determined that the man she only knew as "Robert" was appellant. The officer further testified that he obtained a photograph of appellant from the jail and that he then showed the photograph to the victim. The photo was referenced by the witness a number of additional times.

At the hearing on the Rule 37.1 petition, trial counsel testified that the statement from the witness took him by surprise, and, if he had realized that the witness was going to reference the fact that the photo was taken from the jail, he would have sought to keep that fact from coming in at trial. He stated that he decided to “leave it alone” and indicated that he did not want to draw any more attention to the statement.

Appellant argues that counsel’s conduct was not tactical because the reference to jail and a booking photo was so prejudicial that it would have warranted a strong admonition or even a mistrial if counsel had objected. He contends that the fact that the photo was referenced three times would have supported the more drastic remedy and that counsel could not have made a strategic decision. Appellant alleges that the justification was a post hoc rationalization of counsel’s conduct.

Where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then such a decision is not a proper basis for relief under Rule 37.1. *Anderson v. State*, 2010 Ark. 404, 373 S.W.3d 876 (per curiam); *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam). Although the photo was referenced multiple times, the witness only alluded to the fact that it was taken while appellant was at the jail once. Although prejudicial, a passing reference to the fact that a photo was taken on booking or at the jail is not so prejudicial as to warrant a mistrial. *See Burks v. State*, 2009 Ark. 598, 359 S.W.3d 402 (remarks that amount to inadvertent references to previous illegal conduct may be cured by admonition). Under the circumstances here, the trial court

was not clearly erroneous in finding that the decision was one of trial strategy, or in finding that the decision not to call further attention to the remark by seeking an admonition was supported by reasonable professional judgment.

In its ruling on appellant's second point, the trial court found that the admission of appellant's statements did not prejudice the defense, and it found that the statements would have come in for impeachment purposes even if otherwise excluded. We agree that appellant failed to carry his burden of proof to show that the second prong of the *Strickland* test was satisfied, but we do so because the record here does not provide substantiation for any finding that a motion to suppress the statement would have been successful.

Appellant testified at the hearing on the Rule 37.1 petition that he was not given warnings as required by *Miranda v. Arizona*, 384 U.S.435 (1966). The police officer, in his testimony at trial, indicated that appellant was given those warnings. There is nothing, however, in that testimony that indicates at what point following appellant's arrest the warnings were given. In the order denying postconviction relief, the trial court appears to have found that appellant's testimony was not credible and that he was given the warnings. The trial court also apparently assumed that the warnings were not given prior to the time that appellant made the statements at issue. There is nothing identified by the court or that appellant points to in the record that indicates when the *Miranda* warnings were first given.

A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1.

Appellant had the burden to prove his allegations for postconviction relief. *Hampton v. State*, 2010 Ark. 330 (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587. Trial counsel cannot be ineffective for failing to make an objection or argument that is without merit. *Flowers v. State*, 2010 Ark. 364, 370 S.W.3d 228 (per curiam); *see also Tubbs v. State*, 2009 Ark. 249, 370 S.W.3d 157 (per curiam). Appellant was required therefore to demonstrate that he could have prevailed on the motion, even if it was error, or was not reasonable, not to have pursued it.

The circumstances here are not like those in *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008), where it was clear that the defendant's custodial statement would have been suppressed. Here, there was an issue of when the *Miranda* warnings were given in relation to the statements. Conflicts in testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001).

The court did not appear to find appellant's testimony that he was given no *Miranda* warnings credible, but no evidence was presented to establish when the warnings may have been given. As a result, appellant failed to present credible evidence that the statements were made prior to that time. Nor is it clear that all of the statements made by appellant were the result of express questioning or other actions likely to elicit an incriminating response. *See Talley v. State*, 2010 Ark. 357, 377 S.W.3d 222.

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Without evidence that established a *Miranda* violation, appellant failed to establish that, had counsel pursued the motion to suppress, the evidence would have been suppressed. A claim of ineffective assistance of counsel must state facts sufficient to satisfy both prongs of the *Strickland* test. *Travis v. State*, 2010 Ark. 341 (per curiam). Because he has the burden of proof, when a hearing is conducted on the merits of the claim, a petitioner asserting ineffective assistance must provide adequate evidence in support of those facts in order to establish his claim. Appellant failed to provide sufficient evidence to carry his burden to show that counsel might have successfully challenged admission of the statements.

Affirmed.