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SUPREME COURT OF ARKANSAS

No. CACR 09-212

TROZZIE L. TURNER
PETITIONER

V.

STATE OF ARKANSAS
RESPONDENT

Opinion Delivered September 27, 2012

PETITION FOR WRIT OF ERROR CORAM NOBIS, OR, ALTERNATIVELY, PETITION FOR WRIT OF CERTIORARI OR RECALL OF MANDATE [COLUMBIA COUNTY CIRCUIT COURT, CR 06-79]

PETITION DENIED.

PER CURIAM

Petitioner Trozzie L. Turner, through counsel, filed this petition that seeks a writ of error coram nobis or, alternatively, a writ of certiorari or recall of the mandate, concerning his 2008 conviction on charges of possession of cocaine with intent to deliver, possession of methamphetamine with intent to deliver, and maintaining a drug premises.[1] In the petition, petitioner requests that this court assume jurisdiction of the cause rather than reinvest jurisdiction in the trial court. Petitioner presents no authority or persuasive argument to establish grounds for the relief that he seeks, and we therefore deny the petition.

Petitioner concedes in his petition that he requests a remedy, "but not much exactly seems to fit." He asserts that the issue that he presents is so compelling that this court should assume original jurisdiction over the matter, require further response from the State, and

[1]For clerical purposes, the petition was assigned the same docket number as the direct appeal of the judgment.

decide the case on the merits to address this important issue. He would essentially have this court create a new remedy to investigate allegations concerning an appearance of impropriety in actions by the judge and prosecutor involving unrelated cases.

The compelling issue that petitioner would present involves what he characterizes as an appearance of impropriety relating to the fact that the judge and prosecutor in the case were both involved in a drug-court program that had been implemented in Columbia County to reduce recidivism in certain drug cases. The charges that were filed against petitioner did not qualify him for the drug-court program, and his case was unrelated to the drug-court cases, outside of the individuals involved as judge and prosecutor.

Petitioner alleges that the program was funded by a federal grant, that the trial judge maintained a grant checking account, that the judge and prosecutor received salary supplements for participating in the program, and that this "economic entanglement" and the relationship arising from participation in the "drug court team" somehow compromised both the judge and the prosecutor from participating in other unrelated cases. Although he does not make clear how, petitioner appears to contend that this alleged tainted relationship is somehow further connected to the prosecution's practice of seeking a more severe sentence where a defendant went to trial and did not accept a plea offer. Petitioner asserts that the salary supplements may have been illegal, and he seems to imply that a bias or conflict would result, but, once again, without clearly stating how so.

As discussed below, petitioner's request does not fall within the parameters to establish grounds for any of the remedies that he seeks. With one exception, he does not seek a

specific change to any of the criteria that have been previously stated to establish grounds for relief. Instead, he appears to believe this court should be so outraged by the conduct of the prosecutor and the judge, by their receipt of monies from the grant, that we create an exception or new remedy tailored to this claim. We decline to do so.

Petitioner's primary position is that this court has jurisdiction to grant a writ of error coram nobis. This court must first grant leave to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis, but the writ is properly granted by the court before which the alleged error occurred. *See Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997); *see also Anderson v. State*, 2012 Ark. 270, ___ S.W.3d ___ (per curiam) (a prisoner who appealed his judgment and who wishes to attack his conviction by means of a petition for writ of error coram nobis must first request that this court reinvest jurisdiction in the trial court). Even if we were to treat the petition as one seeking permission to pursue the writ in the trial court, petitioner has not provided a basis for the writ to issue. It is a petitioner's burden to show that the writ is warranted. *Anderson*, 2012 Ark. 270, at 4, ___ S.W.3d at ___.

Petitioner asserts that grounds for the writ are established in his petition because he alleges that there was a legally suspect expenditure of grant funds to supplement the judge's and prosecutor's salaries unknown to the petitioner until the facts appeared publicly. Petitioner apparently claims that this occurred at sometime after the release of a legislative audit in December 2010. He contends that the information, if available at trial, might have been used to recuse the trial judge or disqualify the prosecuting attorney. He fails to show, however, that those circumstances, even if proven, were sufficient to have prevented rendition

of the judgment.

To merit relief under the current standard for granting a writ of error coram nobis, 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 withheld information been disclosed at trial. *See Camp v. State*, 2012 Ark. 226 (per curiam). In the circumstances here, an appearance of impropriety is not sufficient to merit relief, and petitioner would have to demonstrate that he suffered some fatal prejudice from a trial with the particular judge and prosecutor involved. That is, in order to show a ground for the writ, petitioner must demonstrate that, if an unbiased judge or prosecutor had served, there was a reasonable probability that he would not have been convicted. *See id*.

