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SUPREME COURT OF ARKANSAS

No. CR09-76

	Opinion Delivered April 7, 2011
JARVIS RHODES, APPELLANT, VS. STATE OF ARKANSAS, APPELLEE,	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, NO. CR-1984-358-2-5-2, HON. ROBERT H. WYATT, JR., JUDGE, AFFIRMED.

JIM GUNTER, Associate Justice

Appellant appeals the denial of his petition for writ of habeas corpus based on new scientific evidence. On appeal, appellant urges this court to reevaluate our holdings regarding the State's duty to preserve evidence and find that a defendant has greater due-process rights regarding the preservation of evidence under the Arkansas Constitution than under the United States Constitution. Because this argument is not preserved for appellate review, we affirm.

Appellant was originally convicted of capital felony murder in 1985, but this court reversed his conviction because of the equivocation of a juror. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986). Upon remand and retrial, appellant was again convicted of capital felony murder and sentenced to life without parole. His counsel filed a "no merit" brief, and this court affirmed the conviction in an opinion not designated for publication. *Rhodes v. State*, CR 88-41 (Ark. Dec. 12, 1988). Appellant then sought postconviction relief pursuant

to Ark. R. Crim. P. 37, but this court denied his petition to pursue such relief in an unpublished per curiam opinion. *Rhodes v. State*, CR 88-41 (Ark. Dec. 17, 1990).

On October 15, 2002, appellant filed, pursuant to Ark. Code Ann. §§ 16-112-201 through -207 (Supp. 2001), a pro se "Petition For Analyze of Scientific Evidence," asking the court to order testing on the physical evidence from his case, including the debris removed from under the victim's fingernails. On December 9, 2003, appellant filed another petition to "vacate and set aside judgment," in which he again asked for DNA testing of the skin samples taken from the victim. On February 10, 2004, the Office of the Public Defender was appointed to represent appellant.

Effective August 12, 2005, the Arkansas DNA testing statutes were amended by Act 2250. On September 13, 2005, appellant again filed a petition asking for DNA testing of "all evidence currently in possession of the Arkansas State Crime Laboratory" and alleging that such testing would "scientifically establish that petitioner was not present when decedent was killed." On October 13, 2005, the court entered an order that "[a]ll evidence currently in possession of the Arkansas State Crime Laboratory or any of its authorized personnel should be tested pursuant to Act 2250 of 2005, A.C.A. 16-112-201, et. seq."

On May 1, 2007, a hearing was held, at which Sergeant Charles Cash with the Pine Bluff Police Department, who was in charge of the crime scene and evidence division, testified that the nail clippings from the victim could not be located. He testified that the paperwork indicated that custody of the clippings was transferred to John Cone, a prosecuting

attorney. Appellant's counsel requested that DNA testing be performed on all evidence that had been submitted to the State Crime Laboratory, which included a spray can, paint scrapings, an Exacto-type knife, two glass vials, hair samples, and a length of string. The State agreed to the testing of those items. Appellant then asked the court directly what was to be done about the missing fingernails, which appellant said was the only thing that could exonerate him, and the court told him that without proof that the fingernails were intentionally destroyed, the court could not grant him any relief. On May 4, 2007, the court entered an order listing the evidence to be tested and ordering the State Crime Laboratory to submit its findings in a report to the court within forty-five days of the entry of the order.

On November 6, 2007, another hearing was held. Edward Vollman, a forensic serologist at the State Crime Laboratory, testified that no male-specific DNA was found on the vaginal, rectal, and oral swabs from the victim, nor was there male-specific DNA found on the wooden handle of the knife. Vollman also testified that a bag marked "possible human hair" and the length of string had not been tested. The State indicated that it would resubmit the possible head hairs and the piece of string to determine whether a DNA profile could be obtained from either item.

