Cite as 2011 Ark. 305

SUPREME COURT OF ARKANSAS

No. CR 10-727

BENNIE DAVID GUY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered July 27, 2011

PRO SE MOTION TO REQUEST PERMISSION TO FILE MOTION TO SUBMIT EVIDENCE [CRITTENDEN COUNTY CIRCUIT COURT, CR 95-632, HON. RALPH WILSON, JR., JUDGE]

MOTION DENIED; APPEAL DISMISSED.

PER CURIAM

In 1996, appellant Bennie David Guy entered a negotiated plea of guilty to rape in Crittenden County Circuit Court. The trial court imposed a sentence of 600 months' imprisonment. In 2007, appellant filed in the trial court a petition for writ of habeas corpus that asserted his actual innocence, that alleged that his attorney had withheld from him DNA test results exculpating him, and that sought relief under Act 1780 of 2001 Acts of Arkansas, as amended by Act 2250 of 2005 and codified as Arkansas Code Annotated §§ 16-112-201 to -208 (Repl. 2006). The trial court appointed counsel to represent appellant, and counsel filed a petition for writ of error coram nobis and declaratory relief requesting relief under Act 1780 in the alternative.

Subsequently, the court ordered that some evidence in the case be retested. Following a hearing, the trial court denied further relief and provided a written order with findings of

fact and conclusions of law on the issues in the second petition. Appellant lodged this appeal of that order, and he has filed a motion that requests permission to file a motion to submit evidence. The motion seeks to have this court consider on appeal a document that purports to be proposed findings of a magistrate in a case that appellant filed in federal district court. Because appellant would have us include the document in the record on appeal, we treat it as a motion to supplement the record. We deny the motion, and, because it is clear that appellant cannot prevail, we dismiss the appeal. An appeal of the denial of postconviction relief, including an appeal from an order denying a petition for writ of habeas corpus under Act 1780, will not be permitted to go forward where it is clear that the appellant could not prevail. *Strong v. State*, 2010 Ark. 181 ___ S.W.3d ___ (per curiam); *see also Williams v. State*, 2011 Ark. 203 (per curiam) (an appeal from the denial of a petition for writ of error coram nobis will be dismissed if the appeal is without merit).

The document that appellant would have this court consider is of dubious relevance to the proceedings on appeal. Appellant asserts that the document concludes that there was a violation of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), in a case in another county in which appellant was also convicted of sexual assault of the same victim in the case before us. The information is not presented as published, and appellant does not assert that it was taken into consideration by the court below. This court has long and consistently held that it cannot, in the exercise of its appellate jurisdiction, receive testimony or consider anything outside of the record below. *Smith v. Brownlee*, 2010 Ark. 266 (per curiam).

A review of the record that was before the trial court makes clear that the court did not err in denying relief as provided in the appealed order. To some extent, the court did grant relief because it ordered additional testing of the samples. To the extent that the court denied appellant's request that appellant's conviction be set aside, either under the provisions of Act 1780 or through a writ of error coram nobis, the court did not err.

Appellant's claims in his petitions centered on DNA evidence, available at the time of trial, that he claimed exonerated him. Appellant testified at the hearing on the petition that trial counsel would not show him copies of the reports on the DNA tests that had been conducted and that, when appellant asked to see the results, counsel said that he could not show appellant the results because of court rules. Appellant also testified that counsel had said that the test results indicated that appellant was the rapist and that appellant should plead guilty. At the hearing on appellant's petition, counsel testified that he was hired by appellant's family only to assist appellant in entering a plea; that appellant had copies of the DNA test results that he showed counsel and retained; that counsel advised appellant that the DNA results did not implicate him, but that the results also did not exonerate him; and that he would not have advised appellant to plead guilty if appellant maintained his innocence.

The trial court's findings of fact make clear that counsel's testimony was more credible and that the court accepted counsel's account. This court does not assess the credibility of the witnesses. *Loggins v. State*, 2010 Ark. 414, ___ S.W.3d ___; *Lacy v. State*, 2010 Ark. 388, ___ S.W3d ___; *Fernandez v. State*, 2010 Ark. 148, ___ S.W.3d ___. Conflicts in testimony are

for the fact-finder, that is the trial judge in this case, to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Mitchem v. State*, 2011 Ark. 148 (per curiam).

