SUPREME COURT OF ARKANSAS

No. CR08-1481

JESSIE LLOYD MISSKELLEY JR., APPELLANT, VS. STATE OF ARKANSAS, APPELLEE,	**Opinion Delivered** 11-4-10 APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, NO. CR93-47, HON. DAVID BURNETT, JUDGE, REVERSED AND REMANDED.

ROBERT L. BROWN, Associate Justice

Appellant Jessie Lloyd Misskelley appeals from a Clay County Circuit Court order denying his petition for a writ of habeas corpus and his motion for a new trial under Arkansas Code Annotated sections 16-112-201 to -208. Misskelley raises multiple claims, including the trial court's use of the wrong statutory standard in denying the relief sought. We agree with Misskelley that the wrong standard was used by the trial court, and we reverse and remand for an evidentiary hearing to determine whether a new trial is warranted.

In 1993, Misskelley, together with Damien Echols and Jason Baldwin, was charged in connection with the deaths of three young boys: Michael Moore, Steven Branch, and Christopher Byers. Misskelley's jury trial was severed from the jury trial of Echols and Baldwin because Misskelley gave a confession to police but would not agree to testify against the other two men at trial.[1] He was tried first in Clay County Circuit Court and was

[1]This court affirmed Misskelley's conviction and the validity of his confession in *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

convicted of one count of murder in the first degree, for which he received a life sentence, and two counts of murder in the second degree, for which he received a combined sentence of forty years. Echols and Baldwin were tried together after Misskelley's conviction. They were both found guilty of capital murder. Echols was sentenced to death; Baldwin was sentenced to life without parole.[2]

I. *Procedural History*

On November 17, 2000, Misskelley filed a Rule 37 petition for postconviction relief. In 2001, Arkansas enacted Act 1780 ("Arkansas DNA testing statutes"). Act 1780 was codified at Arkansas Code Annotated sections 16-112-201 to -207. On September 27, 2002, Misskelley filed a petition for writ of habeas corpus under Act 1780. His original Rule 37 petition was held in abeyance while issues regarding DNA evidence testing were litigated for purposes of his habeas corpus petition.

On May 26, 2004, the trial judge signed the first DNA testing order in Misskelley's case, which was entered on June 2, 2004. The order was subsequently amended on February 23, 2005. On August 12, 2005, Act 2250 became effective, which amended the Arkansas DNA testing statutes. Although DNA testing had already begun, the DNA testing results from the evidence collected in Misskelley's case had not been made available to the court or the parties at the time the new law became effective. On June 5, 2008, after the DNA testing results were received, Misskelley filed a "Petition for Writ of Habeas Corpus or

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[2]Echols and Baldwin were tried in Craighead County Circuit Court. Both Echols's and Baldwin's convictions were affirmed by this court. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996).

Other Relief Pursuant to Arkansas Code Annotated 16-112-201 et seq. and Motion for a New Trial Pursuant to 16-112-208(e)(1)." On September 11, 2008, without holding a hearing, the trial court denied the habeas corpus petition in its entirety.

In his petition for DNA habeas corpus relief, filed June 5, 2008, Misskelley sought additional testing of evidence under Arkansas Code Annotated section 16-112-201(a) and a new trial under Arkansas Code Annotated section 16-112-208(e)(3).[3] The trial court denied his petition for the relief requested. The court found that any additional results would not raise a reasonable probability that Misskelley did not commit the offenses, as required under Arkansas Code Annotated section 16-112-202(8)(B), and, citing Arkansas Code Annotated section 16-112-208(b), further determined that the testing results were inconclusive as to his claim of actual innocence. Both statutes used by the trial court in its decision were enacted as part of Act 2250 in 2005.

Misskelley now asserts four points on appeal: (1) the trial court used the wrong statutory standard and erred in denying his habeas corpus motion without a hearing; (2) the trial court erred in refusing additional DNA testing requested by Misskelley; (3) the trial court erred when it considered statements Misskelley made pursuant to a grant of use immunity; and (4) the trial judge should have recused from the case.

We find merit in Misskelley's first two points. Accordingly, for the reasons stated in *Echols v. State*, 2010 Ark. ___, ___S.W.3d___, handed down this same date, we reverse and

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[3]This was not Misskelley's first request for additional DNA testing. *See* discussion, *infra*, Part II.

remand for an evidentiary hearing and reconsideration of the motion for new trial in light of the proper statutory standard. With respect to the other issues raised, we reverse the denial of additional DNA testing, for the reasons stated below. We affirm the circuit court's consideration of Misskelley's immunized statements. The issue of Judge David Burnett's recusal, we hold, is moot.

II. *Additional DNA Testing*

The trial court denied Misskelley's request for additional testing of animal hair and fiber evidence recovered from the crime scene.[4] On appeal, Misskelley asserts that the trial court erred in denying the additional testing. We agree.

