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SUPREME COURT OF ARKANSAS

No. CR12-1090

	Opinion Delivered March 28, 2013
ELGIN KING APPELLANT v. STATE OF ARKANSAS APPELLEE	APPELLANT'S PRO SE MOTION TO SUPPLEMENT RECORD [PULASKI COUNTY CIRCUIT COURT, 60CR93-2979, HON. TIMOTHY DAVIS FOX, JUDGE] MOTION DENIED; APPEAL DISMISSED.

PER CURIAM

In 1998, appellant Elgin King was found guilty of first-degree murder and sentenced to 720 months' imprisonment. We affirmed. *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999). In 2011, he filed in the trial court a pro se petition for writ of habeas corpus pursuant to Act 1780 of 2001. The trial court denied the petition, and appellant has lodged an appeal in this court. He now seeks to supplement the record on appeal.

We deny the motion because it is not in essence a request to add to the record on appeal; rather, it is intended to bolster the claims raised in the petition that was denied by the trial court. Information and arguments that were not raised in the petition that was ruled on by the court cannot be added to the record on appeal. This court has consistently held that it cannot, in the exercise of its appellate jurisdiction, receive testimony or consider anything outside the record below. *Darrough v. State*, 2013 Ark. 28 (per curiam); *Lowe v. State*, 2012 Ark. 185, 423 S.W.3d 6 (per curiam); *Smith v. Brownlee*, 2010 Ark. 266 (per curiam); *McLeod*

v. Mabry, 206 Ark. 618, 177 S.W.2d 46 (1944).

We also dismiss the appeal because it is clear that appellant could not prevail if the appeal were allowed to proceed. An appeal from an order that denied a petition for postconviction relief, including a petition under Act 1780 of 2001, will not be allowed to proceed where it is clear that an appellant could not prevail. *See Foster v. State*, 2013 Ark. 61; *Garner v. State*, 2012 Ark. 271 (per curiam); *Strong v. State*, 2010 Ark. 181, 372 S.W.3d 758 (per curiam) (citing *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam))

Act 1780 of 2001, as amended by Act 2250 of 2005 and codified at Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006), 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. *Garner*, 2012 Ark. 271 (citing *Strong*, 2010 Ark. 181, 372 S.W3d 758); Ark. Code Ann. § 16-112-103(a)(1) and §§ 16-112-201 to -207 (Repl. 2006); *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 his petition after the effective date of the amendments to the Act.

Appellant contended in his petition that DNA and fingerprint testing should be performed on a rubber mask that was introduced into evidence at his trial. Witness Vernon Scott testified that appellant was wearing the mask when appellant and another man approached the victim inside a house and bound the victim in duct tape. The victim was then taken outside, and Scott heard multiple gunshots. The victim was not seen again until his body was found in a silo. He had died of multiple gunshot wounds, and the rubber mask was

in the area of the body. Scott said that he had recognized appellant and the other man by their voices and clothing.[1] Appellant asserted that the DNA and fingerprint testing would offer proof that he was actually innocent of the crime.

The trial court held that the petition should be denied because, even if the testing were conducted and appellant's DNA and fingerprints were not found on the mask, his actual innocence would not be established in light of the evidence as a whole. No hearing was held on the petition, but Arkansas Code Annotated section 16-112-205(a) provides that the court is not required to hold an evidentiary hearing if the petition, files, and records conclusively show that the petitioner is entitled to no relief. The generally applicable standard for review of an order denying postconviction relief dictates that this court does not reverse unless the circuit court's findings are clearly erroneous. *Garner*, 2012 Ark. 271; *Cooper v. State*, 2012 Ark. 123 (per curiam). 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. *Cooper*, 2012 Ark. 123 (citing Pitts *v. State*, 2011 Ark. 322 (per curiam)). In light of Scott's testimony that he knew appellant and recognized both the clothing he was wearing and his voice, we cannot say that the trial court's decision was clearly erroneous.

