

SUPREME COURT OF ARKANSAS

No. CR 11-328

BRENDA OWENS
Appellant

v.

RAY HOBBS
Appellee

Opinion Delivered June 23, 2011

APPELLANT'S PRO SE MOTIONS
FOR EXTENSION OF TIME TO FILE
BRIEF AND FOR APPOINTMENT
OF COUNSEL [CRITTENDEN
COUNTY CIRCUIT COURT, CR
91-853, HON. RALPH WILSON,
JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

In 1992, appellant Brenda Owens was found guilty by a jury of capital murder and sentenced to life imprisonment without parole. This court affirmed. *Owens v. State*, 313 Ark. 520, 856 S.W.2d 288 (1993).

In 2010, appellant filed in the trial court a pro se petition for writ of habeas corpus in which she invoked Act 1780 of 2001, codified at Arkansas Code Annotated §§ 16-112-201 to -207 (Repl. 2006). The court denied the petition, and appellant lodged an appeal from the order in this court.

Now before us are two motions filed by appellant, seeking an extension of time to file her brief-in-chief and appointment of counsel. We do not reach the merits of the motions and dismiss the appeal because it is evident that appellant cannot prevail on appeal. 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).

Act 1780 of 2001 provides that a writ of habeas corpus can issue based on new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. See Ark. Code Ann. § 16-112-103(a)(1) (Repl.2006) and sections 16-112-201 to -207; see also *Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (per curiam) (decision under prior law). Act 1780 was amended by Act 2250 of 2005, and appellant filed her petition after the effective date of the amendments to the act.

The act 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 statement that she desired the physical evidence in her case to be "reexamined" was filed more than eighteen years after the judgment was entered in her case. The act therefore required appellant to establish a rebuttal to the presumption arising from one of the five grounds listed in the statute. *Scott v. State*, 372 Ark. 587, 279 S.W.3d 66 (2008) (per curiam).

Under the act, a petitioner may establish that his or her petition is timely through a showing that incompetence substantially contributed to the delay, that the evidence to be

tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. *Id.* A petitioner may rebut the presumption based upon a claim that denial would result in manifest injustice, but may not do so solely through an assertion of innocence. *Id.* A petitioner can also rebut the presumption through other good cause. *Id.*; *see also Aaron v. State*, 2010 Ark. 249 (per curiam).

Appellant here asserted only that the physical evidence in her case was lost or misplaced. She did not allege any reason for her delay in seeking reexamination of the evidence and did not address the timeliness issue. She further failed to identify any particular testing to be done. In short, appellant failed to rebut the presumption that her petition under the act was untimely filed.

With respect to appellant's allegation that a key witness for the State had recanted her testimony, the claim was not within the scope of the act. *White v. State*, 2010 Ark. 429 (per curiam). There is no provision in the act that encompasses a witness's recantation of testimony after trial.

Appeal dismissed; motions moot.