Cite as 2012 Ark. 403

SUPREME COURT OF ARKANSAS

No. CACR 02-228

Opinion Delivered October 25, 2012

JAMES E. SMITH
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

PRO SE PETITION TO REINVEST JURISDICTION IN THE CIRCUIT COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION TO FILE RESPONSE TO THE STATE'S RESPONSE TO THE PETITION [JEFFERSON COUNTY CIRCUIT COUNTY, CR 99-724]

PETITION AND MOTION DENIED.

PER CURIAM

In 2001, petitioner James E. Smith was found guilty by a jury of two counts of rape for engaging in sexual intercourse with his girlfriend's daughters when they were both under the age of fourteen. Petitioner had taken the stand at trial and admitted that he had sex with the victims, but he contended that they were eighteen and twenty years old when the acts occurred and that both had consented. Petitioner was sentenced to two consecutive terms of twenty years' imprisonment. The Arkansas Court of Appeals affirmed. *Smith v. State*, CACR 02-228 (Ark. App. Jan. 8, 2003) (unpublished).

After the judgment was affirmed, petitioner sought postconviction relief in the trial court in a petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The petition was denied, and we affirmed the order. *Smith v. State*, CR 05-294 (Ark. Feb. 23, 2006) (unpublished per curiam).

Now before us is petitioner's petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis and a motion for leave to file a response to the response filed by the State to the petition.[1] A 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. *Pinder v. State*, 2011 Ark. 401 (per curiam); *Cloird v. State*, 2011 Ark. 303 (per curiam); *Dickerson v. State*, 2011 Ark. 247 (per curiam); *Cox v. State*, 2011 Ark. 96 (per curiam); *Fudge v. State*, 2010 Ark. 426 (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Davis v. State*, 2012 Ark. 228 (per curiam); *Camp v. State*, 2012 Ark. 226 (per curiam); *Loggins v. State*, 2012 Ark. 97 (per curiam); *Martin v. State*, 2012 Ark. 44 (per curiam); *Cloird*, 2011 Ark. 303; *Newman v. State*, 2010 Ark. 10 (per curiam). The function of the writ is to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition if it had been known to the circuit court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Camp*, 2012 Ark. 226; *Pinder*, 2011 Ark. 401; *Burks v. State*, 2011 Ark. 173 (per curiam). To warrant a writ of error coram nobis, a petitioner has the burden of bringing forth some fact, extrinsic to the record, that was not known at the time of trial. *Cloird*, 2011 Ark. 303; *see also Dickerson*, 2011 Ark. 247; *Cox*, 2011 Ark. 96. Coram-nobis proceedings are

[1]For clerical purposes, the petition and motion were assigned the docket number for the direct appeal of the judgment of conviction.

attended by a strong presumption that the judgment of conviction is valid. *Smith v. State*, 2011 Ark. 306 (per curiam); *Rayford v. State*, 2011 Ark. 86 (per curiam); *Barker v. State*, 2010 Ark. 354, ___ S.W.3d ___; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

The petition before us is approximately 200 pages in length. While it raises some claims of trial error, the allegations primarily pertain to petitioner's claim that the victims were not under the age of fourteen when the offenses occurred. He contends that the victims, in interviews with the police, gave inconsistent information on their dates of birth and on the exact events that gave rise to the charges and that the prosecution withheld those interviews from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He further alleges that the victims' handwritten statements were also withheld from the defense, thereby denying the defense the opportunity to compare the statements to the police report concerning the offenses. Petitioner asserts that he lied when he told the police, and later testified, that he had had consensual sex with the victims after they turned eighteen to hurt their mother. He seems to argue that, if he had been in possession of the material concealed by the prosecution, he would not have perjured himself at trial.

This court has previously recognized that a writ of error coram nobis was available to address errors found in only 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. *Camp*, 2012 Ark. 226; *Webb v. State*, 2009 Ark. 550 (per curiam). Allegations of a *Brady* violation fall within one of the four categories of error that this court has recognized. *Camp*, 2010 Ark. 226; *Hogue v. State*, 2011 Ark. 496 (per

curiam). The fact that a petitioner alleges a *Brady* violation alone is not sufficient to provide a basis for error- coram-nobis relief. *Camp*, 2010 Ark. 226. Assuming that the alleged withheld evidence meets the requirements of a *Brady* violation and is both material and prejudicial, in order to justify issuance of the writ, the withheld material evidence must also be such as to have prevented rendition of the judgment had it been known at the time of trial. *Id.* To merit relief, a petitioner must demonstrate that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information been disclosed at trial. *Id.* It is a petitioner's burden to show that the writ is warranted. *Scott v. State*, 2009 Ark. 437 (per curiam). This court will grant permission for a petitioner to proceed with a petition for writ of error coram nobis only when it appears that the proposed attack on the judgment is meritorious. *Hogue*, 2011 Ark. 496. We are not required to accept the allegations in a petition for writ of error coram nobis at face value. *Goff v. State*, 2012 Ark. 68, ___ S.W.3d ___ (per curiam).

