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SUPREME COURT OF ARKANSAS

No. CR-10-771

JAMES OLIVER DELAMAR APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 24, 2011 PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF [CLARK COUNTY CIRCUIT COURT, CR 2007-35, HON. ROBERT MCCALLUM, JUDGE] APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2007, appellant James Oliver Delamar was found guilty by a jury of domestic battering in the first degree, aggravated robbery, and stalking in the first degree. He was sentenced as a habitual offender to an aggregate term of 840 months' imprisonment. The Arkansas Court of Appeals affirmed. *Delamar v. State*, CACR 08-64 (Ark. App. Sept. 24, 2008) (unpublished).

Subsequently, appellant timely filed in the trial court a verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied. Appellant lodged an appeal here and now seeks by pro se motion an extension of time to file his brief-in-chief.

We need not address the merits of the motion because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motion is 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. *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); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

As his initial ground for relief, appellant contended in his petition that he was subjected to double jeopardy by virtue of having been found guilty of first-degree battering and first-degree stalking and also being sentenced as a habitual offender. Appellant presented no authority for the proposition. A court need not consider an argument, even a constitutional one, when a claimant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003)).

In his second claim for postconviction relief, appellant argued that the trial court erred in several of its rulings at trial. Specifically, he claimed that he was denied a prompt first appearance, the court did not make sure appellant understood the charges and had counsel and did not allow him to enter a plea in a timely fashion. None of the claims was a ground for relief under our postconviction rule. Assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Lee v. State*, 2010 Ark. 261 (per curiam); *see also Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (per curiam). Rule 37.1 does not permit a direct attack on a judgment or permit a petition to function as a substitute for an appeal. *Frost v. State*, 2010 Ark. 440 (per curiam); *Hill v. State*, 2010

Ark. 102 (per curiam) (citing *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam)). The sole exception lies in claims raised in a timely petition that are sufficient to void the judgment and render it a nullity. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. Appellant did not contend, much less establish with factual substantiation and legal authority, that any claim of trial error raised in the petition was sufficient to void the judgment in his case.

In his third ground for postconviction relief, appellant asserted that the evidence was insufficient to sustain the judgment. Claims challenging the sufficiency of the evidence are a direct attack on the judgment and not cognizable in Rule 37.1 petitions. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983) (per curiam); *see also Grant v. State*, 2010 Ark. 286, 365 S.W.3d 894 (per curiam); *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam).

In the introductory portion of his petition, appellant contended that he was denied effective assistance of counsel. He stated that his attorney had represented him in a prior proceeding and that the attorney knew that appellant did not want him to represent him again. He further stated that counsel lied to him about whether appellant's request for other counsel had been denied by the court. The claims must fail as a ground for a finding of ineffective assistance of counsel because appellant did not explain how the defense was prejudiced by counsel's conduct; that is, he did not allege that any particular act or omission on counsel's part affected the defense. In short, the allegations contained in the petition were conclusory in nature, lacking any factual substantiation on which a finding of ineffective assistance of counsel could be based.

In an 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. *Watkins*, 2010 Ark. 156, 362 S.W.3d 910 (citing *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. *Id.* 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). Under *Strickland*, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

The burden is entirely on the petitioner in a Rule 37.1 proceeding to provide facts that affirmatively support the claims of prejudice. *See Viveros v. State*, 2009 Ark. 548 (per curiam). 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. *Eastin v. State*, 2010 Ark. 275; *Watkins*, 2010 Ark. 156, 362 S.W.3d 910. A court is not required to research or develop arguments contained in a petition for postconviction relief. *See Eastin*, 2010 Ark. 275; *see also Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam). Appellant here did not meet his burden of establishing that counsel was ineffective under the *Strickland* standard.

Appeal dismissed; motion moot.