

Cite as 2011 Ark. 295

SUPREME COURT OF ARKANSAS

No. CR 09-658

CLAUDE WALLACE
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** July 27, 2011PRO SE APPEAL FROM THE
MISSISSIPPI COUNTY CIRCUIT
COURT, CHICKASAWBA DISTRICT,
CR 92-85, HON. CINDY G. THYER,
JUDGE

AFFIRMED.

PER CURIAM

Appellant Claude Wallace appeals the denial of his petition for relief under Act 1780 of 2001, codified at Ark. Code Ann. §§ 16-112-201 to -208 (Supp. 2006). The statute allows a convicted person to file a petition to vacate and set aside the judgment and seek relief if the person claims under penalty of perjury that scientific evidence not available at trial establishes actual innocence, or that the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

On appeal, appellant argues: (1) that the circuit court denied him due process when it denied his petition without an evidentiary hearing; (2) that the circuit court erred by finding

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that his petition failed to properly state a claim for relief, was untimely, and was not properly verified or made under penalty of perjury; and (3) that he was entitled to a grant of default judgment on his petition. We find no error and affirm.

On July 17, 1992, appellant was convicted by a Mississippi County jury of two counts of kidnapping, two counts of rape, and one count of burglary. Because he was a habitual offender, he received sixty years' imprisonment on each count of kidnapping, life sentences for each count of rape, and forty years' imprisonment for burglary, all to be served consecutively. His convictions were affirmed by this court on direct appeal. *Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993).

On October 9, 2008, appellant filed a Petition to Vacate or Set Aside the Judgment, alleging his actual innocence and requesting relief pursuant to Ark. Code Ann. § 16-112-201. In his petition, appellant specifically alleged only that the fingerprint evidence that the State had recovered from the crime scene had never been identified or matched. Appellant also included claims that he was denied due process and equal protection and made allegations of prosecutorial misconduct and abuses of discretion on behalf of the circuit court.¹ The State responded that it had no objection to having the fingerprint evidence retested and compared to the Automated Fingerprint Identification System (AFIS). In an order filed January 6, 2009, the circuit court indicated that it had "serious concerns" about appellant's petition, including

¹Appellant's other claims and allegations are not cognizable in a petition filed pursuant to Ark. Code Ann. § 16-112-201, which is limited to only issues regarding scientific testing. See *Strong v. State*, 2010 Ark. 181, ___ S.W.3d ___ (per curiam).

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whether the court was jurisdictionally barred from considering it. However, the circuit court noted that, due to the State's willingness to retest the fingerprints, the court would reserve all issues, including jurisdictional ones, until after the retesting. Thereafter, that fingerprint comparison was done, and no match was found in the AFIS system.

On March 2, 2009, the circuit court denied appellant's petition. The court found that appellant's petition failed, pursuant to Arkansas Code Annotated § 16-112-202, to specify what other additional items of evidence, other than the fingerprints, that he wanted tested or retested; whether those items were tested prior to trial; what methods were used to test those items; what method of testing he now requested; and whether the testing he proposed was reasonable in scope, utilized scientifically sound methods, and was consistent with accepted forensic practices. The circuit court also noted that appellant's petition was brought sixteen years after his conviction and that Arkansas Code Annotated § 16-112-202(10)(B) creates a rebuttable presumption that any motion made more than thirty-six months after the date of conviction is untimely. The court found that appellant's petition was based solely on his assertions of innocence, that he failed to rebut the presumption of untimeliness, that he failed to set forth any new evidence or new method of technology substantially more probative than prior available testing methods, that he failed to set forth his claims under penalty of perjury as required by Arkansas Code Annotated § 16-112-201(a), and that his petition was not verified as required by Arkansas Code Annotated § 16-112-203(c)(1)(A).

Appellant first asserts that the circuit court denied him due process of law by denying his petition without first holding an evidentiary hearing. Although Arkansas Code Annotated

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§ 16-112-205(a) states that the circuit court is not required to hold an evidentiary hearing if the petition, files, and records conclusively show that the petition is entitled to no relief, we need not address the merits of appellant's constitutional argument because we have held many times that constitutional claims may not be raised for the first time on appeal. *Randall v. State*, 368 Ark. 279, 244 S.W.3d 662 (2006). We are precluded from addressing appellant's due-process claim because it is not preserved for appellate review.

For his second point on appeal, appellant maintains that the circuit court erred in finding that his petition failed to properly state a claim for relief, was untimely, and was not properly verified or made under penalty of perjury. We hold that the circuit court did not err in denying appellant's petition for relief because his petition failed to meet the jurisdictional requirements of Act 1780. Section 16-112-202(10) provides that a motion for relief under Act 1780 must be made in a timely fashion. The statute further provides that

[t]here shall be a rebuttable presumption against timeliness for any motion not made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

- (i) That the person making a motion under this section was or is incompetent and the incompetence substantially contributed to the delay in the motion for a test;
- (ii) That the evidence to be tested is newly discovered evidence;
- (iii) That the motion is not based solely upon the person's own assertion of innocence and a denial of the motion would result in a manifest injustice;
- (iv) That a new method of technology that is substantially more probative than prior testing is available; or
- (v) Of good cause.

Ark. Code Ann. § 16-112-202(10)(B). In *Brown v. State*, 367 Ark. 315, 239 S.W.3d 481 (2006) (per curiam), we held that a circuit court does not have jurisdiction to consider a

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petition for relief filed pursuant to Act 1780 if the petition is outside of the thirty-six-month period and fails to establish one of the enumerated grounds for rebutting the presumption.

Appellant filed his petition sixteen years after the judgment and commitment order was entered, yet he failed to make any showing to rebut the presumption that his petition was not timely filed under section 16-112-202(10)(B). The circuit court found that appellant's petition "failed to prove that his motion is not based solely upon his assertion of evidence;" that he failed to set forth which items he wanted tested, whether they were previously tested, and, if so, what testing methods were used; and that he failed to prove a new method of technology existed that was substantially more probative than prior available testing methods. We are convinced that the circuit court did not err in this instance where appellant's petition included no claim that he was or is incompetent and that his incompetence contributed substantially to the delay; no contention that new evidence had been discovered since his trial; no argument that a new method of technology substantially more probative than prior testing was now available; and no assertion of other good cause for the delay. Moreover, we agree with the circuit court that appellant's petition is largely based on his own assertion of innocence without any evidentiary support. Therefore, we hold that the circuit court was correct to find that it was without jurisdiction to consider appellant's untimely petition.²

The circuit court also found that appellant's petition neglected to state that his claims were made under penalty of perjury or to include proper verification as required by statute.

²We note that appellant's petition did include a viable claim for relief as to the fingerprint evidence, and he was awarded the relief he requested, i.e., the fingerprints were retested and left unidentified, and thus did not exonerate appellant.

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We need not address the merits of this issue, however, where the circuit court properly found that it was without jurisdiction due to appellant's failure to rebut the presumption of untimeliness.

For his last argument on appeal, appellant claims that he was entitled to a default judgment on his petition. We agree with the circuit court that he was not so entitled. Appellant based his request for a default judgment on the Arkansas Rules of Civil Procedure, which this court has held do not apply to an action filed pursuant to Arkansas Code Annotated § 16-112-201. Furthermore, we have specifically held that Arkansas Rule of Civil Procedure 55, pertaining to default judgments, does not apply to postconviction relief sought pursuant to § 16-112-201. *Carter v. State*, 2010 Ark. 29, ___ S.W.3d ___ (per curiam).

Affirmed.