

Cite as 2011 Ark. 127

SUPREME COURT OF ARKANSAS

No. CR 10-467

RAYMOND C. SANDERS, JR.,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,**Opinion Delivered** March 31, 2011APPEAL FROM THE GRANT
COUNTY CIRCUIT COURT,
NO. CR-90-58-1,
HON. JOHN LINEBERGER, JUDGE,DISMISSED.**KAREN R. BAKER, Associate Justice**

Appellant Raymond C. Sanders, Jr., appeals from the trial court's denial of postconviction relief under Arkansas Rule of Criminal Procedure 37 (2010). The trial court denied relief under Rule 37, but granted relief on Sanders's petition for writ of error coram nobis. As a result, Sanders's conviction and death sentence in this case have already been vacated and set aside. We, therefore, dismiss the appeal.

Sanders has brought four prior appeals related to his conviction and sentencing for the murders of Charles and Nancy Brannon, which occurred in Hot Spring County in 1989. Sanders was convicted of two counts of capital murder by a jury in the Grant County Circuit Court on change of venue from Hot Spring County. Sanders was sentenced to death on each count in February 1991. We affirmed the conviction but reversed the sentence and remanded for resentencing. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992). After the

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resentencing trial, held before a new jury in Grant County, the jury again sentenced Sanders to the death penalty. Sanders again appealed, and we affirmed. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994). Sanders filed a petition for postconviction relief, which the trial court denied without a hearing. Sanders appealed this denial, and this court reversed and remanded for an evidentiary hearing pursuant to Rule 37. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). On remand, facts arose during the evidentiary hearing that established possible prosecutorial misconduct in the form of the prosecutor's failing to reveal material evidence, which is not cognizable under Rule 37 but would be cognizable in a petition for writ of error coram nobis. Sanders then sought permission from this court to file a petition for the writ in the trial court, which this court granted. *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008).

Sanders filed both a petition for writ of error coram nobis and a petition for postconviction relief under Rule 37. Following an evidentiary hearing on both petitions, the circuit court entered an order finding that the prosecutor's failure to reveal information about one of its witnesses prejudiced Sanders's right to a fair trial. The court granted Sanders's petition for the writ of error coram nobis and vacated Sanders's conviction and sentence, but denied relief based on Sanders's Rule 37 petition. This appeal followed.

Sanders claims (1) that the trial court erred in permitting a change of venue from Hot Spring County to Grant County; (2) that collusion between trial counsel and the prosecutor amounted to the kind of structural, fundamental error for which no prejudice need be demonstrated to warrant reversal for ineffective assistance of counsel; and (3) that the use of

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the murder of Frederick LaSalle as an aggravating factor in sentencing was a violation of the prohibition against ex post facto laws.

We do not address appellant's arguments because we hold that postconviction relief under Rule 37 is not available to a defendant who has been granted a new trial through the issuance of a writ of error coram nobis. Petitions for Rule 37 relief and for writ of error coram nobis are not procedurally exclusive and may be tried simultaneously; however, the two proceedings are distinct and not interchangeable. *E.g.*, *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001); *Williams v. State*, 289 Ark. 385, 711 S.W.2d 479 (1986). The rule provides that Rule 37 postconviction relief is available to prisoners in custody under sentence of a circuit court. Ark. R. Crim. P. 37.1(a); *see also Pruet v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985). Once the trial court granted Sanders's petition for writ of error coram nobis, there was no longer a sentence from which postconviction relief could be sought pursuant to Rule 37.

Appeal dismissed.