

ARKANSAS SUPREME COURT

No. CR 08-01

MELVIN SHOEMATE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 20, 2008

PRO SE MOTION TO SUPPLEMENT
RECORD [CIRCUIT COURT OF
FULTON COUNTY, CR 96-45, HON.
TIMOTHY M. WEAVER, JUDGE]

MOTION TO SUPPLEMENT THE
RECORD GRANTED; APPEAL
DISMISSED.

PER CURIAM

In 1997, a jury found appellant Melvin Shoemate guilty of rape and sentenced him to 240 months' imprisonment in the Arkansas Department of Correction. This court denied appellant's motion for belated appeal. *Shoemate v. State*, 332 Ark. 435, 965 S.W.2d 779 (1998) (per curiam). In 2006, appellant, through counsel, filed in the trial court a petition for writ of habeas corpus under Act 1780 of 2001 Acts of Arkansas, codified as Ark. Code Ann. §§ 16-112-201–16-112-208 (Repl. 2006). The trial court denied the petition, and appellant, proceeding pro se, appeals that order in this court. Appellant further brings this motion to supplement the record with an expanded record that he has tendered. We grant the motion, but dismiss the appeal as it is clear that appellant cannot prevail.

In his motion, appellant notes that the record fails to contain a number of pertinent documents. The tendered supplement includes an amendment to the petition in the trial court and other pleadings not contained in the original record before us. Although not explicitly, the order

does appear to consider the petition, the amendment, and the other pleadings, and those documents are therefore essential to any review of the order denying the petition. We accordingly grant the motion, and our clerk is directed to file the supplement.

Both parties have filed briefs at this point, and having reviewed the supplement, it is clear that appellant cannot prevail. 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).

In appellant's petition, amendment, and other pleadings, he requested DNA and fingerprint testing of a wooden stick that was used to strike the victim. Appellant argued that, although he admitted to having sex with the victim, because his defense was that the sex was consensual, he did not admit to striking the victim with the stick. Although the stick had been submitted to the Arkansas Crime Laboratory for testing, appellant asserted that the tests for blood and skin that he requested were not performed. While the desired results were not clearly stated, appellant presumably wished to show that the stick did not have the victim's blood or skin on it. Appellant did assert that the tests results would show that the stick was not used on the victim as she claimed and would therefore exonerate him. Appellant also argued that his petition should be considered as timely because he had begun discussions of a petition under Act 1780 with his attorney prior to passage of Act 2250 of 2005, that application of Act 2250 amounted to application of an ex post facto law, and, with diligence on the part of counsel, the petition could have been filed in a timely manner.

The trial court found in its order denying the petition that petitioner had failed to meet the predicate requirements of Act 1780 as amended by Act 2250 on three bases: (1) identity was never

an issue in appellant's trial; (2) the testing appellant sought was available at the time of trial; (3) favorable test results would not produce new, non-cumulative evidence materially relevant to his claim of innocence. Finally, the trial court found that the petition was presumed untimely under the statute, and appellant had provided nothing to overcome that presumption. This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006).

On appeal, appellant raises three points for reversal. First, appellant contends that the trial court erred in finding identity was not an issue. Next, he argues that the trial court erroneously determined that the tests sought were available at the time of trial and would not produce new, non-cumulative evidence materially relevant to his claim of innocence. Finally, he contends that the trial court's finding that his petition was untimely was in error and unconstitutional.

Appellant raises claims of constitutional violations concerning violation of his right to due process and equal protection in all three points but never advances those arguments beyond a bare assertion of a constitutional violation. This court does not research or develop arguments for appellants. *Hester v. State*, 362 Ark. 373, 208 S.W.3d 747 (2005). Moreover appellant did not raise these claims below. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005); *see also Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). As to appellant's constitutional argument in the last point on appeal, he does not reassert his claim that the application of the statute amounts to an ex post facto law. Issues raised below but not argued on appeal are considered abandoned. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004); *see also Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001).

In appellant's last point, he argues that the trial court's finding in the order that it had jurisdiction to consider the petition was at odds with its determination that the petition was untimely, citing *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam). While the trial court may have erred in determining that it had jurisdiction, it did not err in denying the petition.

Douthitt does stand for the proposition that the timeliness requirement in Ark. Code Ann. § 16-112-202(10) (Repl.2006) is jurisdictional in nature. Section 16-112-202(10) 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, in his pleadings in the trial court and on appeal, argues that he initiated the Act 1780 proceedings well before Act 2250's effective date of August 12, 2005, and would have been able to file his petition prior to that effective date but for his attorney's lack of diligence and error. Section 16-112-202(10)(B)(v) allows for the presumption to be rebutted where there is good cause, but we cannot say that, under the circumstances presented here, the trial court was clearly erroneous in determining that good cause was lacking.

There is no entitlement to counsel in a postconviction proceeding such as an Act 1780 proceeding. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). Nor is there a constitutional right to a postconviction proceeding. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988); see also *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004). We cannot say that, even though retained counsel admitted that he could have been more diligent, the circumstances that appellant detailed in his brief, concerning counsel's failure to file the petition for a number of months or research the pending legislation, are so compelling as to clearly constitute good cause to rebut the presumption.

Even had the circumstances constituted good cause, we must agree with the trial court's findings that appellant failed to meet the predicate requirement set forth in section 16-112-202 (7). Appellant failed to show that identity was an issue during the investigation or prosecution of the offense. Appellant admitted that he had sex with the victim, but claimed that the sex was consensual and that the test results would show that there was no forcible compulsion. While appellant argued that identity was an issue on the question of who hit the victim, he also argued that the testing would show that the stick was not used as the victim claimed. What appellant hopes to prove is not that someone else hit the victim, but that the victim was not attacked. That issue is one of the victim's credibility, not of identity of the attacker. For this reason, the predicate requirement was not met.

Finally, we need not reach appellant's challenge to the trial court's findings as to the availability of the tests at the time of trial. A review of appellant's petition reveals that it was defective in that it failed to rebut the statutory presumption against timeliness and did not comply with the procedural requirements of the statute in section 16-112-202 (7). The trial court did not err in denying relief.

Motion granted; appeal dismissed.