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SUPREME COURT OF ARKANSAS

No. CR 10-1022

Opinion Delivered April 28, 2011

WILLIE GASTER DAVIS, JR.
Appellant

v.

STATE OF ARKANSAS
Appellee

PRO SE PETITION FOR WRIT OF CERTIORARI AND MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF [DESHA COUNTY CIRCUIT COURT, ARKANSAS CITY DISTRICT, CR 95-110, HON. SAMUEL B. POPE, JUDGE]

APPEAL DISMISSED; PETITION AND MOTION MOOT.

PER CURIAM

Appellant Willie Gaston Davis, Jr., is an inmate incarcerated in the Arkansas Department of Correction serving a life sentence pursuant to a 1996 judgment reflecting his conviction on charges of first-degree murder, robbery, theft of property, and false imprisonment. This court affirmed that judgment in *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997). In 2008, appellant filed in the trial court a petition for scientific testing under Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Arkansas Code Annotated §§ 16-112-201 to -208 (Repl. 2006), that was denied. We granted appellant's pro se motion for belated appeal of the order denying the Act 1780 petition by Per Curiam order dated November 11, 2010.

Appellant has now filed a motion for extension of time in which to file his brief and a petition for writ of certiorari that seeks to supplement the record on appeal. We dismiss the appeal, and, consequently, the motion and petition for writ of certiorari are moot. An appeal of the denial of postconviction relief, including an appeal from an order denying a petition for writ of habeas corpus under Act 1780, will not be permitted to go forward where it is clear that the appellant could not prevail. *Strong v. State*, 2010 Ark. 181 372 S.W.3d 758 (per curiam).

In this case, a brief review of the petition appellant filed for Act 1780 relief shows that appellant cannot prevail. Appellant did not meet a number of requirements in the act, in that he failed to demonstrate grounds to rebut the presumption that his petition was not timely filed, and he failed to demonstrate that the testing that he sought could produce evidence that would raise a reasonable probability that appellant did not commit the offense.

Act 1780 of 2001 provides that a writ of habeas corpus can issue based upon new scientific evidence proving a person actually innocent of the offense for which he was convicted. Ark. Code Ann. 16-112-201(a); *Strong*, 2010 Ark. 181, 372 S.W.3d 758. The act, however, requires that a motion for relief must be made in a timely fashion. Ark. Code Ann. 16-112-202(10). Section 16-112-202(10) provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction and lists five grounds by which the presumption may be rebutted. Appellant's request for testing was filed more than eleven years after the judgment was entered in his case. Act 1780

therefore required appellant to establish a rebuttal to the presumption arising from one of the five grounds listed in the statute. *Aaron v. State*, 2010 Ark. 249 (per curiam) (citing *Scott v. State*, 372 Ark. 587, 279 S.W.3d 66 (2008) (per curiam)).

Appellant's petition failed to address the timeliness issue, and it does not raise any claim that would provide one of the five grounds for rebuttal. Moreover, even if appellant had offered a basis to rebut the presumption, the petition did not meet other conditions for the form of motion under § 16-112-202.[1]

Appellant requested testing of fingerprints, hairs, and soil samples that were available at the time of trial. The inference drawn from appellant's claims is that the soil samples were not tested because the laboratory did not at that time perform that type of comparison, and the hairs and fingerprints were previously tested and excluded appellant. Appellant did not identify any new testing methods unavailable at the time of trial that should now be employed; rather, he requested comparisons to samples he wished to have collected from unnamed individuals and to soil samples from a particular area. He did not set out in the petition how having the requested testing performed would support a theory of defense that would establish his actual innocence. Section 16-112-202 requires that the proposed testing hold the potential to produce new evidence to support such a theory of defense and raise a

[1] The trial court indicated in its order that identity was not at issue. While appellant admitted to some of the actions at issue, and there was a great deal of evidence placing him in the company of the victim, he did not admit that he killed the victim. Identity was therefore at issue.

reasonable probability that the applicant did not commit the offense. Ark. Code Ann. § 16-112-202(6) & (8).

As this court has noted in previous opinions, there was an abundance of strong evidence in this case that linked appellant to the victim at the time of the incident and in close proximity to her death, including his own admissions and testimony that he was found by the police asleep on a couch with her dead body. *See Davis v. State*, CR 97-401 (Ark. Apr. 10, 2008) (unpublished per curiam); *Davis v. State*, CR 97-401 (Ark. Jan. 31, 2008) (unpublished per curiam). Evidence that others may have come into contact with the victim or that appellant did not take her to a particular location before ultimately being found with her at his house is insufficient to raise a reasonable probability that appellant did not commit the crimes.

Under an earlier version of the statute, this court held that DNA testing of evidence is authorized if the testing or retesting could provide materially relevant evidence that will significantly advance the defendant's claim of innocence. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). A court was to make that assessment in light of all the evidence presented to the jury and the evidence presented to the trial court at the Act 1780 hearing. *Id.* The statute has since been revised, and, as indicated, the new language mandates that an applicant for testing under the act must now demonstrate in his application that the testing would raise a reasonable probability that he did not commit the offense. While a hearing on the issue of testing may be merited where an applicant alleges that new evidence is available, under the

revised statute, the applicant must set out some theory of defense, as provided in the statute, that the alleged new evidence would support. Appellant offered no such theory, and none is apparent. His petition failed to provide a basis for relief under the act.

Appellant's petition was clearly deficient in form as required by the act to merit testing. Because the petition was deficient as a motion for testing under the act, the trial court did not err in denying relief under the act or in declining to order testing. It is clear that appellant cannot prevail.

Appeal dismissed; petition and motion moot.