

Cite as 2010 Ark. 249

# SUPREME COURT OF ARKANSAS

No. CR 10-54

BARRY G. AARON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** May 20, 2010

PRO SE MOTION TO SUPPLEMENT  
THE RECORD [CIRCUIT COURT  
OF MILLER COUNTY, CR 90-468,  
HON. JOE E. GRIFFIN, JUDGE]

MOTION DENIED; APPEAL  
DISMISSED.

## PER CURIAM

Following appellant Barry G. Aaron's second trial on charges of kidnapping and rape,<sup>1</sup> a jury found him guilty and imposed two consecutive life sentences. This court affirmed the judgment. *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995). In 2009, appellant filed a pro se motion in the trial court for scientific testing that the trial court denied. Appellant lodged the instant appeal in this court and has filed a motion to supplement the record. He seeks to include within the record certain exhibits to a motion to amend the motion for DNA testing.

Even if the exhibits might otherwise have some relevance to the proceedings, it is clear that, without need to reference those exhibits, the motion that appellant filed for scientific testing did not meet the predicate requirements of Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Arkansas Code Annotated sections 16-112-201

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<sup>1</sup> This court reversed appellant's conviction on the charges and remanded for a new trial in *Aaron v. State*, 312 Ark. 19, 846 S.W.2d 655 (1993).

to -208 (Repl. 2006).<sup>2</sup> Whatever the exhibits may have contained, the petition was untimely and failed to contain the necessary grounds for a petition for relief under the act.<sup>3</sup> We therefore deny the motion to supplement the record and dismiss the appeal.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Section 16-112-202(10) provides that a motion for relief under Act 1780 must be made in a timely fashion. Section 16-112-202(10) further provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction and lists five grounds by which the presumption may be rebutted. Appellant's motion for testing was filed almost sixteen years after the judgment was entered in his case. He was therefore required to establish in the motion a rebuttal of the presumption arising from one of the five grounds listed in the statute. *Scott v. State*, 372 Ark. 587, 279 S.W.3d 66 (2008) (per curiam).

Under the act, a petitioner may establish that his petition is timely through a showing that incompetence substantially contributed to the delay, that the evidence to be tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. *Id.* A petitioner may rebut the presumption based upon a claim

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<sup>2</sup> As discussed below, appellant's petition also included a number of additional claims other than those for scientific testing that were not cognizable in a petition seeking relief under Act 1780.

<sup>3</sup>The motion to amend listed exhibits that included a motion for discovery, discovery packages from both trials, a letter from the Innocence Project, and rules of professional conduct.

that denial would result in manifest injustice, but may not do so solely through an assertion of his innocence. *Id.* A petitioner can also rebut the presumption through other good cause.

*Id.*

Appellant did not allege his incompetence in the motion for testing or the proposed amendments to that motion. He asserts in his reply brief that he did so, basing the claim on his unfamiliarity with the law. The record, however, does not support that assertion. Neither the motions nor the proposed amendments reference the presumption against timeliness, any cause for delay, or incompetence of any kind.

Appellant did not identify newly discovered evidence to be tested and, in fact, failed to clearly identify the evidence that he did wish to be tested. He indicated that a serologist's report found indicators of the presence of sperm in certain samples taken from the victim, but he did not indicate that there was a sample of sperm present that would now be sufficient for DNA testing. In fact, he appears to imply the contrary, asserting conclusory accusations that the prosecution withheld evidence. Assuming that appellant intended the samples referenced in the serologist's reports as the items to be tested, those items would not have been newly discovered.<sup>4</sup> Appellant contends that his motion fell within the next ground to rebut the presumption as listed in section 16-112-202(10)(B)(iv). Despite appellant's assertion, he did not include in the motion a showing that a new method of technology is available that is substantially more probative than prior testing. He makes a conclusory statement that there

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<sup>4</sup> In his reply brief, appellant references fingerprint testing. Fingerprint testing was not, however, requested in his motion for testing, and no evidence for such testing was identified.

have been advances in DNA technology. While there may have been such advances, appellant's motion for testing did not demonstrate that any such advances would provide results that would be more probative than the testing that was available at the time.

DNA profiles have been admissible evidence in Arkansas since 1991. *Whitfield v. State*, 346 Ark. 43, 56 S.W.3d 357 (2001) (citing *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991)). At appellant's second trial in 1993, both the doctor and the serologist were questioned by the defense concerning the possibility of DNA testing on the samples to further link appellant to the rape charge. The defense was aware of the tests, but there is no indication in the record that the defense requested testing at that time. In fact, appellant's defense was based in part on the lack of DNA testing and the argument that the prosecution should have performed the test.

In order to demonstrate that the requested testing is more probative as required by the statute, a petitioner must show that the testing may prove the petitioner's innocence. *Scott*, 372 Ark. at 589, 279 S.W.3d at 68–69. In addition, the potential proof must be essential to a theory of defense that was identified in the motion for testing and that is not inconsistent with an affirmative defense used by the petitioner at trial. Ark. Code Ann. § 16-112-202(6), (8). Appellant points to no advances that would do more than present what is basically the same proof available at the time of his trial, albeit with potentially greater accuracy.

Appellant also contends that he has rebutted the presumption against timeliness because he asserted that he was innocent and a denial of the motion would result in a manifest

injustice. Appellant made a number of additional claims alleging prosecutorial misconduct, ineffective assistance of counsel, and a wide range of constitutional violations. Those claims, however, should have been addressed through other postconviction proceedings and were not cognizable in a motion under Act 1780. See *Strong v. State*, 2010 Ark. 181, 372 S.W.3d 758 (per curiam). The claims remaining amounted to no more than the conclusory assertion of appellant's innocence as the basis for the motion. Appellant did not provide the showing required by section 16-112-202(10)(B)(iii) or demonstrate other good cause for the delay in seeking relief.

Because the motion before the trial court was untimely and did not contain the grounds necessary to rebut the presumption against timeliness, the trial court did not err in denying the motion. It is therefore clear that appellant cannot prevail. We accordingly deny the motion to supplement the record and dismiss the appeal.

Motion denied; appeal dismissed.

Gunter, J., not participating.