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SUPREME COURT OF ARKANSAS

No. CR 12-288

RODNEY ARLEN PANKAU APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 18, 2013 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. CR-08-798-1] HONORABLE WILLIAM A. STOREY, JUDGE AFFIRMED.

PAUL E. DANIELSON, Justice

Appellant Rodney Arlen Pankau appeals from the circuit court's orders denying and dismissing his petitions for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2009) and for writ of habeas corpus based on new scientific evidence pursuant to Arkansas Code Annotated § 16-112-201 (Repl. 2006). His sole point on appeal is that the circuit court erred in denying scientific testing of certain hairs, recovered from the scene of the crimes for which he was convicted, that were not tested prior to his convictions for residential burglary and attempted rape. We affirm.

On September 30, 2008, a judgment and commitment order was entered convicting Pankau of residential burglary and attempted rape and sentencing him to a total term of 540 months' imprisonment. Pankau appealed his convictions and sentence, and the court of appeals affirmed. *See Pankau v. State*, 2009 Ark. App. 502 (unpublished). Pankau subsequently filed a petition for postconviction relief and a separate petition for writ of habeas

corpus.

In his petition for postconviction relief, Pankau asserted that he was denied the effective assistance of counsel when his trial counsel failed to elicit exculpatory evidence that Pankau had not been present at a certain bar on the evening of the burglary and attempted rape. Pankau further contended that trial counsel was ineffective in failing to seek independent testing of a hair, from which the Arkansas State Crime Laboratory was unable to obtain a DNA profile, that was recovered from the crime scene.

Likewise, in his petition for writ of habeas corpus, Pankau asserted that, pursuant to Ark. Code Ann. § 16-112-202 (Repl. 2006), he was entitled to testing of the hair in light of a newly available method of testing that was substantially more probative than that previously available. Pankau claimed that, while the Arkansas State Crime Laboratory was unable to obtain a DNA profile from the hair, a new system of testing existed, which permitted analysis from a smaller amount of DNA. Pankau contended that the proposed testing might produce new material evidence in support of his defense of misidentification, which would raise a reasonable probability that he did not commit the offenses.

Following a hearing on January 11, 2010, the circuit court entered an order on March 3, 2010, directing the Arkansas State Crime Laboratory and any law enforcement custodians of evidence to send the hair to Bode Technology for independent testing. According to the Bode report, dated June 2, 2011, the hair's DNA profile matched Pankau's DNA profile. Another hearing was held on August 12, 2011, and on September 1, 2011, Pankau filed a supplement to his petition for writ of habeas corpus and motion for testing.

In his supplement, Pankau asserted that while the one hair had been tested, "[w]hat was not ascertainable from the Crime Lab report . . . was that there were three (3) hairs sent to the Crime Lab and eventually to the DNA section, but only the one hair [since tested] was tested. The other two were not tested." Pankau moved that the other two hairs be tested, asserting that testing could lead to his exoneration. The State countered Pankau's supplement and petition, stating that testing of the two hairs would not produce new material evidence that would raise a reasonable probability that Pankau did not commit the offenses, as required by Ark. Code Ann. § 16-112-202.

On January 12, 2012, the circuit court entered its two orders denying Pankau relief. In the first order denying Pankau's Rule 37.1 petition, the circuit court concluded that Pankau failed to demonstrate that he was prejudiced as a result of his trial counsel's failure to interview prior to trial the operator of the bar at which Pankau was allegedly present on the evening of the crimes. It further concluded that Pankau had failed to demonstrate that he was prejudiced as a result of his trial counsel not requesting and obtaining independent testing of the hair found at the crime scene. In addition, the circuit court found that Pankau failed to demonstrate (1) that he had received ineffective assistance of counsel; (2) that there was a reasonable probability that but for trial counsel's alleged errors in representation, the result of Pankau's proceedings would have been different; and (3) that his trial counsel's trial preparation fell below an objective standard of reasonableness.

In its separate order, the circuit court denied and dismissed Pankau's petition for writ of habeas corpus and the supplement thereto. The circuit court found that Pankau's

supplement to the petition was not made in a timely fashion and that the proposed method of testing of the additional hairs contemplated a technique that was in existence at the time of the original testing ordered by the circuit court in 2010. The circuit court further found "[t]hat the proposed testing of the specific evidence at issue, if successful in obtaining more precise results, would fail to raise a reasonable probability that Defendant/Petitioner did not commit the offenses for which he was convicted." Pankau filed a timely notice of appeal and supplemental notice of appeal.

For his sole point on appeal, Pankau argues that the circuit court abused its discretion in denying his request to test the additional hairs found at the crime scene. He contends that as soon as his counsel ascertained that there were additional hairs that had gone untested, he filed a supplement to his habeas corpus petition seeking the testing of the additional hairs. He avers that his defense at trial was that of mistaken identity and that, because a hat was found at the crime scene that contained both his DNA profile and that of an unidentified person, the testing of these previously untested hairs would have provided exculpatory evidence in the form of a DNA profile of someone other than himself. Pankau maintains that these previously untested hairs—not referred to in the Crime Lab's reports or the testimony at trial—had the real potential to provide exonerating evidence. As such, Pankau contends, the failure to test violates the spirit of the DNA habeas statute, and the circuit court's order denying testing of these additional hairs should be reversed.

