Cite as 2012 Ark. 309

SUPREME COURT OF ARKANSAS

No. CR 12-286

JESSIE HILL APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** August 14, 2012 PRO SE MOTIONS TO INTRODUCE NEWLY DISCOVERED EVIDENCE; TO EXTEND PAGE LIMIT; AND TO COMPEL AN ANSWER, STAY PROCEEDINGS, AND FOR ABEYANCE [GRANT COUNTY CIRCUIT COURT, CR 95-38, HON. CHRIS E WILLIAMS AND HON. ED M. KOON, JUDGE] MOTION TO EXTEND PAGE LIMIT GRANTED; MOTIONS TO INTRODUCE NEWLY DISCOVERED EVIDENCE AND COMPEL DENIED; ORDER AFFIRMED.

PER CURIAM

Appellant Jessie Hill lodged in this court an appeal from three orders that denied a number of pleadings that appellant had filed in the trial court where he was convicted of capital murder in 1995. The first pleading that was denied was a motion for DNA testing 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). The other pleadings, which consisted of a motion to compel, "reply brief," and petition for writ of mandamus, sought an order directing the State Crime Laboratory, the Grant County Sheriff's Department, and the prosecuting attorney to provide appellant with copies of a report on the examination of latent fingerprints found on a marble rolling pin that was one of the murder weapons introduced at his trial.

Appellant filed his brief in the appeal, and, after that, he filed a motion to introduce

newly discovered evidence. The State filed its brief, and appellant tendered a reply brief along with a motion to extend the page limit to accommodate an additional page. Later, appellant filed a motion to compel an answer, to stay proceedings and for abeyance. In that motion, appellant avers that he filed a recent motion in the trial court that seeks to compel action in response to a request that he made for the lab report, and he would have this court withhold action in this case and order the circuit court to enter an order granting this recent motion.

In the new motions that appellant filed in the trial court, the ones referenced in his latest motion in this court, appellant appears to have raised arguments not presented in this case, focused on a request that he made that was not at issue in this appeal. Appellant does not demonstrate in his latest motion that the issues in this appeal turn on either the results of the tests that appellant sought or the outcome of the motion appellant avers that he filed in the circuit court. For that reason, appellant's most recent motion filed in this court is denied. We grant the motion to extend the page limit on the reply brief to ensure that the issues that are presented here are fully addressed.[1] Appellant's motion to introduce newly discovered evidence seeks to have this court consider documents that were not before the trial court. Because this court cannot consider anything outside of the record below, we deny the motion. *See Lowe v.*

[1]Appellant references an additional pleading not appealed. He filed a "Mixed Petition" that the trial court denied in a separate order. The record does not contain a notice of appeal as to that pleading, and any issues concerning the denial of appellant's mixed petition are not considered in this opinion. There were also some additional motions, such as a motion for appointment of counsel, that were filed and denied in the orders that are appealed, but that appellant does not address in his brief. We need not consider those abandoned issues. *See Abernathy v. State*, 2012 Ark. 59, ___ S.W.3d ___ (per curiam). Even to the extent that appellant may be considered to raise some limited arguments concerning some of these additional motions, such as his motion for discovery, those motions are made moot by the denial of the pleadings that are addressed here.

State, 2012 Ark. 185, ___ S.W.3d ___ (per curiam). We affirm the trial court's denial of relief in both orders.

The first order that was appealed denied appellant's motion for DNA testing under Act 1780. This is not the first time that appellant has sought relief under Act 1780. Most recently, this court dismissed the appeal of the trial court's denial of appellant's motion to vacate judgment under Act 1780 because the motion failed to rebut the statutory presumption against timeliness imposed by section 16-112-202(10)(B). *Hill v. State*, 2012 Ark. 204 (per curiam). As was the case there, appellant's motion in the present case failed to rebut the presumption, and, as a consequence, the trial court did not have jurisdiction to consider a petition for relief filed under the Act. *See id.* (citing *Wallace v. State*, 2011 Ark. 295 (per curiam)).

Appellant's arguments in his brief assert that the trial court failed to consider the potential test results in context with other potential evidence of his innocence under the correct standard, but the trial court had no jurisdiction to consider whether the test results were of any value in determining his innocence because appellant did not demonstrate the threshold requirements to establish a basis for relief under the Act and allow the court to go forward. On appeal, appellant asserts that ineffective assistance of counsel should provide a basis to rebut the presumption. The allegations made by appellant that counsel was inexperienced in capital cases, however, were not contained in the motion before the trial court, and would not, in any case, provide a sufficient basis to explain how his claim could provide the good cause contemplated by the statute.[2]

[2]We have considered whether claims of ineffective assistance of counsel are cognizable in those habeas proceedings not brought under Act 1780, and held that such claims are not

