Cite as 2012 Ark. 256

SUPREME COURT OF ARKANSAS

No. CR 12-350

RODNEY LEE MITCHAEL APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 31, 2012 PRO SE MOTION FOR BELATED APPEAL AND PETITION FOR WRIT OF MANDAMUS [CRAWFORD COUNTY CIRCUIT COURT, 17CR 2006-166, HON. GARY R. COTTRELL, JUDGE] MOTION FOR BELATED APPEAL TREATED AS MOTION FOR RULE ON CLERK AND DENIED; PETITION FOR WRIT OF MANDAMUS DENIED.

PER CURIAM

In 2006, a Crawford County jury found appellant, Rodney Lee Mitchael, guilty of rape and first-degree terroristic threatening and sentenced him to an aggregate term of 780 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Mitchael v. State*, CACR 07-98 (Ark. App. Jan. 16, 2008) (unpublished). Appellant subsequently filed in the circuit court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2008), which was denied as untimely. This court then denied appellant's motion to proceed with a belated appeal from the denial of his Rule 37.1 petition. *Mitchael v. State*, 2009 Ark. 516 (per curiam).

On October 5, 2011, appellant filed in circuit court a petition to "Vacate and/or to Set Aside the Judgment," which he based on Act 1780 of 2001, as amended by Act 2250 of 2005 and codified at Arkansas Code Annotated sections 16-112-201 to -208 (Repl. 2006). The circuit court denied the petition, and appellant timely filed a notice of appeal on December 13, 2011. On

January 9, 2012, he filed in the circuit court a motion for extension of time to lodge the record on appeal, and, on March 5, 2012, he tendered to this court a petition for writ of mandamus seeking a ruling by the circuit court on the motion for extension of time.

Now before us are appellant's pro se motion for belated appeal and petition for writ of mandamus. Because appellant's notice of appeal was timely filed, we treat the motion for belated appeal as a motion for rule on clerk pursuant to Arkansas Supreme Court Rule 2-2(b) (2012). *Carroll v. State*, 2010 Ark. 33 (per curiam) (citing *Ester v. State*, 2009 Ark. 442 (per curiam)). As it is clear that appellant could not prevail if his appeal were allowed to proceed, we deny the motion. *See Strong v. State*, 2010 Ark. 181, ___ S.W.3d ___ (per curiam). Additionally, since appellant's petition for writ of mandamus fails to establish that a writ of mandamus is warranted, that petition is denied.

Act 1780 of 2001 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. *Id.* (citing *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam)); Ark. Code Ann. § 16-112-103(a)(1) (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).

However, Act 1780 of 2001 was amended by Arkansas Act 2250 of 2005, and, as revised, there are a number of predicate requirements that must be met before a circuit court can order that testing be done. *Strong*, 2010 Ark. 181, at 3, ___ S.W.3d at ___; *Douthitt*, 366 Ark. at 580, 237 S.W.3d at 77; Ark. Code Ann. § 16-112-202. Appellant's petition failed to satisfy these.

Appellant filed his petition in the circuit court nearly five years after the date of his conviction. Arkansas Code Annotated section 16-112-202(10)(B) mandates that there shall be a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction. Appellant attempted to rebut this presumption by arguing, first, that "his own incompetence in knowing how to prepare a petition" was the cause of his delay in filing the motion. Ignorance of the rules does not constitute good cause. *See Ross v. State*, 2011 Ark. 270 (per curiam) (citing *Wright v. State*, 2010 Ark. 474 (per curiam)); *Burgess v. State*, 2010 Ark. 34 (per curiam); *see also Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987).

Alternatively, appellant attempted to rebut the presumption against timeliness by arguing that the petition was not based solely on his own claims of actual innocence and that a denial of the petition would result in a manifest injustice. He supported this claim by further arguing that he was requesting testing that utilized a new method of technology that is substantially more probative than prior testing that was available. Appellant's petition sought testing of specific evidence using the "SNP–Snips procedures," "Short Tandem Repeats – known scientifically as 'micro-satel-lites,'" and mitochondrial-DNA testing. Appellant was convicted in 2006, and all of the testing that he now seeks was available at that time. *See Howard v. State*, 2012 Ark. 177, ___ S.W.3d ___ (noting that mitochondrial-DNA testing had been performed prior to Howard's 1999

trial); *Hamm v. Office of Child Support Enforcement*, 336 Ark. 391; 985 S.W.2d 742 (1999) (noting that short-tandem-repeats had been tested in that case); *see generally United States v. Beverly*, 369 F.3d 516 (2004) (noting that mtDNA-testing that could observe single-nucleotide polymorphisms "has been used extensively for some time in FBI labs, as well as state and private crime labs"). Because the testing was available at the time of his trial, appellant's attempt to rebut the presumption against timeliness fails.

The remainder of the petition that appellant filed in the circuit court raises claims that are simply not cognizable in a petition under Act 1780. Appellant challenges the sufficiency of the evidence adduced against him at trial, including a lack of evidence of penetration; prosecutorial misconduct in the form of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); due-process, equal-protection, and denial-of-counsel violations; and that the trial court abused its discretion in denying appellant's motion to suppress certain evidence at trial. None of these claims is cognizable in a petition under Act 1780. *See Strong*, 2010 Ark. 181, at 7, ___ S.W.3d at ___.

Since appellant failed to rebut the presumption against timeliness in Arkansas Code Annotated section 16-112-202(10), the circuit court could not have ordered DNA testing as appellant requested. Additionally, none of the other claims that appellant raised were grounds for relief under Act 1780. The decision to deny the requested relief was, therefore, not clearly erroneous. Appellant could not prevail if his appeal were allowed to proceed, and the motion for rule on clerk is denied.

Appellant's petition for writ of mandamus seeks an order from this court that directs

Circuit Judge Gary R. Cottrell to rule on a motion that appellant filed in the circuit court on January 9, 2012, seeking an extension of time to file the record on appeal. Under Arkansas Rule of Appellate Procedure–Criminal 4(c)(1) (2011), an appellant who seeks an extension of time to lodge the record on appeal may request such an extension by filing a motion in the circuit court. However, that rule also requires that the appellant who files such a motion must have a copy of the motion served on the prosecuting attorney for that circuit. Nothing in the record suggests that the prosecuting attorney was properly served in this case, and appellant's petition for writ of mandamus does not allege that the prosecuting attorney was served.

A writ of mandamus is appropriate where (1) the duty to be compelled is ministerial and not discretionary; (2) the petitioner has shown a clear and certain right to the relief sought; (3) the petitioner lacks any other adequate remedy. *Strain v. State*, 2012 Ark. 184 (per curiam) (citing *Russell v. Webb*, 2011 Ark. 307 (per curiam). Here, appellant failed to meet the necessary criteria to show that a writ of mandamus was warranted; the plain language of Arkansas Rule of Appellate Procedure–Criminal 4(c) makes it clear that the granting of an extension of time is discretionary with the circuit court. *See* Ark. R. App. P.–Crim. 4(c) (stating that "the court *may* enter an order granting the extension" in certain situations); *see also Cortinez v. Arkansas Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003) (noting that the word "may" is usually employed as implying permissive or discretionary, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used). Because appellant failed to satisfy the first criterion, his petition for writ of mandamus is denied.

Motion for belated appeal treated as motion for rule on clerk and denied; petition for writ

of mandamus denied.