

SUPREME COURT OF ARKANSAS

No. CR 08-1042

KENNETH DANA BREWTON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 12, 2010

PRO SE APPEAL FROM THE
SEBASTIAN COUNTY CIRCUIT
COURT, GREENWOOD DISTRICT,
CR 2005-84, HON. J. MICHAEL
FITZHUGH, JUDGE

REVERSED AND REMANDED.

PER CURIAM

In 2006, a jury found appellant Kenneth Dana Brewton guilty of forgery in the second degree and possession of drug paraphernalia with intent to manufacture a controlled substance. An aggregate term of 480 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Brewton v. State*, CACR 07-330 (Ark. App. Feb. 6, 2008) (unpublished).

After the judgment of conviction was affirmed on appeal, appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2009) that was denied without a hearing. Appellant brings this appeal from the order.

In his petition filed in the trial court, appellant raised several claims of ineffective assistance of counsel as grounds for a new trial. On appeal, appellant raises only the claim that an evidentiary hearing should have been held concerning a letter that his codefendant John Kaiser had written to appellant allegedly stating that appellant had no knowledge of components of a "meth lab" that were found in a house that appellant did not live in at the time it was searched. He asserts that counsel had the letter at the time of trial and was



ineffective in that he failed to question Kaiser about it. He argues that the letter exonerated him and would have impeached Kaiser and shown that appellant had indeed not been living in the residence where the paraphernalia was found. He asserts that the outcome of the trial would have been different if counsel had questioned Kaiser about the letter.

On appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Viveros v. State*, 2009 Ark. 548 (per curiam); *Johnson v. State*, 2009 Ark. 460, 344 S.W.3d 74 (per curiam); *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (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. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

While appellant did not attach the letter alleged to have been written by Kaiser to the Rule 37.1 petition or otherwise provide proof that it existed at the time of trial, he contended that his attorney had the letter. He would have been unable to produce the letter or prove its existence without the cooperation of counsel, however, and it is reasonable to conclude that



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a hearing should have been held at which counsel could have been questioned on whether he had the letter at the time of trial.

Arkansas Rule of Criminal Procedure 37.3(a) (2008) requires an evidentiary hearing in a postconviction proceeding unless the files and records of the case conclusively show that the petitioner is entitled to no relief. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). Here, it could not be conclusively shown on the record, or on the face of the petition itself, that the allegation concerning the letter had no merit. A hearing will settle the question of whether the letter existed, and if so, whether counsel was ineffective under the *Strickland* standard for failing to examine Kaiser concerning it. Accordingly, the order is reversed and the matter is remanded to the trial court for an evidentiary hearing.

Reversed and remanded.

David L. Dunagin, for appellant.

Dustin McDaniel, Att'y Gen., by: *Deborah Nolan Gore*, Ass't Att'y Gen., for appellee.