

SUPREME COURT OF ARKANSAS

No. CR 12-181

FRANK GARNER

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 14, 2012

PRO SE MOTION FOR EXTENSION OF BRIEF TIME [APPEAL FROM THE LITTLE RIVER COUNTY CIRCUIT COURT, CR 04-61, HON. CHARLES A. YEARGAN, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

On September 12, 2005, judgment was entered reflecting that appellant Frank Garner had been found guilty by a jury of kidnapping and rape. Consecutive sentences of 240 months' imprisonment and life imprisonment were imposed, respectively. No timely notice of appeal was taken, and appellant sought a belated appeal in this court in 2009, which was denied. *Garner v. State*, 2009 Ark. 587 (per curiam). On August 5, 2011, appellant filed in the circuit court in which he was convicted a petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). The petition was denied, and appellant timely filed an appeal from the circuit court's order.

Now before us is appellant's motion for extension of time in which to file his brief-in-chief. Because we determine that appellant could not prevail if his appeal were allowed to proceed, the appeal is dismissed. An appeal from an order that denied a petition for postconviction relief, including an appeal from an order denying a petition for writ of habeas corpus based on new scientific evidence, will not be permitted to go forward where it is clear that

the appellant could not prevail. *Strong v. State*, 2010 Ark. 181, ___ S.W. 3d ___ (per curiam) (citing *Doubtitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam)); see *Pierce v. State*, 2009 Ark. 606 (per curiam); *Grissom v. State*, 2009 Ark. 557 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam). Accordingly, appellant’s motion for extension of time is moot.

Act 1780 of 2001, as amended by Act 2250 of 2005 and codified at Arkansas Code Annotated sections 16-112-201 to -208, provides that a writ of habeas corpus can issue based upon new scientific evidence proving a person actually innocent of the offense for which he was convicted. *Strong*, 2010 Ark. 181, ___ S.W.3d ___; Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006); Ark. Code Ann. § 16-112-201. We have held that DNA testing of evidence is authorized under this statute 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 to the jury. *Johnson v. State*, 356 Ark. 534, 546, 157 S.W.3d 151, 161 (2004). Evidence does not have to completely exonerate the defendant in order to be “materially relevant,” but it must tend to significantly advance his claim of innocence. *Id.* at 546–47, 157 S.W.3d at 161 (internal citation omitted).

Before a circuit court can order testing under this statute, however, there are a number of predicate requirements that must be met. *Doubtitt*, 366 Ark. at 580, 237 S.W.3d at 77; Ark. Code Ann. §§ 16-112-201 to -203. One of these is that a petitioner who files a petition more than thirty-six months after the entry of the judgment of conviction must rebut a presumption that his petition is untimely. Ark. Code Ann. § 16-112-202(10)(B). This presumption may be rebutted

by showing that the petitioner was or is incompetent, and the incompetence substantially contributed to the delay; that the evidence to be tested is newly discovered; that the motion is not based solely upon the petitioner's own assertion of innocence, and a denial of the motion would result in a manifest injustice; that a new method of testing exists that is substantially more probative than was the testing available at the time of the petitioner's conviction, or for other good cause. *Id.*

In its order denying appellant's petition for writ of habeas corpus, the circuit court found that appellant had failed to rebut the presumption against timeliness. Specifically, the court noted that appellant had filed the petition nearly five years after the date of his conviction and found that appellant's failure to address the issue of timeliness in his petition was fatal to his claim. The circuit court based this finding on our decision in *Aaron v. State*, 2010 Ark. 249 (per curiam), where we held that a petitioner's bare allegation of innocence, without more, did not amount to a rebuttal of the presumption against timeliness, and the failure of the petitioner to address that issue in his original petition meant that he could not prevail on an appeal from the trial court's denial of the petition.

In his petition, appellant alleged that he was placed in administrative segregation by the Arkansas Department of Correction from his arrival in September 2005 through early October 2007. No other reference was made to the nearly five years that elapsed between appellant's conviction and his filing of the petition for writ of habeas corpus in the circuit court. He did not allege that he was incompetent at any point between his trial and the filing of the petition. His petition was based on his own repetitive claims of actual innocence, and it failed to demonstrate

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that a manifest injustice would occur if testing were denied. He failed to reference any methods of DNA testing and, by extension, failed to demonstrate that new testing was available to him now that was not available during his trial. He did not demonstrate that the evidence that he hoped to have tested was newly discovered;¹ indeed, the circuit court noted that appellant was requesting the victim's medical records, which "were obviously in existence at or before the trial date." Finally, nothing in appellant's petition would establish good cause within the meaning of the statute; even the fact that he was in administrative segregation until October 2007 would not explain why he waited an additional forty-six months to file his petition.

The generally applicable standard for review of an order denying postconviction relief dictates that this court does not reverse unless the circuit court's findings are clearly erroneous. *Cooper v. State*, 2012 Ark. 123 (per curiam). 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.* (citing *Pitts v. State*, 2011 Ark. 322 (per curiam)). Inasmuch as appellant's original petition for writ of habeas corpus failed to rebut the presumption against timeliness, the circuit court's denial of that petition based on appellant's failure to rebut the presumption was not clearly erroneous. Therefore, appellant could

¹The only parts of appellant's petition that could arguably be read to refer to newly discovered evidence were in regard to other allegations of sexual crimes made by the victim against various people, which appellant claims establishes his actual innocence. Such claims are not cognizable in a petition for writ of habeas corpus based on newly discovered scientific evidence. *See, e.g., Strong*, 2010 Ark. 181 (holding that an Act 1780 petition is limited to issues of scientific testing); *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006); *see generally* Ark. Code Ann. §§ 16-112-201 to -202.

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not prevail if his appeal were allowed to proceed, and his appeal is dismissed. Appellant's motion for extension of time is moot.

Appeal dismissed; motion moot.