Appellant also argued that he was entitled to relief on the grounds that there were errors made by the court at trial and he was not afforded effective assistance of counsel at trial.

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[1]The jury considered whether Scott was an accomplice to the offense and concluded that he was not.

Neither allegation was a ground for the writ under the Act. Petitions under the Act are limited to claims related to scientific testing of evidence. *Strong*, 2010 Ark. 181, 372 S.W.3d 758 (per curiam).

The petition was also subject to dismissal on the basis that it was not timely filed. The act requires that a motion for relief must be made in a timely fashion. Before a circuit court can order testing under this statute, there are a number of predicate requirements that must be met. *Douthitt*, 366 Ark. at 580, 237 S.W.3d at 77; Ark. Code Ann. §§ 16-112-201 to -203. One of these is that a petitioner who files a petition more than thirty-six months after the entry of the judgment of conviction must rebut a presumption that his petition is untimely. Ark. Code Ann. § 16-112-202(10)(B). This presumption against timeliness may be rebutted by showing that the petitioner was or is incompetent, and the incompetence substantially contributed to the delay; that the evidence to be tested is newly discovered; that the motion is not based solely upon the petitioner's own assertion of innocence, and a denial of the motion would result in a manifest injustice; that a new method of testing exists that is substantially more probative than was the testing available at the time of the conviction; or for other good cause. *Id*.

We have held that DNA testing of evidence is authorized under this statute if testing or retesting can provide materially relevant evidence that will significantly advance the defendant's claim of innocence in light of all the evidence presented to the jury. *Johnson v. State*, 356 Ark. 534, 546, 157 S.W.3d 151, 161 (2004). Evidence does not have to completely exonerate the defendant in order to be "materially relevant," but it must tend to significantly

advance his claim of innocence. *Foster*, 2013 Ark. 61; *Garner*, 2012 Ark. 271.

Appellant's petition was filed approximately thirteen years after the judgment of conviction was entered against him and ten years after Act 1780 was enacted. In his petition in the trial court, appellant did not attempt to rebut the presumption against timeliness except by suggesting that various technologies were now available to test the mask and link it to another person. Appellant did not contend that he was incompetent within the meaning of Arkansas Code Annotated section 16-112-202(10)(B), which refers to legal incompetence, at any point between his trial and the filing of the petition. *See generally Garner*, 2012 Ark. 271, at 3.

DNA evidence has been admissible in Arkansas since 1991. *Aaron v. State*, 2010 Ark. 249 (citing *Whitfield v. State*, 346 Ark. 43, 56 S.W.3d 357 (2001)). Appellant's petition sought testing of the mask using the "SNP-Snips procedures," "Short Tandem *Repeats—known* scientifically as 'micro-satel-lites [sic],'" and mitochondrial-DNA testing. Appellant was convicted in 1998, and he did not show that the testing that he now seeks was unavailable at that time. *See Mitchael*, 2012 Ark. 256 (citing *Howard v. State*, 2012 Ark. 177, 403 S.W.3d 38 (noting that mitochondrial-DNA testing had been performed prior to Howard's 1999 trial)); *see generally Hamm v. Office of Child Support Enforcement*, 336 Ark. 391, 985 S.W.2d 742 (1999) (noting that short-tandem-repeats had been tested in that case); *United States v. Beverly*, 369 F.3d 516 (2004) (noting that mtDNA-testing that could observe single-nucleotide polymorphisms "has been used extensively for some time in FBI labs, as well as state and private crime labs"). With respect to the fingerprint evidence, appellant said that laser and

light-comparison technology were now available to test the mask for fingerprints, but he did not demonstrate that the technology was substantially more probative than technology available when he was convicted. Because the testing suggested by appellant was either available at the time of his trial or not shown to be substantially more probative than technology available at that time, appellant did not rebut the presumption against timeliness. As appellant failed to rebut the presumption against timeliness in Arkansas Code Annotated section 16-112-202(10), appellant was entitled to no relief under the Act.

Motion denied; appeal dismissed.

Elgin King, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.