

Cite as 2010 Ark. 78

SUPREME COURT OF ARKANSAS

No. CR 08-1028

FERNANDO RODRIGUEZ
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 18, 2010

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT [CR
2005-939]

HON. DAVID S. CLINGER, JUDGE

AFFIRMED.

PER CURIAM

In 2006, a jury found appellant Fernando Rodriguez guilty of first-degree murder on charges stemming from the death of Gabino Mendoza and sentenced appellant to life imprisonment. This court affirmed, holding that the trial court had abused its discretion in admitting a statement from Gabino's minor daughter, but, because there was overwhelming evidence of a bloody altercation between Gabino and the appellant, the statement was cumulative, and the admission was harmless error. *Rodriguez v. State*, 372 Ark. 335, 276 S.W.3d 208 (2008).

Appellant filed a timely pro se petition under Rule 37.1 of the Arkansas Rules of Criminal Procedure (2009) that set forth claims that trial counsel was ineffective for failing to investigate and call Linda Mendoza, the victim's daughter, and his wife, Rosa Mendoza, to testify concerning fabrication of Linda's statements as a result of threats of deportation. Appellant included in the petition affidavits from Linda and Rosa concerning those claims.



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On the same day, appellant filed a motion for permission to amend the petition. He later filed an amended pro se petition that raised a number of additional claims. Counsel for appellant entered an appearance after the amended petition was filed.

The trial court entered an order that denied the motion to amend the petition and that denied the petition without a hearing. Appellant brings this appeal of the order and raises a single point on appeal, alleging that the trial court erred in denying the Rule 37.1 petition. In his argument on that point, appellant additionally contends that the trial court erred in denying the motion to amend and in failing to grant a hearing on the petition. He complains that the trial court did not consider any evidence aside from the pleadings and the trial record and contends that the court's findings in its order were not sufficient. We affirm the denial of postconviction relief. We do so because the record indicates that the initial petition was wholly without merit as appellant failed to set forth facts sufficient to sustain a finding that any alleged ineffective assistance resulted in prejudice.¹

This court does not reverse a denial of postconviction relief unless the trial court's

¹We note that, although appellant argues ineffective assistance of counsel, his brief does not contain an abstract of the trial testimony. In this case, Arkansas Supreme Court Rule 4-2(a)(5) (2009) requires an appellant's abstract to include a condensation of pertinent portions of the transcript filed on the prior appeal. See *Lee v. State*, 375 Ark. 124, 289 S.W.3d 61 (2008) (per curiam). We do not, however, order rebriefing under Arkansas Supreme Court Rule 4-2(b)(3) (2009) on the circumstances presented here. Unlike *Lee*, this is not a death case. We ordinarily order rebriefing under Rule 4-2(b) rather than engage in the passing of a record among seven justices. See *Dansby v. State*, 347 Ark. 509, 65 S.W.3d 448 (2002) (per curiam); Ark. Sup. Ct. R. 4-2(b)(3). We may, however, go to the record to affirm. *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001). Here, only a very cursory review of the record on direct appeal is required because the relevant facts are summarized in our opinion on direct appeal.



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findings are clearly erroneous. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290. 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. *Id.*

Although appellant does not set out the claim as a separate point on appeal, he contends that the trial court should not have denied leave to amend the petition and that appellant demonstrated that he was unable to adequately present his claims within the required limitation. We address that issue first to determine which pleadings were before the court below.

Our standard on review as to the denial of leave to amend is abuse of discretion; we determine whether the trial court's decision was arbitrary or groundless. *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006) (per curiam). In *Butler*, we distinguished those cases in which an appellant sought to substitute a new petition² from those in which the appellant sought to file an expanded petition that exceeds the page limitations in Rule 37.1. Here, appellant clearly sought to amend by filing an expanded petition exceeding the ten-page limit in Rule 37.1. The trial court does not abuse its discretion by denying leave to amend where an appellant failed to set forth any legitimate ground or justification for filing an enlarged petition. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Although appellant asserts that he demonstrated in the motion to amend that he was

²In *Butler*, the appellant had filed the original petition pro se and later retained counsel. Counsel then sought to substitute a new petition for the pro se petition.



