Cite as 2009 Ark. 118 (unpublished)

ARKANSAS SUPREME COURT

No. CACR 08-463

Opinion Delivered March 5, 2009

NATHAN D. ARMSTRONG
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 PULASKI COUNTY, CR 2007-1469]

PETITION DENIED.

PER CURIAM

In 2007, petitioner Nathan D. Armstrong was found guilty by a jury of aggravated robbery and theft of property and sentenced to an aggregate term of 204 months' imprisonment. The Arkansas Court of Appeals affirmed. *Armstrong v. State*, CACR 08-463 (Ark. App. Nov. 19, 2008).

The victim of the offenses testified that she worked the night shift at a Wal-Mart store and decided to drive to her home on her 2:00 a.m. break. As she was walking to the door, she was approached by Antony Kelly, a man she knew from his employment at Wal-Mart, who asked if she would give him and his brother a ride. She agreed, and the two walked outside where they were met by petitioner, whom she did not know, who was wearing a sweatshirt with the hood pulled over his head. When the victim reached the location where the men had asked to be dropped off, petitioner pulled a gun, demanded money, and threatened to shoot her. After handing over her money, she was permitted to leave.

At trial, two witnesses for the defense said that they had seen Kelly at Wal-Mart on the date

of the crime and that the man with him was not petitioner. Another witness, petitioner, and petitioner's mother all testified that he was playing basketball when the crime occurred. Petitioner conceded that he had spoken with Kelly by telephone about a robbery while Kelly was at Wal-Mart but denied being at the Wal-Mart with Kelly.

Petitioner was arrested after the victim picked his picture from a photo lineup, and she testified at trial that she had seen petitioner's face clearly and was certain he was he man who robbed her. Kelly testified at trial that he and petitioner had gotten a ride from Wal-Mart with the victim but that he had not known that petitioner planned to rob the victim until he drew the gun.

Petitioner now asks that this court reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis on the sole ground that the prosecution did not disclose to the defense the existence of a Wal-Mart surveillance videotape that showed that petitioner was innocent.[1] The 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. *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. *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. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). These fundamental errors are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence

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[1]For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis was assigned the same docket number as the direct appeal of the judgment.

withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts*, *supra,* (citing *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984)). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Penn v. State*, *supra*.

The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Strickler v. Greene*, 527 U.S. 263 (1999), the Court revisited *Brady* and declared that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 373 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In *Strickler*, the court also set out the three elements of a true *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. We do not find that petitioner has met his burden of showing that there was a *Brady* violation in his case.

The only substantiation offered by petitioner for his claim that there was an exculpatory videotape withheld from the defense is his statement that Tiffany Jackson, who testified for the defense at trial, was a Wal-Mart employee and knew about the tape. He cites to the trial record, but those parts of the record to which he refers do not indicate that there was surveillance video available that demonstrated that some other person was with Kelly on the night of the robbery. Petitioner provides no facts from which it can be determined how Tiffany Jackson obtained information that

the prosecution had exculpatory evidence and concealed it from the defense. As it was petitioner's burden to substantiate the assertion of a *Brady* violation and he failed to do so, there is no cause to grant leave to proceed with a petition for writ of error coram nobis in the trial court. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004).

Petition denied.