ARKANSAS SUPREME COURT

No. CR 06-1151

	Opinion Delivered **October 25, 2007**
JAMES COOPER, ULONZO GORDON, and JEREMY MOTEN Appellants v. STATE OF ARKANSAS Appellee	PRO SE MOTIONS TO FILE SUPPLEMENTAL ABSTRACT AND ADDENDUM WITH REPLY BRIEF; FOR ORAL ARGUMENTS; AND FOR APPOINTMENT OF COUNSEL FOR ORAL ARGUMENTS [CIRCUIT COURT OF CRITTENDEN COUNTY, CR 95-149, HON. CHARLES DAVID BURNETT, JUDGE] APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 1996, appellant James Cooper was found guilty by a jury of capital murder and sentenced to life imprisonment without parole. This court affirmed. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996). Subsequently, appellant sought relief in the trial court pursuant to Ark. R. Crim. P. 37.1. This court affirmed denial of the petition. *Cooper v. State*, CR 96-880 (Ark. Sept. 18, 1997) (per curiam).

In 2002, appellant filed in the trial court a pro se petition for relief pursuant to Act 1780 of 2001, codified as Ark. Code Ann. §§ 16-112-201–207 (Supp. 2001).[1] The petition also listed Ulonzo

[1]Appellant filed his petition prior to the enactment of Act 2250 of 2005, with an effective date of August 12, 2005, that amended relevant portions of the statute. As a result, appellant's petition for writ of habeas corpus remained subject to the requirements in effect at the time appellant filed his petition.

Gordon and Jeremy Moten, his codefendants at trial, as petitioners.[2] The trial court denied the petition after a hearing, and appellant timely filed a pro se notice of appeal on behalf of himself.[3] However, when the appeal was lodged, the record named all three men as appellants in this court.

We first note that appellant claims that he also included Gordon and Moten in the notice of appeal filed in the trial court based upon the authority of a power of attorney purportedly executed by Gordon and Moten, and is legally able to act on their behalf as a result. The State argues that appellant was engaged in the unauthorized practice of law in this appeal by purportedly attempting to represent Gordon and Moten, and by conducting the appeal on their behalf. However, we need not reach that issue as Gordon and Moten have not perfected their appeal.

In civil matters, such as a petition for writ of habeas corpus, a notice of appeal must be filed by each party-appellant, either jointly or severally. Ark. R. App. P.–Civ. 3(c) and (e). Here, appellant timely filed a pro se notice of appeal in the trial court solely on behalf of himself, which he had the right to do as a pro se litigant, as only his name appeared on the notice. As Gordon and Moten did not file a notice of appeal either individually or jointly with appellant's, the notice filed in this matter preserved only appellant's right to an appeal of the trial court's order denying the Act 1780 petition for writ of habeas corpus. Therefore, Gordon and Moten have failed to obtain appellate jurisdiction with regard to an appeal of that order.

Now before us are appellant's pro se motions to file a supplemental abstract and addendum

[2]The Act 1780 petition was signed only by appellant. At the hearing on the petition, an attorney purported to represent all three men as petitioners, apparently with the trial court's acquiescence.

[3]Pursuant to Ark. R. App. P.–Civ. 4(a), a notice of appeal that is filed prior to entry of the order from which the appeal will be taken "shall be treated as filed on the day after" the order is entered. Here, appellant filed the notice of appeal on August 16, 2006, and the trial court entered the order denying the petition for writ of habeas corpus on August 25, 2006. Therefore, the notice of appeal was deemed timely filed on August 26, 2006.

with the reply brief, for oral argument, and for appointment of counsel for oral argument. We need not consider the motions as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward. Accordingly, we dismiss the appeal and hold the motions moot. This court has consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

Act 1780 of 2001 provides that a writ of habeas corpus can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. Ark. Code Ann. §16-112-103(a)(1) (Supp. 2001); sections 16-112-201–207; *Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (per curiam).

Act 1780 testing is not authorized based on the slightest chance that it may yield a favorable result. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). Scientific testing of evidence is authorized only if testing or retesting can provide materially relevant evidence that will significantly advance the defendant's claim of innocence, in light of all the evidence presented. *Id.*

There are a number of predicate requirements that must be met under the act before a circuit court can order that testing be done. Sections 16-112-201 to -203. Initially, the act requires a prima facie showing of identity as an issue at trial when a petitioner contends that he is entitled to posttrial scientific testing on the ground of actual innocence. Section 16-112-202(b)(1); *Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004) (per curiam).

At trial, the defense of appellant, Gordon and Moten revolved around the contention that the victim, or another person, Tony Johnson, initiated the shooting near the intersection of 31st and S.L.