We do not find that petitioner has met his burden of demonstrating that a writ of error coram nobis is warranted. First, he has not established that there was a *Brady* violation. The evidence contemplated in *Brady* is "evidence material either to guilt or punishment." 373 U.S. at 87. The Court later defined the test for material evidence in the context of a *Brady* violation as being "whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *see also Lacy v. State*, 2010 Ark. 388, ___S.W.3d ___. To establish a *Brady* violation, three elements are required: (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. *Larimore v. State*, 341 Ark. 397, 404, 17 S.W.3d 87, 91 (2000); *see Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). This court has recognized that the withholding by the prosecution of material evidence is a ground for reinvesting jurisdiction in the trial court to consider a writ of error coram nobis. *See Buckley v. State*, 2010 Ark. 154, at 1 (per curiam). Petitioner offers nothing to show that information was concealed from the defense. Moreover, it is apparent that the issue of the birth dates of the victims could have been determined with certainty at the time of trial. The information was not extrinsic to the record.

Also, the evidence adduced at trial against petitioner was overwhelming. Both victims testified that petitioner had sexual intercourse with them frequently when they were in elementary school, below the ages of twelve. Petitioner conceded in cross-examination at trial that he had engaged in sexual relations with the victims but only after each one seduced him within a two-week period when they were adults over the age of eighteen. It was the jury's task to assess the credibility of the witnesses. *See Laswell v. State*, 2012 Ark. 201, ___ S.W.3d ___. The significance of the inconsistent statements that petitioner alleges were hidden from the defense must be weighed against the totality of the evidence to determine if the statements at issue would have been such as to have prevented rendition of the judgment had the existence of those documents been known at the time of trial. *Goff*, 2012 Ark. 68, ___ S.W.3d ___; *Sanders v. State*, 2011 Ark. 199 (per curiam). We consider the

cumulative effect of the allegedly suppressed evidence to determine whether the evidence that was alleged to have been suppressed was material to the guilt or punishment of the defendant. *Goff*, 2012 Ark. 68, ___ S.W.3d ___; *Sanders*, 2011 Ark. 199; *Williams v. State*, 2011 Ark. 151 (per curiam); *see also Thrash v. State*, 2011 Ark. 118 (per curiam). Here, the victims' testimony was sufficient to establish that they were raped at ages well below fourteen. Again, their birth-dates was information easily available at the time of trial. As to inconsistencies between the victims' pretrial statements and their testimony at trial, which consisted largely of when the victims informed their mother of the offenses, petitioner has not shown that any specific inconsistency between the pre-trial statements and the testimony was substantial enough to impeach the victims' testimony that they had been raped almost daily beginning at a very young age. Petitioner has not demonstrated a *Brady* violation that warrants issuance of a writ of error coram nobis.

Intermittently throughout the lengthy petition, petitioner argues that the evidence was insufficient to sustain the judgment, primarily because the witnesses, including himself, did not give truthful testimony. The issue is not cognizable in a coram-nobis proceeding. *Butler v. State*, 2011 Ark. 542. The sufficiency of the evidence and the credibility of witnesses are matters to be addressed at trial. *See Martin*, 2012 Ark. 44; *see also Cooper v. State*, 2012 Ark. 471 (per curiam); *Grant v. State*, 2010 Ark. 286 (per curiam); *Flanagan v. State*, 2010 Ark. 140 (per curiam).

Petitioner also asserts that the Felony Information in his case was based on "incompetent evidence." This court has held repeatedly that any argument pertaining to the

Information could have been addressed at the time of trial and on the record on direct appeal; accordingly, it is not an issue that fits within the narrow confines of an error-coram-nobis proceeding. *Kindall v. State*, 2010 Ark. 342 (per curiam); *see also Thompson v. State*, 2012 Ark. 339 (per curiam).

The petition before us also contains myriad claims that amount to allegations of mere trial error. Such allegations by their very nature constitute issues known at the time of trial that were addressed, or could have been addressed, at that time. Such claims are not grounds for the writ. *Anderson v. State*, 2012 Ark. 270, ___ S.W.3d ___ (per curiam). This applies even to issues of trial error of constitutional dimension that could have been raised in the trial court. *Rodgers v. State*, 2012 Ark. 193 (per curiam); *Martin*, 2012 Ark. 44.

It is not clear from the petition when petitioner obtained the documents that he now relies on as the basis of his assertion that the victims gave inconsistent statements, but the State has appended to its response to the petition a copy of a Recommended Disposition rendered in 2007 in which the United States Magistrate Judge refers to petitioner's being in possession of the documents. The State avers that petitioner filed the petition in the United States District Court in 2006, and, thus, he was not diligent in bringing his claims to this court in the coram-nobis proceeding. We agree.

Although there is no specific time limit for seeking a writ of error coram nobis, due diligence is required in making an application for relief. *Flanagan*, 2010 Ark. 140; *Deaton v. State*, 373 Ark. 605, 285 S.W.3d 611 (2008). Due diligence requires that (1) the defendant be unaware of the fact at the time of the trial; (2) the defendant could not have, in the

exercise of due diligence, presented the fact at trial; and (3) the defendant, after discovering the fact, did not delay in bringing the petition. *Anderson*, 2012 Ark. 270, ___ S.W.3d ___; *Pinder*, 2012 Ark. 45. Even if petitioner here had stated a ground for the writ, which he failed to do, he also failed to meet any of the requirements of due diligence inasmuch as he must have had the documents at issue for at least six years. In the absence of a valid excuse for delay, a coram-nobis petition is subject to denial. *Thompson*, 2012 Ark. 339; *see also Pinder*, 2012 Ark. 45.

Finally, petitioner filed a motion seeking to file a response to the response filed by the State to this petition. There is no provision in our procedural rules for such a response to a response to be filed, and petitioner, who has already submitted a petition almost 200 pages in length containing his arguments, has not established that there is good cause to permit him to file a response.

Petition and motion denied.

James E. Smith, pro se petitioner.

No response.