

SUPREME COURT OF ARKANSAS

Thurmond v. State

2014 Ark. 176 (2014) · No. CR-12-802 · Decided April 17, 2014

SUMMARY

The Arkansas Supreme Court dismissed Sam Edward Thurmond Sr.'s appeal from the denial of his Arkansas Rule of Criminal Procedure 37.1 petition. The court held that the postconviction claims were moot because Thurmond had been released from custody, and alternatively concluded that the claims lacked merit because counsel was not ineffective for failing to pursue a meritless challenge to a photographic lineup.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Arkansas
DECIDED	April 17, 2014
DOCKET	CR-12-802
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from the denial of a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 following a negotiated guilty plea.
STANDARD OF REVIEW	The denial of postconviction relief is reviewed for clear error. A finding is clearly erroneous when, although supported by evidence, the appellate court is left with a definite and firm conviction that a mistake has been committed.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Sam Edward Thurmond, Sr. v. State of Arkansas

TOPICS

- post-conviction relief
- mootness
- ineffective assistance
- suppression of evidence
- appellate procedure

PRACTICE AREAS

- criminal procedure
- post-conviction relief
- ineffective assistance of counsel
- appellate procedure

QUESTIONS PRESENTED

1. Whether Thurmond's appeal from the denial of postconviction relief became moot after he was released from incarceration.
2. Whether the circuit court clearly erred in rejecting Thurmond's claim that counsel was ineffective for failing to seek suppression of allegedly suggestive lineup evidence and for providing allegedly flawed advice concerning the guilty plea.
3. Whether Thurmond could raise on appeal claims concerning trial error, attorney-client privilege, and attorney conflict that were not developed or ruled on below.

HOLDINGS

1. Because Thurmond was no longer incarcerated and therefore could no longer receive postconviction relief, his claims were moot and the appeal had to be dismissed.
2. Issues not developed below and not resolved by the circuit court could not be raised for the first time on appeal.
3. The circuit court did not clearly err in denying the ineffective-assistance claim because Thurmond failed to demonstrate a meritorious suppression challenge to the lineup.

KEY QUOTATIONS

"Because appellant can no longer receive relief on his claims for postconviction relief, those claims are moot, and we must dismiss the appeal." (at 2)

"Failure to make a meritless objection or motion does not constitute ineffective assistance of counsel." (at 3)

FACTUAL BACKGROUND

Thurmond entered a negotiated guilty plea to theft of property and was sentenced to 120 days' imprisonment in the county jail and 60 months' probation. He later sought Rule 37.1 postconviction relief, alleging, among other things, ineffective assistance based on trial counsel's failure to seek suppression of lineup evidence and advice related to his guilty plea. Trial counsel testified that the original lineup photographs were not suggestive and that a suppression challenge would have been meritless; the circuit court credited that testimony.

PROCEDURAL HISTORY

Thurmond pleaded guilty to theft of property and received 120 days in county jail and 60 months' probation. He timely filed a Rule 37.1 petition, which the circuit court denied after a hearing held together with the State's probation-revocation petition. Thurmond appealed, but he was released from jail while the appeal was pending. The Arkansas Supreme Court dismissed the appeal as moot and alternatively held that the claims lacked merit.

DISPOSITION

dismissed

CASES CITED

- Branning v. State, 2010 Ark. 401
- Herron v. State, 2011 Ark. 71 (per curiam)
- Bohanan v. State, 336 Ark. 367, 985 S.W.2d 708 (1999)
- Hogan v. State, 2013 Ark. 223 (per curiam)
- Hayes v. State, 2014 Ark. 104, ___ S.W.3d ___
- Nelson v. State, 2014 Ark. 28 (per curiam)

OPINION

PER CURIAM.

Cite as 2014 Ark. 176 SUPREME COURT OF ARKANSAS No. CR-12-802 SAM EDWARD THURMOND, SR. Opinion Delivered April 17, 2014 APPELLANT PRO SE APPEAL FROM THE V. FAULKNER COUNTY CIRCUIT COURT, [NO. 23CR-11-318] STATE OF ARKANSAS APPELLEE HONORABLE CHARLES EDWARD CLAWSON, JR., JUDGE APPEAL DISMISSED. PER CURIAM In 2012, appellant Sam Edward Thurmond, Sr., entered a negotiated plea of guilty to a charge of theft of property in the Faulkner County Circuit Court, and he received a sentence of 120 days' imprisonment in the county jail and 60 months' probation.

Appellant filed in the trial court a timely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2013). The trial court held a hearing on both the Rule 37.1 petition and a petition for probation revocation filed by the State.

In an order filed in court on May 21, 2012, the trial court revoked appellant's parole, imposing 360 additional days in the county jail and additional parole time. It also denied the Rule 37.1 petition in an order entered June 1, 2012.¹ Appellant appeals the order denying postconviction relief. Appellant was released from the Faulkner County jail after filing this appeal, and he is ¹ Because appellant was incarcerated on the charge at the time that the order denying postconviction relief was entered, the trial court had jurisdiction to grant or deny relief.

See Branning v. State, 2010 Ark. 401. Cite as 2014 Ark. 176 therefore no longer entitled to postconviction relief. Herron v. State, 2011 Ark. 71 (per curiam); see also Bohanan v. State, 336 Ark. 367, 985 S.W.2d 708 (1999) (holding that a petitioner was not "in custody" for purposes of Rule 37 where the petitioner was on parole).

Because appellant can no longer receive relief on his claims for postconviction relief, those claims are moot, and we must dismiss the appeal. Moreover, even if appellant's claims were not moot, the appeal is without merit. Appellant raises some issues on appeal concerning trial error, violations of attorney-client privilege, and attorney conflict that were not developed below and for which he received no ruling.

See *Hogan v. State*, 2013 Ark. 223 (per curiam) (The appellant had an obligation to obtain a ruling on each claim, and he could not raise new arguments on appeal.). The remaining issues in the appeal concern appellant's allegation that trial counsel was ineffective for failing to seek suppression of evidence concerning a lineup. Appellant contends that the copies of the photos that comprised the lineup that were provided to the defense were suggestive and that, because counsel did not act appropriately to suppress that evidence and his recommendations concerning that evidence and entry of a plea were therefore flawed, appellant's plea was not knowingly or voluntarily entered.

Trial counsel testified that his examination of the original photos that would have been introduced showed that the lineup was not suggestive and that, as a consequence, he could not have challenged the evidence with what would have been a meritless claim.

The trial court found that counsel's testimony was credible. The trial court also found that counsel's recommendations based on that conclusion were the result of a reasonable strategic decision and 2 Cite as 2014 Ark. 176 that it followed that appellant's plea was knowingly and voluntarily entered. When this court reviews an order that denies postconviction relief, it does not reverse unless the trial court's findings are clearly erroneous.

Hayes v. State, 2014 Ark. 104, ___ S.W.3d ___. 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.* Appellant's claims hinged on the potential challenge to the lineup, and the record supports the trial court's conclusion that appellant did not demonstrate that there was a meritorious challenge that trial counsel could have made to that lineup.

Failure to make a meritless objection or motion does not constitute ineffective assistance of counsel. *Nelson v. State*, 2014 Ark. 28 (per curiam). The trial court did not clearly err in denying postconviction relief. Appeal dismissed. Sam Edward Thurmond, Sr., pro se appellant. Dustin McDaniel, Att'y Gen., by: Nicana C. Sherman, Ass't Att'y Gen., for appellee.