

Cite as 2009 Ark. 550

# SUPREME COURT OF ARKANSAS

No. CR 96-220

WALTER ANTHONY WEBB  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered November 5, 2009

PRO SE PETITION TO REINVEST  
JURISDICTION IN THE TRIAL  
COURT TO CONSIDER A PETITION  
FOR WRIT OF ERROR CORAM NOBIS  
[CIRCUIT COURT OF GREENE  
COUNTY, CR 95-30]

PETITION DENIED.

## PER CURIAM

In 1995, a jury found petitioner Walter Anthony Webb guilty of two counts of capital murder for causing the deaths of James Graves and Aurora Carney. Petitioner received sentences of life imprisonment without parole and, on appeal, this court affirmed the judgment. *Webb v. State*, 327 Ark. 51, 938 S.W.3d 806 (1997). Petitioner later filed a petition under Arkansas Rule of Criminal Procedure 37.1 in the trial court that was denied, and this court affirmed the order denying postconviction relief. *Webb v. State*, CR 98-411 (Ark. Sept. 16, 1999) (per curiam). Petitioner has now filed a petition requesting this court reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.<sup>1</sup> After a judgment has been affirmed on appeal, a petition filed in this court for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

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<sup>1</sup>For clerical purposes, the instant petition was assigned the same docket number as the direct appeal.

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Petitioner asserts grounds for issuance of the writ as follows: (1) new scientific information concerning the effects of antidepressants that would have caused petitioner to have acted violently and to have been legally insane at the time of the commission of the crimes; (2) the trial court made no inquiry regarding petitioner's "involuntary intoxication" by the prescribed antidepressant Effexor; (3) petitioner was not competent to stand trial due to his mental health problems and lack of medication, and the trial court should have conducted a competency hearing on its own initiative; (4) the trial court erred by failing to issue an order to conduct a mental health evaluation; (5) petitioner's actual innocence based upon new scientific evidence concerning the sleep aid Ambien. To the extent that petitioner may have stated a cognizable claim, he fails to show either that the claim has merit or that he acted with diligence to pursue the claim.

The function of the writ of error coram nobis is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *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. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)). The court is not required to accept at face value the allegations of the petition. *Id.*

The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *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. *Id.* at 583, 986 S.W.2d at 409.

Only petitioner's third claim, regarding his competency at trial, clearly falls within one of the recognized categories of error. Petitioner's second and fourth claims are based upon allegations of trial errors by the court that were not extrinsic to the record; while petitioner contends that new evidence supports the claims, those claims are stated as alleged failures or omissions by the trial court that would only be demonstrated by the record.

Petitioner's first and fifth claims, regarding the effects of certain drugs, are based upon allegations of new evidence. A claim of newly discovered evidence in itself, however, is not a basis for relief under coram nobis. *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam). Here, the alleged error is not the type upon which the writ may issue. There is a distinction between fundamental error which requires issuances of the writ and newly discovered information which might have created an issue to be raised at trial had it been known. *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998) (per curiam). Even if, as petitioner alleges, the effects of the drugs that he claims he took around the time of the crimes provided a sufficient basis to call for a jury instruction pursuant to Arkansas Code Annotated § 5-2-207 (Repl. 2006) (regarding intoxication), the facts that he alleges are not such as to have precluded the entry of the judgment.

As to petitioner's remaining claim that he was not competent at the time of trial, the allegations contained in the petition are neither reasonable nor likely to be truthful. This court will grant permission to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis only when it appears the proposed attack on the judgment is meritorious. *Echols v. State*, 354 Ark. 414,

125 S.W.3d 153 (2003). In making that determination, we look to the reasonableness of the allegations and to the existence of the probability of the truth of those allegations. *Id.*

In petitioner's third claim, he asserts that his mental state rendered him incapable of properly assisting counsel in his defense. Throughout the petition, petitioner appears to recant his testimony at trial in which he stated that Mr. Graves shot Ms. Carney and that he then struggled with Mr. Graves for the gun before shooting Mr. Graves in self-defense. Instead, petitioner now concedes that he committed the violent acts leading to both murders. He contends that, during the proceedings, he was depressed and suffered from a severe mood disorder, and that he did not receive medication while in jail, despite suicidal behavior and a medical record indicating depression and possible bipolar disorder. Petitioner alleges that his mood disorder prevented him from assisting his attorney and resulted in a state of denial from a sense of guilt and shame that prevented him from considering other, potentially more successful, defenses than his now-admitted perjury.

