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SUPREME COURT OF ARKANSAS

No. CR 11-953 & CR 11-1097

BARRY G. AARON APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 15, 2012 PRO SE MOTIONS TO CONSOLIDATE APPEALS AND FOR EXTENSION OF TIME IN CR 11-953 [MILLER COUNTY CIRCUIT COURT, CR 90-468, HON. JOE E. GRIFFIN, JUDGE] APPEALS DISMISSED; MOTION TO CONSOLIDATE MOOT.

PER CURIAM

On March 13, 2002, appellant Barry G. Aaron filed two pleadings—pro se motions referencing an action under Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006)—in the trial court where he received two consecutive life sentences for his convictions on charges of kidnapping and rape. The trial court denied the motions in separate orders entered in 2011, and appellant lodged appeals in this court from the two orders. Appellant has filed a motion for an extension of time to file his brief in one of the two appeals, CR 11-953, and he has also filed a motion to consolidate the two appeals. The motion to consolidated is moot because we hold that both appeals are dismissed.

This court affirmed the judgment of conviction following appellant's second trial on the

charges.[1] *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995). As noted, appellant filed the motions at issue in 2002. In the motions, appellant sought information about evidence that had not been tested but had been referenced in testimony during trial, and he requested the preservation of evidence for testing and materials relating to the chain of custody. Later, in 2009, appellant filed his pro se motion in the trial court for scientific testing that the trial court denied. Appellant appealed, and this court dismissed the appeal. *Aaron v. State*, 2010 Ark. 249 (per curiam).

The trial court did not enter the orders on the two motions until 2011, after appellant had filed a petition for writ of mandamus in this court. *See Aaron v. Griffin*, 2011 Ark. 470. Appellant filed a motion for testing under Act 1780 without having received a ruling on the two motions, but a favorable ruling on the motions would not have prevented the denial of that motion for testing as untimely. The act as amended requires some ground to rebut a presumption against timeliness for petitions filed more than thirty-six months after the date of conviction. Ark. Code Ann. § 16-112-202(10)(B); *Aaron*, 2010 Ark. 249.

Moreover, even if appellant had filed a motion under the Act before it was amended, the Act has not changed in permitting relief only if a petitioner presents a claim for scientific testing of evidence not available at trial or if the scientific predicate for the claim could not have been discovered through the exercise of due diligence. *See* Ark. Code Ann. § 16-112-201(a) (Repl. 2003). Appellant was well aware at trial that DNA testing was available. Clearly, the scientific predicate for the claim that he would now make could have been discovered if he had requested

[1]This court reversed appellant's conviction on the charges and remanded for a new trial in *Aaron v. State*, 312 Ark. 19, 846 S.W.2d 655 (1993).

DNA testing of the evidence at the time of trial. Appellant's defense at trial included pointed reference to the fact that DNA testing could have been done, and the strategy was to have the jury infer that the victim had sex with a boyfriend, or someone else, before her encounter with appellant. The Act was never intended to benefit someone who elects to pursue a defense based upon a tactical decision not to have the evidence tested.

Because relief under the Act is foreclosed to appellant on that basis, the trial court could not have erred in denying any motions designed to facilitate pursuit of relief under the Act. An appeal of the denial of postconviction relief, including an appeal from an order denying a petition for writ of habeas corpus under Act 1780, will not be permitted to go forward where it is clear that the appellant could not prevail. *Harvey v. State*, 2011 Ark. 524 (per curiam). It is clear that appellant cannot prevail on appeal of either of the orders that denied the motions, and we therefore dismiss the appeals.

Appeals dismissed; motion to consolidate moot.

GUNTER, J., not participating.