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unable to adequately present his claims in ten or fewer pages, he fails to present any cogent reason that the claims set out in the motion would demonstrate a need for an expanded petition. Nor does our review of that motion provide one. In the motion to amend, appellant alleged constitutional issues, substantial public interest, and his actual innocence. He referenced the claims raised in the petition, without indicating how he might have required additional explanation of those claims, and he alluded to claims of insufficient evidence, failure to file a motion to suppress, and DNA testing.³ The trial court's finding that the ten-page limitation was reasonable under the circumstances was not clearly erroneous, and the trial court did not abuse its discretion in denying the motion to amend.

This court has interpreted Arkansas Rule of Criminal Procedure 37.3 (2009) to require an evidentiary hearing in postconviction proceedings unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). The trial court has discretion under Rule 37.3 to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Id.* Appellant contends that the trial court failed to provide adequate written findings to support that decision as required by Rule 37.3. If the trial court fails to make appropriate findings under

³Claims challenging the sufficiency of the evidence are not cognizable in Rule 37.1 petitions. See *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam); *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983) (per curiam). This court has also held that newly discovered evidence is a direct challenge and not a proper basis for postconviction relief under Rule 37.1. *Cigainero v. State*, 321 Ark. 533, 534–35, 906 S.W.2d 282, 283–84 (1995) (citing *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981)). Appellant's other claims were simply too vague to provide any legitimate grounds for filing an enlarged petition.



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the rule, it is, with limited exception, reversible error. *Id.*

Even if the trial court's findings were inadequate, this court will affirm the denial of a Rule 37.1 petition notwithstanding the circuit judge's failure to make written findings under Rule 37.3 in two circumstances: (1) where it can be determined from the record that the petition is wholly without merit, and (2) where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008). We determine here that the petition before the court was wholly without merit, based on the record of appellant's trial.

The original petition alleged that counsel was ineffective because he did not adequately investigate information from the family that Linda Belen Mendoza's statement that she had seen appellant with a knife was fabricated as a result of pressure from investigators and threats of deportation of her family.⁴ Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Appellant cannot show prejudice from any alleged error by trial counsel concerning a failure to impeach or discredit Linda's statement.

As noted in our opinion on direct appeal, the evidence at trial, aside from Linda's

⁴In his brief, appellant references affidavits by Linda, her mother Rosa, and a third affidavit that he avers was before the court. The third affidavit, unlike the affidavits provided by Linda and Rosa, was not filed as a part of the original petition and was not, despite appellant's assertion to the contrary, before the court. We do not therefore consider appellant's arguments related to the third affidavit.



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statement, was overwhelming. *Rodriguez*, 372 Ark. at 339, 276 S.W.3d at 212. We held that the admission of Linda’s statement had been error, but that the error was harmless. *Id.* The prosecution presented a neighbor and three of appellant’s family members who all testified as to the bloody altercation. The defense presented additional relatives who had witnessed the fight. In his testimony, appellant admitted that he had fought with Gabino; that, at some point during the fight, he had something in his hand; and that the altercation ended with Gabino bleeding on the ground.

To satisfy the prejudice requirement on a claim such as this, a petitioner must show that there is a reasonable probability that the fact-finder’s decision would have been different absent counsel’s errors. *Viveros v. State*, 2009 Ark. 548 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* In our opinion on direct appeal we found that the admission of the statement was not prejudicial; for the same reasons, a failure to impeach that statement was not prejudicial.

Because appellant’s petition was wholly without merit, the trial court did not err in denying postconviction relief. Accordingly we affirm the order denying the petition.

Affirmed.

Robert R. Cortinez, Sr., for appellant.

Dustin McDaniel, Att’y Gen., by: *Kent G. Holt*, Ass’t Att’y Gen., for appellee.