A third hearing was held on September 17, 2008. At the hearing, Mary Simonson, a DNA examiner for the State Crime Laboratory, testified that she tested item E-Q1, identified as multi-colored fibers, and item H-Q1, identified as swabs from a piece of string, and compared these items to a known DNA sample from the victim. Simonson testified that the

partial profile obtained from both items was consistent with the profile from the victim. Simonson testified that she also analyzed anal swabs that had previously been tested but not compared to the victim's profile and that no foreign DNA was found on those swabs. Simonson concluded that no DNA matter from any male was found on the items that she tested, and she stated that no fingernail clippings had ever been submitted to her for testing in reference to this case.

Appellant's counsel then explained to the court that the fingernail clippings were of vital importance to his client's case and asked that, if those fingernail clippings are found in the future, the public defender's office be notified. The court agreed that if the fingernail clippings "ever show up and I'm still here, I will enter an order that they be tested." However, the court found that, based on everything that had been tested, there was nothing that "would rise to the level to where this Court could offer Mr. Rhodes any relief from his conviction." Therefore, the court denied the petition for writ of habeas corpus because "there's nothing new here for the Court to look at that would exonerate Mr. Rhodes in this matter." On October 27, 2008, the court entered an order finding that appellant had failed to prove by a preponderance of the evidence that he was entitled to any relief under Act 2250. Appellant filed a notice of appeal from this order on November 4, 2008.

On appeal, appellant argues that this court should grant his petition for habeas corpus because the State's failure to preserve physical evidence, specifically the fingernail clippings, deprived him of due process under the Arkansas Constitution. Appellant acknowledges that

this court has previously followed the standard set by the United States Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988), in which the Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *See Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997) (holding that defendant had failed to establish that the State's failure to preserve a blood sample was in bad faith, thus defendant was not deprived of his right to due process); *Wenzel v. State*, 306 Ark. 527, 815 S.W.2d 938 (1991) (holding that the State's failure to preserve samples so that the defense could conduct its own tests did not violate due process in the absence of a showing that the evidence possessed any apparent exculpatory value before it was destroyed or that the State acted in bad faith). Appellant argues, however, that this is the appropriate case for this court to reevaluate our holdings and find that a defendant has greater due-process rights regarding the preservation of evidence under the Arkansas Constitution than under the United States Constitution.

In place of the bad-faith standard, appellant urges this court to adopt the Connecticut Supreme Court's holding in *State v. Morales*, 657 A.2d 585 (Conn. 1995). In *Morales*, the court held that, under its state constitution, due process required the trial court to apply a balancing test,

> weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: "the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence."

Morales, 657 A.2d at 594–95 (quoting *State v. Asherman*, 478 A.2d 227, 246 (Conn. 1984)). The court also held that, if a due-process violation is found, the trial court may fashion the appropriate remedy, which in some cases may require the dismissal of charges.

Appellant argues that, in this case, it should not matter whether the Pine Bluff Police Department or the prosecutor's office acted in bad faith, because the end result is that the fingernail clippings are unavailable for DNA testing, and thus appellant has lost any chance of being exonerated by the scientific analysis of the fingernail clippings. Appellant contends that this court should find that the loss of the fingernail clippings renders his conviction fundamentally unfair and that, using a balancing of the *Morales* factors above, he should be granted a new trial.

However, we are precluded from reaching the merits of appellant's argument because it is being raised for the first time on appeal. There is no evidence that appellant raised this due-process argument below or that he ever requested the circuit court to consider granting him greater due-process rights regarding the preservation of evidence under the Arkansas Constitution than under the United States Constitution. In short, appellant's argument on appeal was never articulated to the circuit court, and this court has held many times that constitutional claims may not be raised for the first time on appeal. *See Randall v. State*, 368 Ark. 279, 244 S.W.3d 662 (2006) (affirming denial of habeas corpus relief because defendant failed to raise constitutional arguments at the circuit court level). Therefore, we find that appellant's argument on appeal is not preserved for appellate review and affirm.

Affirmed.