In addition to counsel's testimony, during the hearing on the petition, the trial court received evidence and testimony concerning new tests performed on samples taken from the victim and her clothing. The testimony was that, although there was DNA found on the samples and appellant was excluded as the source of that DNA, the samples were not sufficient for the testing to have tied the perpetrator to the crime. Although semen was found on the vaginal swabs, neither the swabs nor the underwear cuttings contained Y-chromosomal DNA. The experts testified that there were reasonable explanations for a lack of sperm in the samples, and that the exclusion of appellant as a contributor of the DNA did not necessarily exclude him as the offender.[1]

Appellant first sought a writ of error coram nobis. The standard of review of a denial of a petition for writ of error coram nobis is whether the circuit court abused its discretion in denying the writ. *Benton v. State*, 2011 Ark. 211 (per curiam); *Williams*, 2011 Ark. 203; *Pierce v. State*, 2009 Ark. 606 (per curiam). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *McCoy v. State*, 2011 Ark. 13 (per curiam).

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[1] The victim claimed to have gone swimming after the rapes occurred and before she was examined. Crime laboratory personnel testified that swimming after sexual penetration may diffuse semen but not remove it completely. A serologist testified that no sperm cells would be present if the rapist had undergone a vasectomy and that vaginal fluid may have overcome seminal fluid.

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Williams*, 2011 Ark. 203. The remedy is exceedingly narrow and is appropriate only when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown and would have prevented the rendition of the judgment had it been known to the trial court. *McCoy*, 2011 Ark. 13 (citing *Clark v. State*, 358 Ark. 469, 192 S.W.3d 248 (2004)). This court has previously recognized that a writ of error coram nobis was available to address errors found in four categories: insanity at the time of trial; a coerced guilty plea; material evidence withheld by the prosecutor; a third-party confession to the crime during the time between conviction and appeal. *Benton*, 2011 Ark. 211.

Appellant's claim for the writ was based on his assertion that his plea was coerced. To the extent that he alleged that information was withheld, he did not allege that the information was withheld from the defense by the prosecution. Instead, he alleged that the information was withheld by trial counsel as a part of the effort to coerce him into a guilty plea. The trial court found that appellant's testimony concerning what transpired in his meetings with counsel was not credible and specifically accepted counsel's version of events in its findings of fact. As a consequence, the facts supported a basis for denial of the writ, and the court did not abuse its discretion in finding that appellant was not coerced into entering a guilty plea.

As for appellant's claim under Act 1780, the court found that identity was not at issue and that appellant therefore failed to file a petition upon which relief could be granted. This

court will not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous, although issues concerning statutory interpretation are reviewed de novo. *Echols v. State*, 2010 Ark. 417, ___ S.W.3d ___. The court's ruling is somewhat at odds with its previous order for additional testing prior to the hearing. Whether or not the court correctly determined identity was not at issue as required to grant a motion for testing under § 16-112-202, appellant was not entitled to relief under the act. More fundamentally, appellant failed to show a basis to commence a proceeding for the writ under either basis set out in § 16-112-201(a).

Appellant asserted that his claim fell within § 16-112-201(a)(2) and that the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence. He alleged that the DNA evidence was sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the rape. As already discussed, considering the trial court's assessment of the credibility of the witnesses, the scientific predicate for the claim here had been previously discovered and was well-known to appellant personally. In addition, the facts underlying the claim, viewed in light of the evidence as a whole as presented at the hearing on the petition, simply did not establish evidence to potentially exonerate appellant. Because the samples did not contain Y-chromosomal DNA that would have connected any potential suspect to the crime, the absence of appellant's DNA in the samples did not eliminate him as a suspect.

The trial court did not err in declining to issue a writ of error coram nobis or in denying relief or any further proceedings under Act 1780. It is therefore clear that appellant cannot prevail, and we dismiss the appeal.

Motion denied; appeal dismissed.