

SUPREME COURT OF ARKANSAS

Small v. State, 371 Ark. 244

264 S.W.3d 512 (2007) · No. CR 06-1364 · Decided October 4, 2007

SUMMARY

The Supreme Court of Arkansas reviewed the denial of Gregory M. Small’s pro se petition for post-conviction relief under Arkansas Rule of Criminal Procedure 37.1. Small raised twelve ineffective-assistance-of-counsel claims concerning witness testimony, charging delay, offense merger, evidentiary issues, jury instructions, confrontation, and plea negotiations. The court held that the trial court did not clearly err in denying relief without a hearing.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                           |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Arkansas                                                                                                                                                                                                                                                                 |
| WRITING FOR THE COURT | Per Curiam                                                                                                                                                                                                                                                                                |
| JURISDICTION          | Arkansas                                                                                                                                                                                                                                                                                  |
| DECIDED               | October 4, 2007                                                                                                                                                                                                                                                                           |
| DOCKET                | CR 06-1364                                                                                                                                                                                                                                                                                |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Appeal from the denial, without a hearing, of a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, asserting twelve claims of ineffective assistance of counsel.                                                                                          |
| STANDARD OF REVIEW    | The court reviews the denial of postconviction relief for clear error. Under Strickland v. Washington, the petitioner must show both deficient performance and prejudice, and the appellate court asks whether the trial court clearly erred in finding that counsel was not ineffective. |
| PRECEDENTIAL VALUE    | Published Arkansas Supreme Court opinion; precedential                                                                                                                                                                                                                                    |
| PARTIES               | Gregory M. Small v. State of Arkansas                                                                                                                                                                                                                                                     |

TOPICS

- state post-conviction relief
- ineffective assistance
- post-conviction relief
- criminal procedure
- appellate procedure

## PRACTICE AREAS

state post-conviction relief

criminal procedure

criminal defense

appellate procedure

## QUESTIONS PRESENTED

1. Whether the trial court clearly erred in denying Small's Rule 37.1 claims that trial counsel was ineffective for failing to call or investigate witnesses.
2. Whether counsel was ineffective for failing to challenge the delay in filing charges.
3. Whether counsel was ineffective for failing to preserve a claim that the three offenses constituted one continuing offense.
4. Whether counsel was ineffective regarding challenges to the investigation, allegedly perjured testimony, lack of DNA evidence, prior sexual conduct evidence, alternative-sentencing instructions, prosecutorial closing argument, the victim's position while testifying, and the exclusion of statements by Small's father.
5. Whether counsel was ineffective for failing to convey a counteroffer during plea negotiations.

## HOLDINGS

1. The trial court did not clearly err in denying Small's ineffective-assistance claims because he failed to establish deficient performance and resulting prejudice under Strickland.
2. The rape, attempted rape, and second-degree sexual-assault counts were separate offenses rather than a single continuing offense because the acts were different in nature and separate in time.
3. Counsel was not ineffective for failing to argue that the absence of DNA evidence rendered the evidence insufficient because uncorroborated testimony of a rape victim may support a conviction if it satisfies the statutory elements.
4. Small failed to establish ineffective assistance based on counsel's alleged failure to convey a counteroffer because he did not show that the State would have accepted the counteroffer or extended the original offer, or that he suffered prejudice.

## KEY QUOTATIONS

*"The Strickland standard is a two-part test."* (at 516)

*"The three counts did not constitute a single continuing offense."* (at 518)

*"Accordingly, we affirm the trial court's denial of postconviction relief."* (at 523)

## FACTUAL BACKGROUND

A jury found Small guilty of rape, attempted rape, and second-degree sexual assault based principally on the victim's testimony concerning separate acts of sexual contact and penetration. The jury imposed consecutive terms of 240 months, 144 months, and 108 months, for an aggregate sentence of 492 months. In postconviction proceedings, Small alleged twelve instances of ineffective assistance, including failures concerning witnesses, charging delay, sufficiency, evidence, jury instructions, confrontation, and plea negotiations.

## PROCEDURAL HISTORY

A jury convicted Small of rape, attempted rape, and second-degree sexual assault and imposed consecutive sentences totaling 492 months. The Arkansas Court of Appeals affirmed the judgment. Small then filed a timely Rule 37.1 petition in the trial court, which denied relief without a hearing. The Arkansas Supreme Court granted a belated appeal and affirmed the denial of postconviction relief.

## DISPOSITION

affirmed

## CASES CITED

- Small v. State, CACR 04-1390, 2005 WL 1463414 (Ark. App. June 22, 2005)
- Small v. State, CR 06-1364, 2007 WL 70426 (Ark. Jan. 11, 2007) (per curiam)
- State v. McCormack, 343 Ark. 285, 34 S.W.3d 735 (2000)
- Howard v. State, 367 Ark. 18, 238 S.W.3d 24 (2006)
- Beshears v. State, 340 Ark. 70, 8 S.W.3d 32 (2000)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- Jackson v. State, 352 Ark. 359, 105 S.W.3d 352 (2003)
- Flores v. State, 350 Ark. 198, 85 S.W.3d 896 (2002)
- Noel v. State, 342 Ark. 35, 26 S.W.3d 123 (2000)
- Burton v. State, 367 Ark. 109, 238 S.W.3d 111 (2006)
- Hill v. State, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam)
- Lee v. State, 343 Ark. 702, 38 S.W.3d 334 (2001)
- Nelson v. State, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam)
- Weatherford v. State, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam)
- State v. Townsend, 366 Ark. 152, State v. Townsend, 366 Ark. 152, 233 S.W.3d 680 (2006)
- Scott v. State, 263 Ark. 669, 566 S.W.2d 737 (1978)
- Camargo v. State, 346 Ark. 118, 55 S.W.3d 255 (2001)
- Rains v. State, 329 Ark. 607, 953 S.W.2d 48 (1997)
- Smith v. State, 354 Ark. 226, 118 S.W.3d 542 (2003)
- Ricks v. State, 327 Ark. 513, 940 S.W.2d 422 (1997)
- Kelly v. State, 350 Ark. 238, 85 S.W.3d 893 (2002)
- Williams v. State, 363 Ark. 395, 214 S.W.3d 829 (2005)
- Wicoff v. State, 321 Ark. 97, 900 S.W.2d 187 (1995)
- State v. Smith, 368 Ark. 620, 249 S.W.3d 119 (2007)
- Smith v. State, 340 Ark. 116, 8 S.W.3d 534 (2000)