

SUPREME COURT OF ARKANSAS

No. CR 10-627

ERIC WAYNE KELLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 21, 2011

APPELLEE’S MOTION TO DISMISS
APPEAL; PRO SE MOTIONS TO FILE
BELATED BRIEF AND BELATED
RESPONSE TO APPELLEE’S
MOTION [APPEAL FROM PULASKI
COUNTY CIRCUIT COURT, CR
2005-5176, HON. CHRIS PIAZZA,
JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

On December 13, 2006, appellant Eric Wayne Kelley was convicted by a Pulaski County jury of rape, and he was sentenced to life imprisonment. On appeal, this court reversed the conviction and remanded the case to the trial court. *Kelley v. State*, 371 Ark. 599, 269 S.W.3d 326 (2007) (“*Kelley I*”). Appellant was retried, was convicted again on August 27, 2008, and was sentenced to forty-seven years’ imprisonment in the Arkansas Department of Correction. We affirmed. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373 (“*Kelley II*”).

In September of 2009, appellant timely filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010), in which he alleged that trial counsel in *Kelley II* had been ineffective. He then filed a “Motion to Attach

Addendum to Rule 37.1 Petition,” which included additional bases for postconviction relief.¹ Following a hearing on January 26, 2010, the trial court denied relief on appellant’s Rule 37.1 petition. Appellant timely filed a notice of appeal from the trial court’s order, and his brief was due in this court no later than August 2, 2010.

On September 16, 2010, the appellee State filed a motion to dismiss appellant’s appeal, noting that no brief had been filed by appellant as of the date the motion to dismiss was filed. Appellant then filed a pro se motion to file a belated appeal brief, with which he tendered his brief, and a pro se motion to file a belated reply to the State’s motion to dismiss. The State’s motion to dismiss and both of appellant’s pro se motions are now before us.

Because it is clear that appellant could not prevail if his appeal were allowed to proceed, we dismiss the appeal, and we need not reach the merits of the parties’ respective motions, which are all accordingly moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Delamar v. State*, 2011 Ark. 87 (per curiam); *Morgan v. State*, 2010 Ark. 504 (per curiam); *Goldsmith v. State*, 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam).

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.*

¹Nothing in the trial court’s order denying relief states whether this motion to file an overlength petition was granted. However, because one of the grounds for relief discussed in the trial court’s order was contained only in the addendum, we treat the motion as if it had been granted.

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.*

As grounds for relief in his original Rule 37.1 petition, appellant alleged ineffective assistance of counsel in *Kelley II* based upon counsel's failure: (1) to fully investigate the nature of his prior convictions and to offer proof of the exact nature of those convictions; (2) to object to the instruction given to the jury regarding Arkansas Rule of Evidence 404(b); (3) to object to certain documentary evidence as being improperly verified or untimely; (4) to object to the introduction of documentary evidence of prior convictions as being in violation of Arkansas Code Annotated § 16-90-204 (Repl. 2006) and to preserve this issue for review on appeal "under the constitutional standard of harmless beyond a reasonable doubt." Appellant's addendum to his Rule 37.1 petition added allegations that counsel was ineffective for failing to prevent the introduction of telephone calls as being too prejudicial, unauthenticated, and recorded in violation of federal wiretapping laws, and trial counsel was also ineffective for seeking a limiting instruction regarding certain testimony.²

The trial court's order denying relief on appellant's petition stated that appellant's arguments based on the alleged failure of trial counsel to fully investigate appellant's prior convictions and counsel's failure to object to the introduction of those prior convictions were

² Appellant's addendum to his Rule 37.1 petition also reiterated trial counsel's failure to preserve the issue of "harmless error beyond a reasonable doubt" for appellate review.

without merit; it was a matter of trial strategy to keep the details of the prior convictions vague, and trial counsel did argue to keep these convictions out of evidence. In fact, as the trial court's order noted, this argument was successful on direct appeal to this court, where we determined that the convictions should not have come in, but that their admission was harmless error in light of the voluminous evidence of appellant's guilt. *Kelley II*, 2009 Ark. 389, 327 S.W.3d 373.

Regarding appellant's argument that trial counsel was ineffective for allowing phone calls to be introduced into evidence, the trial court determined that this was also a question of trial strategy. Trial counsel testified at the Rule 37.1 hearing that she did, in fact, argue that the calls should be kept out of evidence because they were too prejudicial, and she found no merit in appellant's contentions that the calls were not properly authenticated or that they violated federal wiretapping laws.

Based on our review of the record before us, we cannot say that the trial court's findings on these two points were clearly erroneous. Nothing in appellant's petition established that trial counsel's decision as to either issue could not have been the result of her reasonable professional judgment. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam). Where the trial court has determined a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then counsel's decision is not a basis for relief under Rule 37.1. See *Chambliss v. State*, 2011 Ark. 12.

As to appellant's argument that counsel was ineffective for failing to object to the instruction given to the jury regarding the evidence of prior convictions under Rule of Evidence 404(b), the trial court found that appellant failed to demonstrate what other argument trial counsel should have made or what other instruction should have been given. The trial court correctly found that the instruction given was part of the Arkansas Model Jury Instructions – Criminal (2d Edition).

Our holdings have created a presumption that the model instruction is a correct statement of the law. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007). As such, any party who wishes to challenge the accuracy of a model instruction must rebut the presumption of correctness. See *McCoy v. State*, 348 Ark. 239, 74 S.W.3d 599 (2002). As he offered nothing in the way of an alternate interpretation of the law or an alternate instruction that could have been given, appellant did not meet his burden on this point.

Finally, the trial court determined that appellant's argument that trial counsel and appellate counsel should have argued the harmless-error-beyond-a-reasonable-doubt standard for the admission of his prior convictions under Rule 404(b) was without merit because appellant did not establish what argument or objection counsel could have made to the evidence that would have made this standard appropriate. Appellant's original Rule 37.1 petition states only that "counsel should have made a constitutional objection to the admission of the prior convictions at trial or on appeal," and that the admission "violated due process" because it was a "structural trial error not subject to the harmless error analysis."

Cite as 2011 Ark. 175

Appellant did not cite to any relevant case law that would support his claim, nor did he make an otherwise cogent and persuasive argument on this point. Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel was effective, nor do they warrant granting postconviction relief. *Delamar v. State*, 2011 Ark. 81; *Eastin v. State*, 2010 Ark. 275; *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910.

The trial court's order denying relief does not contain rulings by the trial court on appellant's remaining claims. 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).

Based on all of the foregoing, it is clear that appellant could not prevail on appeal. His appeal is accordingly dismissed, and all motions in this case are moot.

Appeal dismissed; motions moot.