Henry Streets in West Memphis, Arkansas. This location was approximately 130 yards from an open field behind a housing project. The shoot-out was later concluded on the field where the victim was eventually shot. Bullets and casings were recovered at both locations. Only the evidence collected at the scene of the shooting was processed by the Arkansas State Crime Lab.

Appellant's primary defense at trial was that he had no knowledge that Gordon and Moten intended to shoot the victim. Gordon's and Moten's defense was that the victim was chasing them after the initial exchange of gunfire at the street intersection, and that they were acting in self-defense. However, the autopsy results indicated that the victim was shot from behind. Eye witnesses testified at trial that Moten advanced toward the victim as the victim ran from him. The victim fell to the ground after being shot, and Moten then walked over to the victim who was on the ground and shot him several more times.

The Act 1780 petition sought fingerprint testing of the bullets found at 31st and Henry in order to prove that the shooting was justified. Appellant reasoned that if the victim's or Johnson's prints were on any of the bullets or casings found at that location, the fingerprints would prove that the victim was the aggressor in the gun fight. Thus, according to the petition, all defendants would be found innocent of the later shooting of the victim.

At the hearing on the Act 1780 petition, an attorney then representing all codefendants argued to the trial court that the identity prerequisite was satisfied when attempting to determine the identity of the victim/aggressor. However, this interpretation of Act 1780 is patently incorrect. The identity issue goes only to the person convicted of the crime, and only when scientific testing is able to exclude him or her from having committed the crime, thus proving the person's innocence. Section 16-112-103(a)(1) states that a petition for writ of habeas corpus shall issue to one "who has alleged

actual innocence of the offense . . . for which the person was *convicted*[.]" (Emphasis ours.)

In addition to exoneration of one wrongly accused of committing a crime, the act allows the state to commence prosecution against an unknown person identified in the information or indictment only by his or her genetic information. Ark. Code Ann. §5-1-109(i) (Supp. 2001), as amended pursuant to §2, Act 1780 of 2001. It is clear from the language of the statutes and Act 1780 that the issue of identity is limited to the person accused or convicted of committing the crime, and not as support for a defense of justification, or based upon the identity of a third person. Moreover, appellant has cited no authority to support this interpretation of the act

As to the identity of the shooter, evidence adduced at trial showed that the victim and Johnson were in the field talking when all three of the defendants drove up in appellant's car. Gordon and Moten, each holding a gun, got out of the car while appellant remained in the driver's seat. The identity of the shooter was known, as Moten readily admitted that he shot the victim. Appellant, who remained in the car during the shooting, was convicted as an accomplice to the murder. As the identity of the shooter and his accomplices was never an issue at trial, the identity prerequisite pursuant to section 16-112-202(b)(1) could not be met.

As to his claims of actual innocence, any fingerprint results would not advance appellant's claim, or exonerate appellant under section 16-112-202(c)(1)(B) to show that the testing would produce evidence materially relevant to his assertion of actual innocence. The presence of the victim's or Johnson's fingerprints on the bullets would not disprove the evidence introduced at trial as outlined above. Also, fingerprints could not prove that the victim or Johnson were the persons firing the bullets, that the bullets were fired at the defendants, or when the bullets were discharged in order to chronologically place the firing immediately prior to the victim's murder. At most, the

men's fingerprints would merely confirm that the men touched the bullets at one time.

Therefore, even if direct proof existed that the victim was shot shortly after firing at the defendants, evidence of appellant's guilt was overwhelming in spite of a claim of self-defense. The requested scientific testing would not advance appellant's claim of innocence. Section 16-112-202(c)(1)(B). Moreover, a claim of self-defense cannot be *proved* by the presence of the victim's fingerprints, as appellant contends.

Finally, any scientific testing would be cumulative to evidence introduced to the jury under section 16-112-202(c)(1)(B). At trial, the jury was presented with the self-defense theory advanced by Gordon and Moten, and with appellant's claim that he had no knowledge that the victim was going to be killed. The scientific evidence requested would be solely for the purpose of attempting to reinforce the self-defense claim, rather than proving the claim, as contended by appellant. Therefore, any fingerprint testing sought by appellant would be contrary to the requirement that scientific testing produce new, non-cumulative evidence pursuant to section 16-112-202(c)(1)(B).

The scientific testing requested does not support appellant's claim of innocence, or comply with the prerequisites mandated by statute. Appellant failed to meet his burden of establishing entitlement to relief pursuant to Act 1780.

Appeal dismissed; motions moot.

Brown, J., not participating.