

No. 1-09-2801

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
JANUARY 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|----------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 87 CR 2082 |
| |) | |
| ARTHUR SMITH, |) | Honorable |
| |) | Paul P. Biebel, Jr., |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: Where defendant was barred by the doctrine of *res judicata* from relitigating his claim that a DNA test was performed on the wrong evidence, he was not entitled to further testing; the trial court's denial of his motion for additional DNA testing was affirmed.

Defendant Arthur Smith appeals the trial court's denial of his *pro se* motion for additional DNA testing under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)). On appeal, defendant contends that the evidence previously tested in 1995 pursuant to an order of this court was not the physical evidence that was introduced against him at trial. As relief, defendant requests that this court order additional DNA testing on the items which were admitted into evidence at his trial. We affirm.

Following a 1989 bench trial, defendant was convicted of aggravated criminal sexual assault and robbery, and sentenced to an extended term of 40 years' and 7 years' imprisonment, to be served consecutively. We affirmed that judgment on direct appeal. *People v. Smith*, 215 Ill. App. 3d 1029, 1039 (1991).

In February 1992, defendant filed a *pro se* post-conviction petition alleging that his conviction was the result of unreliable DNA evidence, and that he was denied effective assistance of trial and appellate counsel. The circuit court dismissed the petition, and we reversed that decision, remanding the cause for further proceedings with respect to defendant's claims that his trial counsel concealed certain police reports from him and failed to submit DNA evidence for further testing. *People v. Smith*, 268 Ill. App. 3d 574, 579-82 (1994).

Following remand, the trial court issued an order in November 1995, directing the clerk of the circuit court to forward certain impounded items to Forensic Sciences Associates. The instant record on appeal does not contain the results of this DNA testing, but we indicated in a previous order that the DNA testing did not result in defendant's exoneration. See *People v. Smith*, No. 1-00-4182 (2001) (unpublished order under Supreme Court Rule 23).

In 1997, defendant filed a *mandamus* action alleging that the prior DNA test was performed on the wrong evidence. The trial court denied defendant's petition, and he did not appeal.

In February 1998, defendant filed a petition for a writ of *habeas corpus* in federal court, alleging that he was convicted on the basis of perjured testimony, and that he received ineffective assistance of trial, posttrial, and post-conviction counsel. The federal district court denied defendant's petition. *United States ex rel. Smith v. Tally*, No. 98-C-881 (March 9, 1999) (unpublished opinion).

In May 2000, defendant filed another *pro se* post-conviction petition alleging that the State concealed evidence which should have been subject to DNA testing. Defendant asserted that even though the forensic expert testified that she prepared threads and extracts from blood and possibly saliva samples to preserve for future testing, this evidence was turned over to the State's

Attorney, but never tested. Defendant also asserted that post-conviction counsel was ineffective for failing to ensure that the DNA evidence was properly impounded and preserved for testing, and for failing to ensure that the chain of custody was not broken. The circuit court dismissed his petition. On appeal, defendant challenged only his sentence pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and this court affirmed his sentence. *People v. Smith*, No. 1-00-2967 (2002) (unpublished order pursuant to Supreme Court Rule 23).

In September 2000, defendant sought relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401) (West 2000)), again questioning the validity of the DNA testing. The circuit court dismissed his petition and we affirmed that dismissal after granting appellate counsel leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Smith*, No. 1-00-4182 (2001) (unpublished order under Supreme Court Rule 23).

In May 2002, defendant filed a second section 2-1401 petition for relief from judgment, again alleging that the evidence preserved for DNA testing was turned over to the State's Attorney, but never properly tested. The court dismissed defendant's petition, and we affirmed. *People v. Smith*, No. 1-03-0054 (2004) (unpublished order under Supreme Court Rule 23). In doing so, we noted that his claim regarding concealed DNA

evidence that should have been tested was previously raised in his second post-conviction petition.

In November 2004, defendant attempted to file another post-conviction petition to raise the same DNA claim, but the circuit court denied him leave to file his successive petition. This court affirmed that decision on appeal. *People v. Smith*, No. 1-05-0718 (2007) (unpublished order under Supreme Court Rule 23).

In January 2006, defendant attempted to file yet another post-conviction petition, but was again denied leave to file the successive petition. After allowing counsel to withdraw pursuant to *Finley*, 481 U.S. 551, this court affirmed the circuit court's decision. *People v. Smith*, No. 1-06-1470 (2007) (unpublished order under Supreme Court Rule 23).

In June 2007, defendant filed a *habeas corpus* petition pursuant to section 10-102 of the Code of Civil Procedure (735 ILCS 5/10-102 (West 2006)), again arguing that the State colluded with judges and switched the DNA evidence that was ordered tested on remand. The circuit court denied the petition, holding that *res judicata* barred relitigation of defendant's claim. Defendant did not appeal that ruling.

On June 5, 2008, defendant filed the instant motion pursuant to section 116-3 of the Code (725 ILCS 5/116-3 (West 2008)), requesting additional DNA testing. On March 31, 2009, the circuit court denied defendant's motion. In doing so, the court

stated that the motion failed to raise anything new and that defendant's argument concerning whether the proper DNA evidence was tested was previously raised and rejected by this court, as well as several other courts.

On appeal from that order, defendant contends that the trial court erred in denying his motion for additional DNA testing pursuant to section 116-3 of the Code. He specifically maintains that the evidence previously tested pursuant to the order of this court was not the physical evidence that was introduced against him at trial. In response, the State argues that defendant's claim is barred by *res judicata*.

Under the doctrine of *res judicata*, a final judgment rendered on the merits is conclusive as to the rights of the parties, and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. *Toracasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490 (1993). When there is identity of parties, subject matter, and cause of action, *res judicata* extends not only to matters that were determined in the prior suit, but to every other matter that might have been raised and determined in it. *Toracasso*, 157 Ill. 2d at 490. The burden of establishing *res judicata* is on the party invoking it, and, to operate as such, it must either appear on the face of the record or be shown by extrinsic evidence that

the precise question was raised in determining the former suit. *Toracasso*, 157 Ill. 2d at 491.

Here, defendant has repeatedly tried to relitigate his claim that the evidence preserved for DNA testing was never properly tested. Most notably, defendant made this argument in several of his petitions, including his 1997 *mandamus* action, 2000 post-conviction petition, 2000 section 2-1401 petition, 2002 section 2-1401 petition, and in the 2007 *habeas corpus* action. Each time defendant argued this claim, it was found to be without merit. Defendant cannot seek to circumvent the doctrine of *res judicata* by simply invoking section 116-3 of the Code and asking for another DNA test. See *People v. White*, 198 Ill. App. 3d 781, 784 (1989) (stating that the petitioner was barred from retrying issues decided in a prior collateral proceeding by rephrasing essentially the same argument for presentation in a different action). Therefore, we find, similarly to the trial court, that defendant's motion pursuant to section 116-3 is barred by the doctrine of *res judicata*.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.