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SUPREME COURT OF ARKANSAS

No. CR-09-384

FLOYD KEITH HERRON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 17, 2011

APPEAL FROM THE ASHLEY
COUNTY CIRCUIT COURT
[NOS. CR 2008-6, CR 2008-59]

HON. SAM POPE, JUDGE

AFFIRMED.

PER CURIAM

Appellant Floyd Keith Herron brings this appeal from the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2010). He asserts error in the trial court's dismissal of the petition, alleges that his guilty plea was not intelligently and voluntarily entered, and requests that we grant relief or remand for a hearing. Because we find that the petition clearly was without merit and that there was therefore no error in the denial of relief, we affirm.

An amended judgment entered on September 19, 2008, reflects that appellant entered a negotiated plea of guilty or nolo contendere to four counts of sexual assault in the second degree in CR 2008-59 and one count of sexual assault in the second degree in CR 2008-6. The trial court-imposed sentences of 120 months' imprisonment on each of the first three counts in CR 2008-59 and suspended imposition of sentence of 60 months for each of the remaining counts. Two counts were to run consecutively for an aggregate sentence of 240 months' imprisonment.

Through counsel, appellant filed a “Motion Combined with Brief for Rule 37 Relief and to Withdraw Guilty Plea.” Although the petition was filed within the requisite time period under Arkansas Rule of Criminal Procedure 37.2(c) (2010), the verification did not utilize the form of affidavit provided in Rule 37.1(c), and the petition, including the referenced attachments, exceeded the ten-page limit in Rule 37.1(b) by more than fifty pages. The petition referenced and included allegations concerning all five counts, but only provided the case number for CR 2008-6. Appellant later again filed the same petition, without any verification, but with the addition of a specific reference to case number CR 2008-59.

The order dismissing the petition found that appellant was not in custody for the charge under CR 2008-6 and that the petition referencing CR 2008-59 was not verified. Appellant does not argue that he was in custody from the CR 2008-6 charges, and a petitioner under Rule 37.1 must be in custody to be eligible for postconviction relief. *Branning v. State*, 2010 Ark. 401. We need not determine whether the basis for dismissal of the claims as to CR 2008-59 were otherwise proper because the allegations stated in both the initial petition and the later petition failed to set forth facts in support of a cognizable claim under the rule. In circumstances, as here, where we can determine from the record or the face of the petition that the petition is without merit, this court will affirm a denial of postconviction relief without a hearing. *See Rodriguez v. State*, 2010 Ark. 78 (per curiam).

The allegations in the initial petition, the later amended petition, and appellant’s brief on appeal largely consist of a recitation of the apparent evidence against appellant and criticism of counsel’s failure to adequately investigate or contest that evidence prior to appellant’s entry of his plea of guilty. Appellant made only a conclusory claim that the plea was not intelligently

and voluntarily entered; he did not provide any factual basis for the claim. Neither conclusory statements nor allegations without factual substantiation are sufficient to warrant granting postconviction relief. *Frost v. State*, 2010 Ark. 440 (per curiam). Appellant asserts ineffective assistance of counsel and contends that the stated facts describing counsel's behavior demonstrated that appellant would not have entered a guilty plea if counsel had developed his defense, but he does not explain how the alleged deficient representation impacted appellant's decision to enter a plea of guilty.

Where a petitioner alleges counsel was ineffective for inadequate preparation for trial prior to the entry of a plea of guilty, the petition must allege that, but for counsel's failure to prepare for trial, he would not have pled guilty. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. The petitions did not directly make that allegation, and to the extent that it was made, no facts were offered to support it. Neither petition established prejudice from the alleged ineffective assistance. Appellant appears to concede that he did not establish prejudice, because he argues that prejudice should be presumed.

Defendant did not, however, demonstrate actual denial of counsel as a basis for the exception under *United States v. Cronin*, 466 U.S. 648 (1984) that this court has acknowledged. See *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).¹ A defendant making 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). An appellant who has pleaded guilty normally will have

¹Appellant alleged that counsel had failed to subject the prosecution's case to meaningful adversarial testing, but he offered only the conclusory statement and again alleged no facts to support the allegation. Such a claim is, in any case and as a practical matter, untenable under circumstances

considerable difficulty in proving any prejudice as the plea rests upon an admission in open court that the appellant did the act charged. *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam). As already noted, in this situation, the petitioner must allege some direct correlation between counsel's deficient behavior and the decision to enter the plea, or the petitioner is procedurally barred from postconviction relief. See *Poliwka*, 2010 Ark. 152, 362 S.W.3d 918. Conclusory statements to that effect, without an alleged factual basis, do not suffice. The petitions did not state any facts that established the requisite prejudice.

Affirmed.

Billy J. Hubbell, for appellant.

Leslie Rutledge, Att'y Gen., by: *Eileen Harrison*, Ass't Att'y Gen., for appellee.

where the petitioner has pled guilty and no trial is held.