In appeals of postconviction proceedings, we will not reverse a trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *Johnson v. State*, 356 Ark. 534, 542, 157 S.W.3d 151, 158 (2004). 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.* The same standard of review applies when a trial court denies DNA testing under Arkansas Code Annotated sections 16-112-201 to -208. *See, e.g., Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006).

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[4] As early as November 17, 2000, Misskelley filed a "Motion to Preserve Evidence and For Access to Evidence for Testing," requesting testing on hair and fiber evidence from the crime scene. In his September 2002 "Petition for Writ of Habeas Corpus and Supplement to Motion to Preserve Evidence and For Access to Evidence for Testing," Misskelley again requested additional DNA testing of hair and fiber evidence. The trial court did not rule on either of these motions until the order appealed from in this case, entered September 11, 2008.

In denying Misskelley's request for further scientific testing of hair and fiber evidence, the trial court found that, "[a]s is true of the results he relies on now, any results of those further tests would not raise a reasonable probability that he did not commit the offenses, a required showing under § 16-112-202(8)(B) [Repl. 2006]." While we question how fully Misskelley developed this argument on appeal, we must reverse and remand because the circuit court applied the wrong legal standard. Misskelley's request for additional testing dates back at least to September 2002, if not earlier; therefore, the circuit court should have considered the request under the DNA testing statutes in effect at that time. *See* Ark. Code Ann. §§ 16-112-201 to -207 (Supp. 2001); *see also, Baldwin v. State*, 2010 Ark. ___, ___ S.W.3d ___ (handed down this same date).

III. *Use Immunity*

Misskelley further urges that when the trial court denied his current petition for habeas corpus relief, it improperly considered a statement he gave to prosecutors on February 17, 1994. He asks this court to instruct the trial court not to consider this statement for purposes of the hearing on remand or in the event of a new trial.

By law, a grant of use immunity means that no testimony or other information provided under the order, or any other information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. *See* Ark. Code Ann. § 16-43-603 (Repl. 1999).

Misskelley directs this court to two decisions in a single case involving use immunity. *See Hammers v. State*, 263 Ark. 378, 565 S.W.2d 406 (1978); *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977). In the second *Hammers* case, appealed to this court after remand, we held that Pamela Hammers was entitled to immunity based on equitable principles because the prosecutors had made a bargain with her for her testimony. *Hammers*, 263 Ark. at 380, 565 S.W.2d at 407. In that bargain, the State agreed to nolle pros the charge against her and grant her total immunity, if she would waive her privilege against self incrimination and testify against her codefendant. *Id.* at 379, 565 S.W.2d at 407. Thereafter, Hammers stood ready and willing to testify at all times, and the State took full advantage of the bargain until her codefendant pled guilty and promised to testify against her. *Id.* at 380, 565 S.W.2d at 407. We held that the State, at that juncture, could not withdraw the plea agreement and prosecute her. *Id.*

The *Hammers* case differs from the instant case in two critical respects. First, Misskelley's statement to prosecutors on February 17, 1994, occurred after his trial and conviction and was taken for use in the upcoming trial of Echols and Baldwin, though it was not allowed into evidence. Use immunity was granted to Misskelley under Arkansas Code Annotated section 16-43-603, which addresses immunity from use in a criminal case against that witness. The State, however, gives no indication that it would use this particular statement against Misskelley in the event a new trial is granted. Indeed, at his original trial, his two prior confessions, given to police on the same day, were introduced into evidence against him, at a time when the February 17, 1994 statement had not yet been taken. *See*

Misskelley v. State, 323 Ark. 449, 459, 915 S.W.2d 702, 707 (1996). Clearly, if the February 17, 1994 statement is not used against Misskelley, his immunity under section 16-43-603 would not be violated.

But, in addition, as we set out in *Echols v. State*, handed down this same date, the plain language of Arkansas Code Annotated section 16-112-208(e)(3) states that the trial court is to consider the DNA test results "with all other evidence in the case, *regardless of whether the evidence was introduced at trial*" in deciding whether to grant a new trial. Ark. Code Ann. §16-112-208(e)(3) (Repl. 2006) (emphasis added). In *Echols*, we said all other evidence means any evidence, whether inculpatory or exculpatory, that is relevant to a determination of whether the petitioner has established, by compelling evidence, that a new trial would result in acquittal. *Echols*, 2010 Ark. ___, ___ S.W.3d___. Thus, while the trial court erred in its interpretation of section 16-112-208(e)(3) to include only evidence of guilt, it was not error for the court to consider the immunized statement of Misskelley taken on February 17, 1994. We affirm the trial court on this point.

IV. *Recusal*

As we noted in our opinion in *Baldwin v. State*, handed down this same date, Judge David Burnett has been elected to the Arkansas Senate, effective January 1, 2011. Hence, he is foreclosed from adjudicating this matter and Misskelley's motion for recusal in this case is moot.

The court directs the Honorable Ralph Wilson, Jr., Administrative Judge of the Second Judicial District, to reassign this case in accordance with its Administrative Plan.

Reversed and remanded.

Special Justice JEFF PRIEBE joins this opinion.

WILLS, J., not participating.