

**SUPREME COURT OF ARKANSAS**

No. CR 09-813

EUGENE ISAAC PITTS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** September 8, 2011

PRO SE APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, CR 79-  
471

HON. WILLARD PROCTOR, JR.,  
JUDGE

AFFIRMED.

**PER CURIAM**

Appellant Eugene Isaac Pitts appeals from a Pulaski County Circuit Court order denying his petition for habeas corpus pursuant to Act 1780 of 2001, as amended by Act 2250 of 2005, codified at Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). On appeal, appellant argues (1) that his due-process rights were violated when the Arkansas State Crime Laboratory (ASCL) failed to conduct alternative DNA testing of a hair fragment after determining that nuclear DNA testing results were inconclusive; (2) that his due-process rights were violated when the ASCL failed to discharge its affirmative duty to preserve potentially exculpatory evidence; (3) that the circuit court's denial of his habeas petition was erroneous. We find no error and affirm.

Appellant was convicted of capital murder and kidnapping in 1979 and sentenced to life in prison without parole. We affirmed. *Pitts v. State*, 273 Ark. 220, 617 S.W.2d 849 (1981). In 2001, appellant filed a pro se petition for writ of habeas corpus alleging his actual



innocence and requesting relief pursuant to Arkansas Code Annotated section 16-112-201. An amended petition was filed by his appointed counsel on November 12, 2002. In that amended petition, appellant noted that a negroid hair recovered from the victim's clothing had been used as evidence against him because it was "microscopically" similar to appellant's hair and that the validity of microscopic hair analysis had been discredited by the advent of DNA testing. He requested that the hair be retested using current DNA testing methods to determine if it matched appellant's hair. The circuit court entered an order on December 17, 2002, finding that appellant was entitled to DNA testing on the hair and ordering the ASCL to conduct DNA testing of the hair under "generally accepted scientific conditions."

The ASCL proceeded with testing of the hair fragments recovered from the original investigation. Hair fragments originally identified as Q13 were sent to the ASCL for testing. It determined that one hair fragment contained a root suitable for nuclear DNA testing, isolated that fragment, and relabeled it Q13A. The ASCL performed a nuclear DNA test on Q13A but was unable to obtain a DNA profile from the sample. It also isolated another hair fragment without a root that was possibly suitable for mitochondrial DNA testing that was relabeled Q13B. Due to the fact that the ASCL did not have the capability to perform mitochondrial DNA testing, it sent Q13B to the Federal Bureau of Investigation, which found only Caucasian hairs not suitable for testing on the sample. After it performed the nuclear DNA test, the ASCL allegedly returned Q13A to its custodian, the Office of the Clerk of the Arkansas Supreme Court, which has no record of its return. Q13A has been missing since that time.

On November 17, 2008, appellant filed another petition for writ of habeas corpus



pursuant to Arkansas Code Annotated sections 16-122-201 to -208 alleging actual innocence and citing his inability to have further testing, specifically mitochondrial DNA testing, performed on the missing Q13A hair fragment. The circuit court entered an order on April 15, 2009, finding that all relief available to appellant under the statute had been granted, and he was entitled to no further relief. Specifically, the court noted that it had held three hearings on the matter of the missing hair fragment, after which it had determined that reasonable efforts had been made to locate the missing evidence but that the evidence was irretrievably lost. The circuit court found that pursuant to Arkansas Code Annotated section 16-112-208(b), where the results of court-ordered DNA testing were inconclusive, the court could either order additional testing or deny further relief. The circuit court found that it was “bereft of any actions, orders or procedures that could be taken that would result in the production of the slides [and was] compelled to deny any further relief.” The court noted that, if the evidence was found, it would order that further testing be conducted on the specimen. Appellant filed a timely notice of appeal from that order.

Appellant’s initial arguments on appeal both involve constitutional issues. First, he asserts that his constitutionally protected due-process rights were violated when the ASCL failed to conduct alternative mitochondrial DNA testing of Q13A after determining that nuclear DNA testing results were inconclusive. He claims that Arkansas Code Annotated sections 16-122-201 to -208 create a constitutionally protected liberty interest on the part of convicted defendants to have evidence that was introduced against them at trial retested using technology not available at the time of trial. Second, he claims that his due-process rights were violated when the ASCL failed to discharge its affirmative duty to preserve potentially



exculpatory evidence. Neither of these constitutional arguments is preserved for our review because the trial court never ruled on either issue.

Our law is well settled that issues raised for the first time on appeal, even constitutional ones, will not be considered because the trial court never had the opportunity to rule on them. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007). Where the abstract does not reveal that a ruling was obtained from the trial court, this court will not address the issue on appeal. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). The burden of furnishing a record sufficient to demonstrate that reversible error occurred is upon the appellant. *Id.* Without the trial court's ruling, this court has no basis for a decision and is, thus, precluded from a review of the issue. *Id.* Here, although appellant made both of his constitutional arguments in his pro se petition below, the circuit court did not rule on either of those issues or even mention them in its order. Rather, it focused solely on the issue of whether appellant was entitled to additional relief under the statute. Because it was appellant's obligation to obtain a ruling with respect to his constitutional arguments below in order to preserve those issues for appeal, and he failed to do so, we decline to address them for the first time on appeal.

Appellant's final point on appeal pertains to the ruling that the circuit court did make—whether appellant was entitled to further relief pursuant to Arkansas Code Annotated section 16-112-208(b). Appellant asserts that the circuit court erred in finding that he had received all the relief to which he was entitled under the statute. He claims that the ASCL had a duty pursuant to the statute “to seek and obtain alternative testing of the hair fragment using mitochondrial DNA testing,” rather than returning it to its custodian.

We do not reverse a denial of postconviction relief unless the trial court's findings are



clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1 (2009). 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.*

The circuit court relied on Arkansas Code Annotated section 16-122-208(b) in finding that appellant had received all the relief to which he was entitled. That section provides that, “[i]f the deoxyribonucleic acid (DNA) test results obtained under this subchapter are inconclusive, the court may order additional testing or deny further relief to the person who requested the testing.” Ark. Code Ann. § 16-122-208(b). As we have repeatedly held, the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving words their ordinary and usually accepted meaning in common language. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 439 (2003).

Here, we cannot say that the circuit court’s decision that appellant had received all the relief to which he was entitled and to deny additional testing was clearly erroneous. Appellant had sought and received DNA testing on Q13 in 2002, the results of which were inconclusive. Therefore, under the statute, the circuit court had discretion to order either additional testing or deny further relief. Due to the fact that the hair fragment had been lost, the circuit court concluded that no further testing on the hair could be conducted. Moreover, the statutory language does not support appellant’s claim that the ASCL had a duty to perform—or direct to be performed, due to the fact that the ASCL did not have such capability—additional mitochondrial DNA testing after the initial nuclear DNA testing results were inconclusive. The statute specifically reserves to the circuit court, not the ASCL, the



authority to direct further testing where initial results are inconclusive.

Included in his third point on appeal, appellant reargues both of the constitutional arguments that he raised in his first two points. As explained earlier, neither of those arguments is preserved for appellate review because appellant failed to obtain a ruling on those arguments. In addition, appellant maintains that the circuit court's ruling "unjustly rewards the State," punishes him for the State's "misconduct" with regard to failing to preserve potentially exculpatory evidence, and results in a "manifest injustice." However, those arguments are also not preserved for our review because appellant failed to make them to the circuit court below. *Ellison v. State*, 354 Ark. 340, 344, 123 S.W.3d 874, 877 (2003) ("It is well-established that an argument not made to the trial court will not be heard for the first time on appeal.").

Affirmed.