

Cite as 2010 Ark. 180

SUPREME COURT OF ARKANSAS

No. CACR 04-176

THEODIS KELLY
Petitioner

v.

STATE OF ARKANSAS
Respondent**Opinion Delivered** April 15, 2010PRO SE PETITION TO REINVEST
JURISDICTION IN THE TRIAL
COURT TO CONSIDER A
PETITION FOR WRIT OF ERROR
CORAM NOBIS OR A PETITION
UNDER ARKANSAS RULE OF
CRIMINAL PROCEDURE 37.1
[CIRCUIT COURT OF PHILLIPS
COUNTY, CR 99-238]

PETITION DENIED.

PER CURIAM

In 2003, following his second trial, a jury found petitioner Theodis Kelly guilty of first-degree murder for the death of Shakeyia Miller and sentenced him to 720 months' incarceration. The Arkansas Court of Appeals affirmed. *Kelly v. State*, CACR 04-176 (Ark. App. Dec. 15, 2004) (unpublished); *see also Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002). Petitioner now brings this petition requesting this court to reinvest jurisdiction in the trial court so that he may pursue a petition for writ of error coram nobis.¹ As an alternative, petitioner would have this court reinvest jurisdiction in the trial court to consider a petition under Arkansas Rule of Criminal Procedure 37.1 (2005). Petitioner fails to set forth cause to recall the mandate or reinvest jurisdiction for error coram nobis proceedings, and we deny the petition.

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

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The basis petitioner asserts for error coram nobis relief is that the prosecution withheld evidence of statements the dying victim made to Dana Ewing about the shooting being accidental. Petitioner contends these actions are violations of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner asserts that Ms. Ewing's name was not listed in a motion for discovery. He offers an affidavit from an affiant who had overheard a discussion of the case by a cousin of Ms. Ewing. In that overheard conversation, the cousin contended that Ms. Ewing provided statements about what the victim had said about the shooting to the police and that the prosecution would not allow her to testify. Petitioner also offers an affidavit from someone who alleged that an unnamed witness had told her an account of events similar to petitioner's defense at trial.²

If a prisoner who has appealed his judgment wishes to attack his conviction by means of a writ of error coram nobis, he must first request that this court reinvest jurisdiction in the trial court. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam); see also *Deaton v. State*, 373 Ark. 605, 285 S.W.3d 611 (2008) (per curiam). A petition to reinvest jurisdiction in the trial court is necessary after a judgment has been affirmed on appeal because the circuit court may entertain a petition for the writ only after this court grants permission. *Mills v. State*, 2009 Ark. 463 (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Newman v. State*, 2009 Ark. 539, ___ S.W.3d ___. The writ is

² Petitioner also attached a number of other documents that appear to concern a federal action and prison conditions, which have no apparent bearing on his petition in this court.

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appropriate when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown. *Pierce v. State*, 2009 Ark. 606 (per curiam). For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Thomas v. State*, 367 Ark. 478, 241 S.W.3d 247 (2006) (per curiam). It is a petitioner's burden to show that the writ is warranted. *Scott v. State*, 2009 Ark.437 (per curiam).

We have held that a writ of error coram nobis is 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. *Webb v. State*, 2009 Ark. 550 (per curiam). Petitioner alleges a *Brady* violation falling under the second category. There are three elements of a *Brady* violation, as follows: (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. *State v. Larimore*, 341 Ark. 397, 404, 17 S.W.3d 87, 91 (2000).

Petitioner does not carry his burden of showing that the writ is warranted because he does not demonstrate that there was exculpatory information concerning Ms. Ewing that was willfully or inadvertently suppressed. Although petitioner alleges Ms. Ewing was not listed in a motion for discovery, petitioner was aware from testimony at the first trial that Ms. Ewing had been present after the shooting and helped to render medical assistance to the victim. The hearsay statements from third parties that petitioner provides are not sufficient

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to establish that Ms. Ewing provided exculpatory information in her statements to the police, or that the defense was not fully aware of the contents of the statements that Ms. Ewing did provide to the police.

As to the alternative claim, petitioner acknowledges that he previously filed a petition for postconviction relief and that his request to reinstate jurisdiction under his alternate claim would be to file a second petition under Rule 37.1. This court has consistently upheld the rule that a petitioner is limited to one petition for postconviction relief unless the first petition was specifically denied without prejudice to allow the filing of a second petition. *Kemp v. State*, 2009 Ark. 631. Arkansas Rule of Criminal Procedure 37.2(b) (2009) was held in *Kemp* to prohibit a successive Rule 37.1 petition without leave of this court. *See id.*

In those circumstances where a petitioner seeks relief that will require recall of the mandate for the purpose of filing a second Rule 37.1 petition, this court has described three factors that may be recognized, when combined, as providing the type of extraordinary circumstances sufficient for this court to permit a successive petition despite the prohibition in Rule 37.2, as follows: (1) the presence of a defect in the appellate process; (2) a dismissal of proceedings in federal court because of unexhausted state court claims; and (3) the appeal was a death case that required heightened scrutiny. *See Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006); *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003). Because petitioner does not meet this criteria—including that the appeal be a death case—he cannot succeed in his efforts to secure a second or subsequent Rule 37 petition.

Petition denied.