Appellant's remaining motions relevant to this appeal alleged that he had a right to copies of a report on latent fingerprint analysis conducted by the Arkansas Crime Laboratory on prints found on the marble rolling pin and the trunk of the car where the victim was placed. These pleadings sought to have the trial court order that appellant be provided with those copies at State expense. Appellant had made a number of requests for the document under the Arkansas Freedom of Information Act ("FOIA"), codified as Arkansas Code Annotated sections 25-19-101 to -110 (Repl. 2002 & Supp. 2009).[3] Appellant provided copies of responses from the recipients of those requests indicating that he or his representative would be permitted to examine the files in which that document would be located, if it existed, and that he would be allowed to have copies made for a fee.[4]

The FOIA does not require a court to provide photocopying at public expense. *Avery v. State*, 2009 Ark. 528 (per curiam). Indigency alone does not entitle a petitioner to free photocopying. *Id.* To demonstrate entitlement to photocopying at public expense, the burden is on the petitioner to establish some compelling need for certain documentary evidence to

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cognizable. *Culbertson v. State*, 2012 Ark. 112 (per curiam). A petition for the writ is not a substitute for proceeding under Arkansas Rule of Criminal Procedure 37.1. *Id.* A petition that seeks postconviction relief cognizable under Rule 37.1 is governed by that rule regardless of the label placed on it by a petitioner. *Gonder v. State*, 2011 Ark. 248, ___ S.W.3d ___ (per curiam). To the extent that appellant seeks relief that may have been granted to him under a timely postconviction petition, therefore, appellant does not establish good cause to excuse the delay.

[3]As noted earlier, appellant alleged in his motion to compel that he also made a subsequent request that was the subject of the motions that he filed after this appeal was lodged.

[4]The crime lab deferred to the prosecuting attorney concerning the issue of providing access, and the prosecuting attorney responded that the file that would contain the document would be housed in that office and would be available on the stated terms.

support an allegation contained in a timely petition for postconviction relief. *Id.*

Appellant cited Arkansas Code Annotated section 12-12-312 (Supp. 2011) as a basis for providing the document to him at no cost and repeated his arguments from the motion under Act 1780, claiming that the document would be used to establish a right to relief under Act 1780. As already discussed, those allegations did not establish that he is entitled to seek relief under Act 1780. Without a showing that postconviction relief may be available to him, appellant has not demonstrated a compelling need for the document.

Despite his allegations to the contrary, appellant has not fully established that the document that he seeks exists or, if it does exist, that it was not furnished to his counsel at trial. Although appellant insists that there is such a report, and has made references to what he believes is contained in it, the facts documented in the record of his trial do not tend to support his allegations that the prosecution withheld the report, and he did not plead additional facts that would support his claim that the document was withheld by the prosecution.

There was discussion on the record concerning the crime lab's analysis of the physical evidence in a pretrial hearing. That conversation established that counsel was aware that fingerprint evidence had been submitted for testing, and counsel specifically inquired of a witness about whether there was a report on prints from the rolling pin. It was not clear from the discussion whether the evidence that had been submitted was sufficient for comparison, but it was clear that counsel was aware that some prints had been submitted to the lab.

There was a single expert witness from the crime lab who testified at trial about fingerprints collected and analyzed in connection with the case. On direct examination by the

State, that expert testified concerning the analysis of the victim's print found on an ashtray. On cross-examination, counsel specifically asked about any other prints examined in connection with the case. Counsel elicited testimony that confirmed appellant's fingerprints were not among nine other prints submitted in connection with the murder that were suitable for identification. There was no report submitted as evidence for the nine prints, and the locations from which the prints were taken was not referenced. Counsel, however, requested and received time to examine a report. If this document included the report that appellant sought, then counsel was given access to the report; it was not withheld by the prosecution.

Appellant asserts that, regardless of whether counsel was provided access to the report or a copy of it, appellant should be furnished a copy now under his FOIA request without charge. Appellant's position on appeal is that he is entitled to a copy from each of the agencies responding to his FOIA request without charge. That is, however, not consistent with our holding in *Avery*. As previously noted, appellant failed to demonstrate a compelling need for the report. Without such a demonstration, appellant is not entitled to copies of the requested documents at public expense, in addition to access to the document. As a consequence, appellant failed to establish any basis for the trial court to order that copies should be furnished to him at no charge.

Even if section 12-12-312 may provide support for appellant's claim that he is entitled to access to the report, it does not provide support for appellant's position that a copy should be provided to him without charge. Appellant did not establish that his attorney had not received access to the report at trial, and appellant does not contend that he has not been offered

access to examine the files that would contain the report in response to his FOIA request.

Appellant's first motion failed to establish the required rebuttal of the presumption of untimeliness and, therefore, failed to provide a basis for the trial court to assume jurisdiction under Act 1780. His other pleadings also failed to establish a basis for the relief that he requested. The trial court did not err in denying relief on any of the pleadings in issue.

Motion to extend page limit granted; motions to introduce newly discovered evidence and compel denied; order affirmed.

Jessie Hill, pro se appellant.

No response.