ARKANSAS SUPREME COURT

No. CR 05-942

NOT DESIGNATED FOR PUBLICATION

ALLEN LYNN PENN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 5, 2006

PRO SE APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, CR 83-441, HON. MARION ANDREW HUMPHREY, JUDGE

AFFIRMED

PER CURIAM

In 2004, appellant Allen Lynn Penn, an inmate in the custody of the Arkansas Department of Correction, filed a *pro se* petition for writ of *habeas corpus* pursuant to Act 1780 of 2001, codified as Ark. Code Ann. §§ 16-112-201--207 (Supp. 2003), in which he requested DNA testing of blood samples that he claimed had been collected from the crime scene. The trial court denied the petition and appellant now brings this appeal from that order.

Appellant was convicted of capital murder and sentenced to life imprisonment without parole on charges relating to the robbery of a service station and convenience store during which the store clerk was shot and killed. Prior to our decision on the appeal, appellant filed a petition for writ of error *coram nobis* based upon a confession to the crime made by a prisoner at the Arkansas Department of Correction. We granted the petition. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). The trial court held that appellant was not entitled to a new trial. Appellant did not appeal that decision, and we affirmed the judgment on direct appeal. *Penn v. State*, 284 Ark. 234, 681

S.W.2d 307 (1984). Appellant also filed a *pro se* petition requesting permission to proceed in circuit court for postconviction relief pursuant to Ark. R. Crim. P. 37, which we denied in an unpublished opinion. *Penn v. State*, CR 84-43 (Ark. June. 23, 1986) (*per curiam*).

While appellant's appeal in this court on the order denying his Act 1780 petition was pending, appellant filed a petition requesting this court to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis*.[1] In his petition for writ of error *coram nobis*, appellant asserted a violation of his right to due process as guaranteed by *Brady v. Maryland*, 373 U.S. 83 (1963), in that he contended the police withheld and then destroyed these same blood samples. We denied appellant's petition on the basis that the issues raised in his request to proceed with a petition for writ of error *coram nobis* were addressed in his trial. *Penn v. State*, CR 84-43 (Ark. October 20, 2005) (*per curiam*). While appellant attempts in his brief on this appeal to again assert claims that jurisdiction should be reinvested in the trial court to consider a petition for writ of error *coram nobis*, we limit our review to those claims concerning the order denying the petition for writ of *habeas corpus* pursuant to Act 1780 of 2001.

Under Act 1780 as in effect when appellant filed his petition,[2] a number of predicate requirements must be met before a circuit court can order that testing be done. *See* sections 16-112-201 to -203. *See also Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004) (*per curiam*). Section 16-112-202(a)(1) provided that:

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[1] The petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error *coram nobis* after a judgment has been affirmed on appeal only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (*per curiam*).

[2] Act 1780 of the 2001 Acts of Arkansas was amended by Act 2250 of 2005.

> [A] person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:
>
> (A) The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and
>
> (B) The evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

The trial court indicated in its order denying relief under the act that appellant had not stated facts to merit relief. We do not reverse a trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

In its order, the trial court found that the record did not demonstrate that the blood sample which appellant was requesting to be tested ever existed. We cannot say that the trial court was clearly erroneous in reaching that conclusion. Indeed, appellant concedes that he has failed to provide any sample to test. Witnesses at trial testified that the robber had left the store through a hole shot out of the store's window, and one witness stated that she observed what she believed was some blood on the broken glass in the window. But, there was also testimony, both during the trial proceedings and during the hearing on the petition under Act 1780, from the officers who collected evidence from the crime scene indicating that they were unable to locate any glass from the window that had blood on it. There was also testimony that no such evidence was listed in the police records as having been stored in the property room in connection with the case.

Appellant contends that the trial court erred through actions he argues prevented him from

presenting a *prima facie* case, further arguing that certain witnesses could have aided in establishing a chain of custody. Yet, while appellant speculates that one of these witnesses might have information concerning the existence of a sample at the Arkansas State Crime Laboratory, he did not contend that he has any knowledge that a sample in fact exists for which he could establish a chain of custody. As previously noted, the evidence before the trial court was that the records indicated no such sample was ever taken into evidence in order to be sent for testing.

Appellant also urges that the trial court erred in denying him counsel. Postconviction matters are considered civil in nature with respect to the right to counsel; there is no absolute right to appointment of counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (*per curiam*). The State is not obligated to provide counsel in postconviction proceedings. *Hardin v. State*, 350 Ark. 299, 86 S.W.3d 384 (2002) (*per curiam*). Here, when the trial court was advised that the public defender's office had declined to represent appellant, and inquired whether appellant wished to proceed *pro se* at the hearing on the Act 1780 petition, appellant indicated that he was capable and prepared to do so. Appellant was clearly not entitled to counsel under the circumstances.

While appellant makes a number of conclusory allegations that the police officers found blood on the glass and hid that evidence, he offered no factual support for those allegations in his petition or the hearing. As appellant did not meet the predicate requirements for relief under the statute because he failed to establish that a sample existed to be tested, we affirm the trial court's denial of postconviction relief.

Affirmed.