During petitioner's lengthy testimony, he demonstrated that he was cogent and clearly capable of providing carefully reasoned responses to the questions presented. Petitioner provided detailed testimony about his relationship with Ms. Carney and the events on the night of the murders. He explained that Ms. Carney had told him that she was going to be picked up by a friend to attend a meeting, and that she would call him to let him know where she was staying. Petitioner testified that when he did not receive a call, he left work and went to her house at about 1:00 a.m. to discover that her car was missing. He then went to Mr. Graves's residence in Rector and found her car there.

Petitioner related that he went to the door, and pocketed the keys from the door, after Mr. Graves let him in. According to petitioner's testimony, Ms. Carney came out of the bedroom with the murder weapon and pointed the gun at petitioner. He took the gun away from her, put it down, and

calmly convinced her to leave with him. As petitioner related at trial, Mr. Graves then picked the gun up, shot Ms. Carney, and then pointed the gun at petitioner. Petitioner scuffled with Mr. Graves for the gun, and ultimately shot and killed Mr. Graves.

After the scuffle, petitioner testified that he checked Ms. Carney and determined that she was dead, started to leave, but went back and got the gun. Petitioner then went back to work, and after finishing up there, threw the keys into a ditch, the gun into the water under a bridge, and the cartridges into the mud in a separate location. Petitioner explained to the jury that he did not contact the police and initially lied about his presence at the murder scene because he was afraid in that he knew there were no witnesses and the results looked very bad. He indicated that he left shortly after the bodies were found to go to Florida because he thought that Ms. Carney would be buried there.

On cross-examination, petitioner denied that he was angry with Ms. Carney and related that although he did not know Mr. Graves, he knew that Ms. Carney sometimes helped Mr. Graves and that they were in Alcoholics Anonymous together. He explained that Ms. Carney had previously been a nurse. Petitioner indicated that he did not recall making a statement to a friend that he thought Ms. Carney's ex-husband had committed the murders, and said that he did not believe he was "running" when he left the state for almost three months and made arrangements to turn himself in to law enforcement through his attorney.

A criminal defendant is presumed to be competent to stand trial and has the burden of proving otherwise. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006). A circuit court is not required to hold a hearing on a criminal defendant's competency sua sponte unless there is reasonable doubt about the defendant's competency. *Davis v. State*, 375 Ark. 368, \_\_\_ S.W.3d \_\_\_ (2009). The test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a

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reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him. *Thessing*, 365 Ark. at 390, 230 S.W.3d at 532.

During his testimony, petitioner demonstrated more than the requisite ability and he demonstrated that he had a very good understanding of the proceedings. Even assuming that petitioner's alleged mental disorder contributed to certain regrettable decisions made, petitioner is not likely to carry his burden to show that he was incompetent to stand trial. Petitioner does not point to evidence presented to the court that he was not fit to proceed, and, as with his fourth claim, the allegations within petitioner's third claim as to failure to conduct a hearing are of a type of error that does not support issuance of the writ.

Furthermore, petitioner has failed to sufficiently demonstrate that he acted with diligence in pursuing any of his claims. While there is no specific time limit for seeking a writ of error coram nobis, due diligence is required in making an application for relief, and in the absence of a valid excuse for delay, the petition will be denied. *Echols*, 354 Ark. at 419, 157 S.W.3d at 153. Due diligence requires that (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; and (3) upon discovering the fact, the defendant did not delay bringing the petition. *Id.*

Here, as in *Echols*, the medical records relied upon by petitioner were available since prior to his trial. The new evidence that petitioner references concerning the drugs that he was taking was available, according to petitioner's allegations, since prior to 2005 for Effexor and since 2007 for Ambien. Petitioner offers in explanation for the delay that he was not aware of the information concerning antidepressants until 2005 or of the information as to Ambien until June 10, 2009, and that research is difficult for him due to his limited sight. He indicates that he was hesitant to file his petition because

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new scientific information on the drugs has continued to be published.

Petitioner offers no explanation as to the almost-fourteen-year delay in bringing the claim concerning his lack of competency to stand trial. Petitioner has not alleged that counsel was unaware of his previous treatment and diagnosis, or the conditions of which he complains, in order to raise the issue at trial. While adequate treatment may have been unavailable during petitioner's incarceration for trial, he has not alleged that the Arkansas Department of Correction failed to provide appropriate treatment for his condition.

Petitioner was sufficiently recovered to make inquiries concerning his prior treatment in 2006 and to be aware and admit that he committed the homicides as early as 2003. He acknowledges that he became aware of the basis for his antidepressant claims in 2005. In spite of limitations concerning his eyesight, petitioner was able to prepare a document on the topic of antidepressant reactions that referenced the Virginia Tech shootings, in April 2007, as having recently occurred. Considering these facts, petitioner has not presented a valid excuse for the delay in making application for error coram nobis relief.

Petition denied.