

THE ARKANSAS SUPREME COURT HELD THAT DEFENDANT WAS NOT ENTITLED TO POSTCONVICTION FORENSIC DNA TESTING OF EVIDENCE WHEN THE TESTING WOULD NOT SHOW EVIDENCE OF ACTUAL INNOCENCE.

The case came before the Arkansas Supreme Court on appeal from the circuit court's orders denying and dismissing Rodney Arlen Pankau's petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 and for writ of habeas corpus based on new scientific evidence pursuant to Arkansas Code Annotated § 16-112-201.<sup>1</sup> The Appellant's point of appeal was that the circuit court erred in denying scientific testing of hairs removed from the crime scene.<sup>2</sup> The hairs were not tested prior to his conviction for residential burglary and attempted rape.<sup>3</sup>

Pankau was sentenced to 540 months imprisonment on September 30, 2008.<sup>4</sup> Pankau subsequently appealed his conviction and sentence and filed a petition for postconviction relief and a separate petition for writ of habeas corpus.<sup>5</sup> The appellant's petition for postconviction relief alleged that he was denied effective assistance of counsel because the attorney had no sought independent testing of a hair for which the Arkansas State Crime Lab was unable to extract a DNA profile.<sup>6</sup> Appellant's writ of habeas corpus asserted that he was entitled to testing of the hair sample due to a newly available method that was more probative than previous testing.<sup>7</sup>

Pankau argued that the additional evidence would support his defense of misidentification and raise a reasonable probability that he was innocent.<sup>8</sup> The State countered that Pankau's additional testing would not produce any new material evidence that would raise a reasonable probability of his innocence.<sup>9</sup> The circuit court agreed with the lower court and denied both Pankau's petition and writ of habeas corpus.<sup>10</sup>

Pankau's sole point of appeal to the Arkansas Supreme Court was that the circuit court abused its discretion in denying his request to test the additional hairs found at the crime scene.<sup>11</sup> Pankau argues that since his defense at trial was that of mistaken identity, then testing the previously untested hairs would provide additional evidence that someone else was the guilty

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<sup>1</sup> *Pankau v. State*, 2013 Ark. 162, at 1, 2013 WL 1694909, at \*1.

<sup>2</sup> *Id.*, 2013 WL 1694909, at \*1.

<sup>3</sup> *Id.*, 2013 WL 1694909, at \*1.

<sup>4</sup> *Id.*, 2013 WL 1694909, at \*1.

<sup>5</sup> *Id.* at 1–2, 2013 WL 1694990, at \*1–\*2.

<sup>6</sup> *Id.* at 2, 2013 WL 1694990, at \*2.

<sup>7</sup> *Pankau*, 2013 Ark. at 2, 2013 WL 1694990, at \*2.

<sup>8</sup> *Id.*, 2013 WL 1694990, at \*2.

<sup>9</sup> *Id.* at 3, 2013 WL 1694990, at \*3.

<sup>10</sup> *Id.*, 2013 WL 1694990, at \*3.

<sup>11</sup> *Id.* at 4, 2013 WL 1694990, \*4.

party.<sup>12</sup> The State countered that the evidence was not “newly discovered” as Pankau claims and that they were available at the time of the initial trial.<sup>13</sup> In the alternative, the State argued that they circuit court did not err in denying relief because the additional testing would not establish actual innocence required by the statute.<sup>14</sup>

In appeals for postconviction relief, the Arkansas Supreme Court will not reverse a circuit court’s decision granting or denying postconviction relief unless it is clearly erroneous.<sup>15</sup> Clearly erroneous occurs when, “although there is evidence to support a finding, the appellate court after reviewing the entire evidence is left with the firm conviction that a mistake has been committed.”<sup>16</sup> The same standard applies when a circuit court denies a DNA testing under Ark. Code Ann §§ 16-112-201 to -208.<sup>17</sup>

A writ of habeas corpus can be issued based on new scientific evidence proving that a person is actually innocent of the offense in which he was convicted.<sup>18</sup> There are certain requirements that must be met before a court can order DNA testing under sections 16-112-201.<sup>19</sup> The one condition that the court focused on was that the proposed testing of the specific evidence would produce new material evidence that would support the theory of defense and raise a reasonable probability that the person did not commit the crime.<sup>20</sup>

The court held that Pankau did not demonstrate that the testing of the additional hairs would result in any evidence that would raise a reasonable probability that he did not commit the crime.<sup>21</sup> Evidence found at the crime scene pointed to Pankau as the culprit, including a baseball cap with the logo of Pankau’s employer containing his evidence.<sup>22</sup> The court held that even if the additional testing could identify someone other than Pankau, it did not raise reasonable probability that he did not commit the crime for which he was convicted.<sup>23</sup> For this reason, the circuit court’s denial of Pankau’s appeal was upheld.<sup>24</sup>

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<sup>12</sup> *Id.*, 2013 WL 1694909, at \*4.

<sup>13</sup> *Pankau*, 2013 Ark. at 4–5, 2013 WL 1694909, at \*4–\*5.

<sup>14</sup> *Id.* at 5, 2013 WL 1694909, at \*5.

<sup>15</sup> *Id.*, 2013 WL 1694909, at \*5 (citing *Misskelley v. State*, 2010 Ark. 415).

<sup>16</sup> *Id.*, 2013 WL 1694909, at \*5.

<sup>17</sup> *Id.*, 2013 WL 1694909, at \*5.

<sup>18</sup> *Id.*, 2013 WL 1694909, at \*5. (citing *Hutcherson v. State*, 2013 Ark 104).

<sup>19</sup> *Pankau*, 2013 Ark. at 5, 2013 WL 1694909, at \*5.

<sup>20</sup> *Id.*, 2013 WL 1694909, at \*5–\*6. (quoting Ark. Code Ann. § 16-112-202(8)).

<sup>21</sup> *Id.* at 6, 2013 WL 1694909, at \*6.

<sup>22</sup> *Id.*, 2013 WL 1694909, at \*6.

<sup>23</sup> *Id.* at 6–7, 2013 WL 1694909, at \*6–\*7.

<sup>24</sup> *Id.* at 7, 2013 WL 1694909, at \*7.