

Cite as 2009 Ark. 467

ARKANSAS SUPREME COURT

No. CR 09-428

THEODORE ANDERSON
Appellant

v.

STATE OF ARKANSAS
Appellee**Opinion Delivered** October 1, 2009PRO SE MOTION FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF AND PRO SE MOTION TO
DISMISS WITHOUT PREJUDICE
[CIRCUIT COURT OF SALINE
COUNTY, CR 2005-476, HON. GARY
M. ARNOLD, JUDGE]APPEAL DISMISSED; MOTIONS
MOOT.**PER CURIAM**

In 2008, appellant Theodore Anderson filed in the trial court a petition for writ of habeas corpus pursuant to Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated sections 16-112-201 to - 208 (Repl. 2006). The petition requested DNA testing of semen referenced in a laboratory report introduced during appellant's 2007 trial for rape, residential burglary and third-degree domestic battery. The bench trial resulted in appellant's conviction on those charges¹ and the court sentenced appellant to an aggregate term of 240 months' imprisonment in the Arkansas Department of Correction. Appellant appealed the judgment as to the rape charge, and the Arkansas Court of Appeals affirmed. *Anderson v. State*, CACR 07-900 (Ark. App. Feb. 20, 2008). The trial court denied appellant's petition under Act 1780.

¹ An additional charge of violation of a protective order is listed on the judgment with a notation that appellant was found not guilty as to that charge.

Cite as 2009 Ark. 467

Appellant has lodged an appeal of the order denying the petition for writ of habeas corpus in this court. He filed a motion for extension of time in which to file his brief and later filed a motion to dismiss the appeal without prejudice. It is clear that appellant cannot prevail because the petition did not state a basis for the writ in compliance with section 16-112-202. We therefore dismiss the appeal and the motions are moot. 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).

Appellant admitted in a statement introduced at trial and in his testimony that he had anal sex with the victim. His defense, presented both in his statement and in his testimony, was that the sex was consensual rather than rape. Section 16-112-202(6) requires that a person who files a motion seeking testing under the act must identify a theory of defense that utilizes the results from the testing. That theory must establish the petitioner's actual innocence and must also be consistent with any affirmative defense presented at trial. Appellant's petition did not clearly set forth any theory of defense and simply asserted that the victim's statements concerning an assault were not supported by the evidence and that the test results would exonerate him.

Even had appellant identified a theory, the only possible theories of defense that would establish appellant's innocence are clearly inconsistent with the defense appellant presented to the police and at trial. If appellant would now contend that the victim was not truthful in her statements as to the intercourse and that she must have had sex with some other man, then that position is at odds with appellant's claim during his trial that he had sex with the victim, but that it was with her consent. Appellant cannot prevail because his petition clearly did not state a sufficient basis for a

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claim under Act 1780.

Appeal dismissed; motions moot.