Official Arkansas
Supreme Court Opinion

Cite as 2009 Ark. 338 (unpublished)

ARKANSAS SUPREME COURT

No. CR 08-1004

TAVARUS MONTGOMERY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered June 4, 2009

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, CR 2005-3134, HON. CHRIS PIAZZA, JUDGE

AFFIRMED.

PER CURIAM

In 2007, a jury found appellant Tavarus Montgomery guilty of first-degree murder and the trial court sentenced him to 480 months' imprisonment. The Arkansas Court of Appeals affirmed. *Montgomery v. State*, CACR 07-693 (Ark. App. Jan. 30, 2008) (unpublished per curiam). Appellant timely filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 that was denied. Now represented by counsel, appellant has lodged in this court an appeal of the denial of postconviction relief.

Appellant presents only one point on appeal. Appellant asserts that the trial court erred in denying appellant a hearing on the issue of whether trial counsel failed to investigate the medical evidence presented by the State in order to determine whether a prior injury contributed to or caused the victim's death. In his brief, appellant alleges that he could have presented evidence at a hearing to show that the previous injury contributed to the bleeding that resulted in the death of three-year-old Eudre Broadway. Appellant's claims in his petition

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were not sufficient to merit a hearing, however, and we therefore affirm the denial of postconviction relief.

The trial court found that appellant's allegations concerning ineffective assistance in the petition were matters of trial tactics and strategy and were not grounds for postconviction relief. We note that the trial court did not clearly provide a ruling as to this issue. An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). The order addressed ineffective assistance of counsel based upon trial counsel's failure to sufficiently challenge witnesses, but it did not discuss appellant's claim that counsel failed to call medical witnesses to refute the testimony of the doctors at trial or to investigate the possibility of calling such witnesses. Even if the trial court's broad ruling on the claim of ineffective assistance could be construed to address the claim, however, the trial court did not err in denying appellant a hearing on the claim.

Arkansas Rule of Criminal Procedure 37.3(a) 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). The trial court has discretion under the rule to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Id.* A trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

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Here, the petition shows that the allegations had no merit. 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 did not plead facts in the petition to support the requisite showing of prejudice. Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam); *see also Barrett*, 371 Ark. at 96, 263 S.W.3d at 546. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

On appeal, appellant contends that he could have provided evidence to show that the injury contributed to the fatal bleeding, if the trial court had granted a hearing. But, petitioner did not plead facts in the petition to establish that trial counsel would have discovered witnesses to provide the testimony appellant alleges was available. Where a petitioner makes such a claim, it is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Weatherford v. State*, 363 Ark. 579, 586, 215 S.W.3d 642, 649 (2005) (per curiam).

Even if the issue was preserved for appeal, the petition set forth only conclusory allegations as to the claim. The petition conclusively shows that the allegations had no merit and that the trial court did not err in denying a hearing on the petition.

Affirmed.