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SUPREME COURT OF ARKANSAS

No. CR 08-1333

	Opinion Delivered January 21, 2010
SANDERS M. CARTER APPELLANT	PRO SE APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
V.	[CR 87-63]
	HON. JOHN LANGSTON, JUDGE
STATE OF ARKANSAS APPELLEE	
	AFFIRMED.

PER CURIAM

In 1987, appellant Sanders M. Carter was convicted by a jury of rape, aggravated robbery, and burglary. He was sentenced as a habitual offender to consecutive terms of imprisonment of life and forty years. We affirmed. *Carter v. State,* 295 Ark. 218, 748 S.W.2d 127 (1988).

Subsequently, appellant filed in this court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1.[1] The petition was denied. *Carter*

[1]Prior to July 1, 1989, a petitioner whose judgment of conviction had been affirmed on appeal was required to petition this court for relief under Arkansas Rule of Criminal Procedure 37.1 and gain leave from this court to proceed under the rule in the circuit court before filing a petition there. Arkansas Rule of Criminal Procedure 37 was abolished by this court effective July 1, 1989. *In re Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. App'x 573, 770 S.W.2d 148 (1989) (per curiam). Rule 37 was reinstated in a revised form on January 1, 1991. *In re Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. App'x 746, 797 S.W.2d 458

v. State, CR 87-209 (Ark. Oct. 16, 1989) (per curiam). In 1990, appellant filed a pro se petition for writ of habeas corpus in the trial court that was denied. On appeal from the order, this court concluded that the allegations raised in the petition were cognizable under Arkansas Rule of Criminal Procedure 37.1 and did not state a ground to issue the writ. The appeal was dismissed. *Carter v. State*, CR 90-187 (Ark. Nov. 5, 1990) (per curiam). Appellant then filed in the trial court a petition for scientific testing pursuant to Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated. §§ 16-112-201 to -207 (Supp. 2003), based on a claim that the chain of custody of certain evidence was not broken. Ark. Code Ann. § 16-112-202(b). After a hearing at which appellant was represented by counsel, the trial court denied the petition, and we affirmed. *Carter v. State,* CR 03-148 (Ark. Feb. 19, 2004) (per curiam). Next, in 2005, appellant filed a petition for writ of habeas corpus in the circuit court in the county in which he was incarcerated. The petition was denied, and we affirmed the order. *Carter v. Norris*, 367 Ark. 360, 240 S.W.3d 124 (2006) (per curiam).

On May 29, 2008, appellant filed another pro se petition for writ of habeas corpus in the trial court pursuant to Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated §§ 16-112-201 to -208 (Repl. 2006). In the petition, appellant asserted that he was actually innocent of the crimes of which he had been convicted, and he claimed that there was evidence collected at the crime scene in 1986 that should be subjected to scientific testing. He noted that in his first proceeding under Act 1780, it was determined that the

(1990) (per curiam). The revised rule does not require petitioners to gain leave of this court before proceeding in the trial court.

evidence collected in 1986 was no longer in police storage and that in 1987 it had been delivered to Detective Gray LaMaster. Appellant contended that the court should subpoena LaMaster to produce certain hairs that were a part of the evidence so that the hairs could be tested, apparently maintaining that LaMaster still had the hairs in his possession.

On June 26, 2008, appellant filed a motion for default judgment pursuant to Arkansas Rule of Civil Procedure 55 on the ground that the State had failed to file an answer to the habeas petition. On August 1, 2008, the court entered a final order on the habeas petition, holding that appellant could have made his request to subpoena LaMaster when the hearing was held in 2002 on the first habeas petition inasmuch as he knew the basis for the request to subpoena him at that time. The court further said that the fact that a detective may have removed evidence for testing at the Arkansas State Crime Laboratory in 1987 did not mean that the evidence was still in the detective's possession twenty-one years later. The court concluded that appellant had already sought scientific testing of evidence collected at the crime scene and that he had not established that he was entitled pursuant to Arkansas Code Annotated § 16-112-205(d) to file a subsequent petition for scientific testing. The petition was denied, and appellant brings this appeal.[2]

Appellant first argues on appeal that the motion for default judgment pursuant to Arkansas Rule of Civil Procedure 55 should have been granted. There is no merit to the claim. This court has recognized that postconviction proceedings are civil in nature and

[2]Appellant urges this court to strike the brief filed by the appellee in this appeal on the ground that it was not timely filed. As our docket indicates that the brief was filed on the date it was due, the request is denied.

applied the Arkansas Rules of Appellate Procedure–Civil when necessary. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). However, we have never applied the Arkansas Rules of Civil Procedure to postconviction proceedings. *Id.* Nor do we apply those rules to a postconviction habeas proceeding. *See Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). While there is a mandatory response requirement in Arkansas Code Annotated § 16-112-204(a), there is no provision for a default judgment as in Rule 55.

In his second argument for reversal of the trial court's order, appellant asserts that he did not become aware of the hairs recovered from the crime scene until 2007 when he obtained a copy of exhibits from the 2002 hearing. He asserts that he filed the second habeas petition in 2008 based on the newly acquired information. He contends that there is no record of Detective LaMaster having returned the evidence he removed from the property room, and thus LaMaster has retained the evidence "to this date."

Under Act 1780, the petitioner must claim that (1) the scientific evidence was not available at trial or (2) the scientific predicate for the claim could not have been previously discovered through due diligence, and the facts when viewed in light of the evidence as a whole, establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense. Ark. Code Ann. § 16-112-201(a). Appellant has a duty to present a prima facie case that (1) identity was an issue in the trial and (2) the chain of custody was not broken. Ark. Code Ann. § 16-112-202(b). Here, it is abundantly clear that appellant has not shown that the chain of custody concerning the hairs or any other evidence on which he relies was not broken. The proceeding in 2002 on appellant's first petition under Act 1780 revealed that the evidence was no longer

available for testing. Appellant did not offer a factual basis for his claim in the 2008 petition that the evidence was indeed available with an unbroken chain of custody as required by section 16-112-202(b)(2). Accordingly, the trial court did not err in finding that the 2008 petition was a successive petition and subject to summary denial. Ark. Code Ann. § 16-112-205(d).

Affirmed.

No briefs filed.