Cite as 2013 Ark. 104

SUPREME COURT OF ARKANSAS

No. CR12-31

WILLIE HUTCHERSON APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 7, 2013 PRO SE MOTION TO STAY APPEAL [PULASKI COUNTY CIRCUIT COURT, CR 99-1834, HON. HERBERT WRIGHT, JR., JUDGE] APPEAL DISMISSED; MOTION DENIED.

PER CURIAM

In 2000, appellant Willie Hutcherson was found guilty by a jury of four counts of aggravated robbery, three counts of misdemeanor theft of property, and one count of felony theft of property. He was sentenced as a habitual offender to an aggregate term of 2880 months' imprisonment, which included 60 months' imprisonment for possession of a firearm by a felon. The Arkansas Court of Appeals affirmed. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001).

On September 14, 2011, appellant filed in the trial court a pro se petition for writ of habeas corpus pursuant to Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). 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 v. State*, 2010 Ark. 181, 372 S.W 3d 758 (per curiam); Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006); Ark. Code Ann. § 16-112-201. 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. In his petition, appellant asked that the videotape that showed the robbery of a Texaco station, which was one of the robberies of which he was convicted, should be "tested." He contended that testing the tape would prove that he was not the man who perpetrated the offense. Appellant did not state that there was any new technology that would result in a clearer image or otherwise allege what evidence testing the tape would produce.

Appellant's petition was denied, and he has lodged an appeal in this court from the circuit court's order. Now before us is appellant's motion to stay the appeal and order the circuit court to test the videotape. We deny the motion because it is an attempt to add information to bolster the petition that was before the trial court by naming new technological advances that might be employed to make the tape more helpful in identifying the robber. An appellant may not rewrite his petition on appeal to add material that was not before the court when the court made its ruling. This court does not consider any item that was not before the trial court when it entered its order on the petition for postconviction relief. *Jackson v. State*, 2013 Ark. 19 (per curiam); *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

We also dismiss the appeal, because it is clear that appellant could not prevail if his appeal were allowed to proceed. 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. *Garner v. State*, 2012 Ark. 271 (per curiam); *Strong*, 2010

Ark. 181, 372 S.W.3d 758 (citing *Douthitt 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).

Appellant's petition was little more than a bare allegation of innocence with no showing that there was good cause to order further scientific testing of evidence. 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)). Considering the unsubstantiated claim raised by appellant that merely asked for "testing," it cannot be said that the trial court erred in denying relief. Thus, appellant could not prevail if his appeal were allowed to proceed, and the appeal is dismissed.

Appeal dismissed; motion denied.

Willie Hutherson, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.