Cite as 2011 Ark. 304

SUPREME COURT OF ARKANSAS

No. CACR 02-573

Opinion Delivered July 27, 2011

ALVIN H. BIGGS
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [CIRCUIT COURT OF MISSISSIPPI COUNTY, CHICKASAWBA DISTRICT, CR 2001-108]

PETITION DENIED.

PER CURIAM

Petitioner Alvin H. Biggs was found guilty by a jury of the first-degree murder of his stepfather, Tommy Clay, with whom he and his family lived. He was sentenced to 480 months' imprisonment with an additional sixty months' enhancement for using a firearm in the commission of the murder. The Arkansas Court of Appeals affirmed. *Biggs v. State*, CACR 02-573 (Ark. App. Feb. 12, 2003) (unpublished).

In his pretrial statement that was introduced into evidence at petitioner's trial, petitioner said that he had been thinking about killing the victim for some time until one morning he awoke, went to stand over the victim for a moment, retrieved the victim's gun from a bedroom, stood over him again for a time, and then shot him once in the head. A forensic pathologist testified that the victim died from a single gunshot wound to the head.

At trial, petitioner disavowed the statements he had made and contended that he was not guilty and that it would have been physically impossible for him to have fired the fatal shot. Petitioner testified that the fatal shot occurred when the victim woke up and grabbed a man named Charles who was present in the house and that petitioner saw the gun in Charles's hand immediately after the shooting.

Now before us is petitioner's pro se petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis in the case.[1] A petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Williams v. State*, 2011 Ark. 151 (per curiam); *Cox v. State*, 2011 Ark. 96 (per curiam); *Fudge v. State*, 2010 Ark. 426 (per curiam); *Grant v. State*, 2010 Ark. 286, ___ S.W.3d ___ (per curiam) (citing *Newman v. State*, 2009 Ark. 539, ___ S.W.3d ___); *see also Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Sanders v. State*, 2011 Ark. 199 (per curiam); *Rayford v. State*, 2011 Ark. 86 (per curiam); *Whitham v. State*, 2011 Ark. 28 (per curiam); *Fudge*, 2010 Ark. 426; *Barker v. State*, 2010 Ark. 354 , ___ S.W.3d ___; *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Dickerson v. State*, 2011 Ark. 247 (per

[1]For clerical purposes, the petition was assigned the docket number for the direct appeal of the judgment of conviction, CACR 02-573.

curiam) (citing *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam)). We have held that a writ of error coram nobis was available to address certain errors that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts*, 336 Ark. at 583, 986 S.W.2d at 409. The function of the writ is to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition if it had been known to the circuit court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Dickerson*, 2011 Ark. 247; *Grant*, 2010 Ark. 286, ___ S.W.3d ___ (citing *Newman*, 2009 Ark. 539, ___ S.W.3d ___); *see also Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam); *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). The petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. *Crawford v. State*, 2011 Ark. 165 (per curiam); *Webb v. State*, 2009 Ark. 550 (per curiam); *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Crawford*, 2010 Ark. 165; *Gardner v. State*, 2011 Ark. 27 (per curiam); *Barker*, 2010 Ark. 354, ___ S.W.3d ___; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005); *Venn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

Petitioner's sole ground for issuance of the writ is that the State withheld evidence of the victim's extensive prior criminal history of abuse, assaults, and threats against petitioner

and others that revealed his aggressiveness. Petitioner states that he discovered the criminal history by means of a Freedom of Information Act request made to the Blytheville Police Department in 2010. Petitioner claims that the information should have been provided to the defense in response to the motion for discovery made by defense counsel prior to trial so that the defense could have used the information at trial. He alleges in particular that the police officers who took the reports could have testified at trial and that the information would have supported his claim of self-defense. Petitioner has appended to his petition a copy of a number of police reports made prior to his trial that reflect criminal behavior on the part of the victim. The allegations do not warrant issuance of the writ. First, petitioner argued at trial that he did not shoot the victim. Thus, the aggressive nature of the victim as reflected in the police reports was not germane to the defense of actual innocence. Secondly, even if the police reports could have been beneficial to the defense, petitioner does not explain why the defense was unable to obtain the police reports at the time of trial. There is no explanation of why the reports were available to petitioner in 2010, but not available to the defense at trial in 2001.

The leading precedent concerning evidence not disclosed by the prosecution to the defense is *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a *Brady* violation, three elements are required: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Larimore*, 341 Ark. at 404, 17 S.W.3d at 91.

Petitioner has offered nothing to demonstrate that the evidence would indeed have been favorable to the defense, considering that he did not claim self-defense. He further offers nothing to show that the State in any way suppressed the police reports. Moreover, to merit relief, a petitioner must demonstrate that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information been disclosed at trial. *Buckley v. State*, 2010 Ark. 154, ___ S.W.3d ___ (per curiam). In order to carry his burden to show that the writ is warranted, petitioner must demonstrate that, had the police reports that he alleges were withheld been available, the evidence would have been sufficient to have prevented rendition of the judgment. *Sanders v. State*, 2011 Ark. 199 (per curiam); *see also Harris v. State*, 2010 Ark. 489 (per curiam). He has not met that burden. He contended at trial that he did not shoot the victim, and he has failed to establish that the police reports would have changed the jury's determination that he did commit the crime.

Petition denied.