The State responds that, despite Pankau's claim that the additional hairs to be tested were "newly discovered," they were not, in light of the fact that they were "discovered and

available" at the time he filed his original petition in 2009. The State further urges that the type of testing sought was also available at the time of his original petition. In the alternative, the State claims, the circuit court did not clearly err in denying Pankau relief because the additional testing would not have established Pankau's actual innocence as required by the statute.

In appeals of postconviction proceedings, we will not reverse a circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *See Misskelley v. State*, 2010 Ark. 415. 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. *See id*. The same standard of review applies when a circuit court denies DNA testing under Ark. Code Ann. §§ 16-112-201 to -208. *See id*.

Act 1780 of 2001, as amended by Act 2250 of 2005 and codified at Ark. Code Ann. §§ 16-112-201 to -208, provides that a writ of habeas corpus can issue based on new scientific evidence proving a person actually innocent of the offense for which he was convicted. *See Hutcherson v. State*, 2013 Ark. 104 (per curiam). There are a number of predicate requirements, however, that must be met before a circuit court can order testing under sections 16-112-201 et seq. *See Foster v. State*, 2013 Ark. 61 (per curiam). One of these is that the "proposed testing of the specific evidence may produce new material evidence that would . . . [s]upport the theory of defense . . . and raise a reasonable probability that the person . . . did not commit the offense." Ark. Code Ann. § 16-112-202(8); *see also Davis v.*

State, 2011 Ark. 191 (per curiam) (holding that the language of the statutes 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). We cannot say that Pankau demonstrated that the testing of the additional hairs would result in evidence raising a reasonable probability that he did not commit the offenses for which he was convicted.

The instant record reflects that the crimes for which Pankau was convicted occurred in the home of the victim, A.P. When police responded to A.P.'s call to 911, they discovered a baseball cap containing the logo of "Crossland Construction Company," a company for which Pankau worked. When tape lifts from the cap were tested for DNA, genetic material from two individuals was discovered, with the major component of the profile attributable to Pankau.[1] While a hair from A.P.'s bed was discovered and submitted for testing, no DNA profile could be obtained from it.

It was this hair from the bed for which Pankau requested testing in his original section 16-112-201 petition for writ of habeas corpus and for which the circuit court ordered testing in 2010. However, after the results of that test came back, finding that the DNA profile from the hair matched Pankau's DNA profile, Pankau sought additional testing on two other hairs that had been collected and reported by the Arkansas State Crime Laboratory, but had not been previously tested. Pankau asserted in his supplemental petition that "if a result is

[1]The Crime Lab's forensic DNA examiner testified that the probability of selecting an individual at random from the general population having the same genetic markers as those identified on the major component of the tape lift and of those identified for Pankau was approximately one in thirty-eight quadrillion. She testified that the DNA identified as a major component of the tape lift originated from Pankau within all scientific certainty.

obtained on the other two hairs, it will exonerate him, particularly if it is consistent with the non-Pankau alleles found in the hat."

Even assuming that the additional hairs could be tested and would result in the identification of someone other than Pankau, the new evidence must raise a reasonable probability that Pankau did not commit the offense. *See* Ark. Code Ann. § 16-112-202(8)(B). Here, none of the evidence that might potentially result from the testing of the two additional hairs as sought by Pankau satisfies this requirement. Another person's hair at the scene of the crime would in no way preclude Pankau's having committed the offenses. Accordingly, we hold that the circuit court did not clearly err in denying Pankau's request for additional testing.

Affirmed.

HART, J., concurs.

Jeff Rosenzweig, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

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JOSEPHINE LINKER HART, Justice

In this one-issue appeal, Rodney Arlen Pankau argues that the trial court abused its discretion in denying the DNA testing of hairs recovered from the crime scene. After a jury found him guilty of residential burglary and attempted rape, Pankau petitioned for a writ of habeas corpus pursuant to Arkansas Code Annotated section 16-112-201 et seq. (Repl. 2006), seeking DNA testing of three hairs recovered from the victim's bed. The State acceded to the petition. However, only one hair had a root, and that hair matched Mr. Pankau's DNA profile. Nonetheless, Pankau filed a supplemental petition seeking testing of the other two hairs. The trial court denied additional testing. I cannot say that the trial court clearly erred.

Act 1780 of 2001 established a mechanism for using posttrial scientific testing to establish the actual innocence of a wrongly convicted person. But rather than sanctioning an open-ended fishing expedition, the statute requires that petitions for scientific testing be granted only if the movant "identifies a theory of defense" that would "establish the actual

innocence of the person" Ark. Code Ann. § 16-112-202(6)(B). Here, testing the additional hairs, which is the subject of Pankau's supplimental petition, would neither negate nor otherwise explain the presence of Pankau's hair in the victim's bed, even if the other hairs matched the trace DNA found in Pankau's hat that was discovered at the crime scene. Accordingly, testing of these hairs could not establish Pankau's "actual innocence." *See id.* For that reason alone, the trial court did not err in denying Pankau's petition for additional scientific testing.