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SUPREME COURT OF ARKANSAS

No. CR12-683

LLOYD C. FOSTER APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 14, 2013 PRO SE MOTION FOR EXTENSION OF BRIEF TIME [APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, CR 07-4229] APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

Appellant Lloyd C. Foster was convicted of first-degree murder on August 20, 2008, and was sentenced to life imprisonment. We affirmed. *Foster v. State*, 2009 Ark. 454. On April 23, 2012, he filed in the circuit court a pleading styled, "Petition to Vacate And/Or Set Aside The Judgment per Act 1780 of 2001 & Act 2250," which the circuit court denied. Appellant timely filed an appeal in this court from the circuit court's denial, and he now requests an extension of time in which to file his brief-in-chief.

We need not consider appellant's request for an extension of time, however, because it is clear that he could not prevail if his appeal were allowed to proceed. An appeal from an order that denied a petition for postconviction relief, including a petition under Act 1780 of 2001, will not be allowed to proceed where it is clear that an appellant could not prevail. *See Garner v. State*, 2012 Ark. 271 (per curiam); *Strong v. State*, 2010 Ark. 181, 372 S.W.3d 758 (per curiam) (citing *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam)). Accordingly, we dismiss the appeal, and the 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 (Repl. 2006), 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. *Garner*, 2012 Ark. 271 (citing *Strong*, 2010 Ark. 181, 372 S.W.3d 758); 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. *Garner*, 2012 Ark. 271.

Before a circuit court can order testing under this statute, however, there are a number of predicate requirements that must be met. *Douthitt*, 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 against timeliness 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 conviction; or for other good cause. *Id.*

Appellant's petition was filed forty-four months after the judgment of conviction had been entered against him. In his petition in the circuit court, he attempted to rebut the presumption against timeliness "by admitting to his own incompetence in knowing how to prepare a petition from an indigent, pro se, incarcerated person's standpoint." We have specifically rejected this argument as a basis for rebuttal under the statute. *See Mitchael v. State*, 2012 Ark. 256 (per curiam) (holding that petition failed to rebut the presumption against timeliness with allegation 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. *Id.*; *see Ross v. State*, 2011 Ark. 270 (per curiam) (citing *Wright v. State*, 2010 Ark. 474 (per curiam)). The "incompetence" that is referenced in Arkansas Code Annotated section 16-112-202(10)(B) refers to legal incompetence, and appellant did not allege that he was incompetent at any point between his trial and the filing of the petition. *See generally Garner*, 2012 Ark. 271, at 3.

Alternatively, appellant argued that the presumption against timeliness was rebutted because his assertions were not based solely on his actual innocence, and any denial of the petition would result in 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 [sic],'" and mitochondrial-DNA testing. Appellant was convicted in

2008, and all of the testing that he now seeks was available at that time. *See Mitchael*, 2012 Ark. 256 (citing *Howard v. State*, 2012 Ark. 177, __ S.W.3d __ (noting that mitochondrial-DNA testing had been performed prior to Howard's 1999 trial); *see generally 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); *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 raised claims that are simply not cognizable in a petition under Act 1780. Appellant alleged 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 failing "to deliver the state and federal protections and safeguards promulgated toward a fair and impartial entitlement." None of these claims are cognizable in a petition under Act 1780. *See Mitchael*, 2012 Ark. 256 (citing *Strong*, 2010 Ark. 181, 372 S.W.3d 758).

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 appeal is accordingly dismissed. Appellant's motion for extension of time in which to file his brief is moot.

Appeal dismissed; motion moot.

Lloyd C. Foster, pro se appellant.

No response.