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SUPREME COURT OF ARKANSAS

No. CR 09-1309

ROBERT HEFFERNAN APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 8, 2011 PRO SE APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [CR 80-41] HON. GRISHAM A. PHILLIPS, JR., JUDGE AFFIRMED.

PER CURIAM

Appellant Robert Heffernan appeals from a Saline County Circuit Court order denying his pro se petition for writ of habeas corpus pursuant to Act 1780 of 2001, as amended by Act 2250 of 2005, and codified at Ark. Code Ann. §§ 16-112-201 to -208 (Repl. 2006). The statute allows for 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 that the facts underlying the claim, if proved 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 that the circuit court erred in denying his petition on the basis that appellant was originally tried and convicted as

an accomplice and that new scientific evidence would not prove appellant's actual innocence or demonstrate that he was not acting as an accomplice. We find no error and affirm.

On May 4, 1981, appellant was convicted by a jury of capital murder and sentenced to life imprisonment without parole. His conviction arose out of the abduction, rape, and murder of a fourteen-year-old girl in 1980. This court affirmed his conviction on direct appeal. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983). Appellant pursued federal habeas corpus relief, which was denied. *Heffernan v. Norris*, 48 F.3d 331 (8th Cir. 1995). He also filed a state habeas corpus petition for relief under Arkansas Code Annotated sections 16-112-201 to -207 (Supp. 2003) in 2001, claiming that DNA testing had been performed on evidence prior to his trial but that the results of that testing had not been admitted into evidence. This court affirmed the denial of appellant's petition on the basis that appellant conceded that the evidence he sought to be tested was available at the time of trial and that it was precluded from being used as the basis for relief under the statute. *Heffernan v. State*, CR 02-239 (Ark. Jun. 13, 2002) (unpublished per curiam).

On August 25, 2009, appellant filed a habeas corpus petition requesting relief pursuant to Arkansas Code Annotated section 16-112-201. In his petition, appellant asserted that his co-defendant, Mike Breault, raped and murdered the victim and that Breault later confessed to the crime. Appellant claimed that semen found on the victim was collected at the time of the investigation. He also alleged that when he and Breault were arrested in Colorado, officials there took DNA samples from each of them. Appellant requested that the evidence from the crime scene be DNA tested so as to "conclusively identify Mike Breault" as the murderer and

the rapist. On September 3, 2009, the circuit court denied appellant's petition. The court found from a review of the record that appellant was charged and convicted as an accomplice to Breault and that testing the semen found on the victim and matching it to Breault would not prove appellant's actual innocence, nor would it demonstrate that he did not act as an accomplice.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1. 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.*

Appellant and Breault were both charged with capital murder and tried separately. Jurors in appellant's original trial were instructed that they could convict appellant of capital murder as an accomplice if they found he had assisted Breault in the abduction, rape, and murder. In his most recent petition, appellant sought to have the semen that he claims was found on the victim DNA tested to prove that Breault was the rapist and the murderer. Appellant maintained that doing so would prove his actual innocence, but he is mistaken. Although DNA testing could feasibly demonstrate that Breault was the rapist, this would not prove that appellant did not act as an accomplice, nor would it prove that he was not the person who committed the murder. Therefore, under the circumstances, we are convinced that the circuit court was correct to find that the scientific testing appellant requested could not exonerate him, and it was proper to deny his petition.

Affirmed.