THIRD DIVISION
March 9, 2011

No. 1-09-0510

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).

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. 92 CR 13556
HENRY LOVETT,	)	
	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.

Presiding Justice Quinn and Justice Murphy concurred in the judgment.

ORDER

HELD: Where defendant's motion to reconsider DNA testing was filed more than 30 days following the entry of the order denying the motion, the trial court lacked subject matter jurisdiction; the trial court's order is void and the appeal is dismissed.

Defendant Henry Lovett appeals from the dismissal of his motion to reconsider the denial of his motion for DNA testing. On appeal, he contends that his motion should have been granted because testing has the potential to produce new, noncumulative evidence that is materially

relevant to his claim of actual innocence. We hold that defendant's motion to reconsider as to the DNA testing was untimely and therefore dismiss his appeal.

BACKGROUND

Following a jury trial, defendant and his three codefendants were convicted of aggravated kidnapping and first degree murder of Kristin Ponquinette on January 10, 1994. Defendant was sentenced to consecutive prison terms of 100 years for first degree murder and 5 years for aggravated kidnapping. Defendant's convictions and sentences were affirmed on direct appeal on July 5, 1996. *People v. Lovett*, No. 1-94-0789 (1996) (unpublished order under Supreme Court Rule 23). Defendant filed a *pro se* postconviction petition, which was summarily dismissed by the trial court as untimely, frivolous and patently without merit on March 19, 1997. This court affirmed the dismissal of the petition on February 19, 1999. *People v. Lovett*, No. 1-97-2773 (1999) (unpublished order under Supreme Court Rule 23).

On October 5, 2000, defendant filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2000)), and the State filed a motion to dismiss on June 1, 2001. The court, which treated defendant's motion as a second postconviction petition, granted the State's motion to dismiss on September 14, 2001. On March 19, 2003, defendant filed a supplement to the second post-conviction petition seeking DNA testing. A second supplement to the second postconviction petition was filed on defendant's behalf by counsel contesting defendant's sentence on July 11, 2003. The State filed a supplemental motion to dismiss defendant's section 2-1401 petition on January 7, 2005, and a motion to dismiss defendant's motion to request DNA testing on March 4, 2005. The trial court dismissed defendant's motion for DNA testing on October 21, 2005. The

State later filed a motion to dismiss defendant's successive postconviction petition on December 9, 2005, which the trial granted in 2009.[1] Defendant's motion to reconsider the denial of his successive postconviction petition and the denial of his request for DNA testing was denied on January 30, 2009. This appeal followed.

DISCUSSION

As an initial matter, the State argues that this court lacks jurisdiction to review defendant's claim regarding the trial court's denial of his motion for DNA testing because defendant did not appeal the order within 30 days of the denial. The trial court denied defendant's motion on October 21, 2005,[2] and defendant's motion to reconsider was not filed until January 16, 2009. The State therefore concludes that this court lacks jurisdiction.

In his reply brief, defendant asserts that because the trial court considered his request for DNA testing as part of a consolidated postconviction pleading, the notice of appeal filed within 30 days of the 2009 order was timely.

An appellate court has a duty to consider its jurisdiction and to dismiss an appeal if jurisdiction is lacking. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2006).

Here, the record indicates that defendant filed a motion for DNA testing on March 19, 2003, captioned as a "supplement to second post-conviction petition." The trial court denied that

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[1]A certified order dismissing defendant's successive postconviction petition was entered on February 11, 2009, which was after the date defendant's motion to reconsider was denied.

[2] Although the parties assert that the denial order was entered on October 25, 2005, the report of proceedings indicates that the actual date was on October 21, 2005.

motion on October 21, 2005, in a joint proceeding with the other codefendants who had filed similar motions. Defendant neither filed a motion to reconsider the denial of that motion nor appealed the denial of that motion within 30 days of the entry of the denial order.

A notice of appeal shall be filed within 30 days of the entry of the final judgment appealed from, or if a motion directed against the judgment is timely filed, within 30 days after the entry of an order disposing of the motion. Ill. S. Ct. R. 606(b) (eff. Sept. 1, 2006). A motion to reconsider tolls the time to appeal, and a notice of appeal filed within 30 days after the resolution of a motion to reconsider is timely filed. *People v. Marker*, 233 Ill. 2d 158, 167-68 (2009).

The record indicates that defendant did not file a motion to reconsider until January 16, 2009, which was after the court granted the State's motion to dismiss defendant's successive postconviction petition. Defendant's motion attempted to encompass the earlier denial of the motion for DNA testing. At the hearing on the State's motion, the trial court noted that it had previously denied defendant's motion for DNA testing in 2005 and denied the motion to reconsider.

Although the trial court "denied" defendant's motion to reconsider DNA testing, it should have dismissed the motion because it lacked subject matter jurisdiction to consider it as more than 30 days had passed since the trial court denied the original motion. *People v. Hood*, 387 Ill. App. 3d 380, 387 (2008). A trial court ruling made without subject matter jurisdiction is void. The remedy on appeal is to vacate the trial court's ruling and dismiss the appeal. *Hood*, 387 Ill. App. 3d at 387. Accordingly, we vacate the portion of the trial court's ruling pertaining to reconsideration of the denial of the request for DNA testing.

Moreover, we find that even if defendant's motion to reconsider would have been timely filed, it would have still been properly dismissed by the trial court. As this court found in codefendant Moore's appeal from the denial of his "Supplement to Petition for Post-Conviction Relief and Motion to Allow DNA testing on Biological Evidence" (*People v. Moore*, No. 1-06-0318, at 13 (2008) (unpublished order under Supreme Court Rule 23)), defendant has failed to demonstrate that the evidence he seeks to be tested has the potential to produce new, noncumulative evidence materially relevant to his assertion of actual innocence. As previously determined, the testimony regarding the hairs on the rock was a minor part of the evidence presented at defendant's trial. The record shows that the hairs were tested and compared to samples taken from the victim and codefendants, and found to be consistent with the victim's hair standards. The same testing excluded defendant as a source of the 17 head hairs found on the rock. Accordingly, as we determined in codefendant Moore's appeal, favorable hair testing of the requested hair fragments could only provide cumulative evidence that defendant was excluded as the source of the hairs on the rock, but would not show that he was not a participant in the crime or significantly advance his claim of actual innocence. *People v. Savory*, 197 Ill. 2d 203, 215 (2001). Therefore, defendant's motion for forensic testing would have been properly denied in any case.

Additionally, we note that defendant did not raise any issues on appeal regarding the dismissal of his successive postconviction petition.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County is vacated in part and the appeal is dismissed for lack of jurisdiction.

Order vacated in part; appeal dismissed.