Petitioner makes no allegations to that effect, and rather appears to contend only that his sentence was more harsh than it should have been. Petitioner argues for an exception to the rule requiring that the withheld facts would have prevented rendition of the judgment, contending that, where the withheld evidence could have been used to recuse the judge or disqualify the prosecuting attorney, the rule should not apply. Petitioner does not further develop this argument by explaining why we should change our policy in that regard.

The broad policy change that petitioner would have us adopt would make an exception regardless of whether there had been actual bias or prejudice to the defense as a result of the failure to recuse a judge or disqualify a prosecutor. He has alleged none, but instead asserts that the appearance of impropriety that results where the judge should have recused or the prosecutor disqualified himself is damaging to the reputation of the judicial

system and that damage alone is a sufficient basis to overturn the judgment.

Coram-nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Id.* The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Id.* To make an exception, as petitioner would have us do, would therefore require reconsideration of the basic nature and purpose of the writ. The error that petitioner alleges occurred in this instance, a judge or prosecutor who did not withdraw in circumstances where there was an appearance of impropriety but no demonstration of actual bias, was not sufficient to support reversible error, much less the type of fundamental error addressed by coram-nobis proceedings. *See City of Rockport v. City of Malvern*, 2010 Ark. 449, ___ S.W.3d ___; *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999).

Petitioner offers only a vague concern for public perception of fairness to overcome converting what has been an extraordinarily rare remedy that has been made available for very limited categories of error into a very broad and easily accessible remedy available to even those defendants who could not have obtained relief on direct appeal of the judgment under *Gates*. *See, e.g.*, *Maxwell v. State*, 2012 Ark. 251 (per curiam) (noting that the writ is an extraordinarily rare remedy and had been found available in four categories of error); *Davis v. State*, 2012 Ark. 228 (per curiam); *Rodgers v. State*, 2012 Ark. 193 (per curiam). Nor does he provide any reason that the alleged economic entanglement might serve as a sufficient influence upon the judge or prosecutor so as to provide a possible demonstration of actual bias. In every criminal case, the judge and prosecutor are both employed by the State and

receive monies from State funds, and petitioner does not provide any factual basis for a distinction here, where both appear to have received compensation from a federal grant for service in conjunction with cases not related to petitioner's. Petitioner does not explain how the circumstances here differ so as to create a situation where the judge and prosecutor could not be expected to perform their duties without bias.[2]

Petitioner's claim does not support issuance of a writ of error coram nobis. This court will grant permission for a petition to proceed in the trial court with a petition for writ of error coram nobis only when it appears the proposed attack on the judgment is meritorious. *Maxwell*, 2012 Ark. 251. Petitioner has not demonstrated that he could demonstrate a fundamental error.

Petitioner next contends that this court may grant a writ of certiorari. The writ is an appropriate remedy where the lower court's order has been entered without, or in excess of, jurisdiction. *See Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994). There are two requirements that must be satisfied before this court will grant a writ of certiorari. *McKenzie v. Pierce*, 2012 Ark. 190, ___ S.W.3d ___. The first requirement is that there can be no other remedy but the writ of certiorari. *Id.* Second, a writ lies where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, or there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the

[2]Petitioner references the judge's administration of the grant checking account, but, if he contends that fact would lead to a situation where some sort of influence on cases outside of those under the drug-court program might result, he has not developed an argument on the point.

proceedings are erroneous on the face of the record. *Id.*

Petitioner contends that the second requirement is met because the proceedings were erroneous based on "the public record presented." Apparently, petitioner contends that the audit report and other materials that he attached to his petition establish that the trial judge and prosecutor should not have been permitted to execute their roles in petitioner's trial, but he does not develop that argument, and it is not apparent from those materials presented that there was a clear lack of jurisdiction for the judge and prosecutor to proceed in cases related or unrelated to the drug-court program as a result of any impropriety.

The decision for a trial judge to recuse where there may be an appearance of impropriety involves an exercise of discretion. *See City of Rockport*, 2010 Ark. 449, ___ S.W.3d ___; *Davis v. State*, 367 Ark. 341, 240 S.W.3d 110 (2006). Petitioner asserts an appearance of impropriety concerning the conduct of the trial judge and prosecutor, but, while he contends that the receipt of monies from the grant is "suspect," he does not explain how this might result in a loss of jurisdiction, create an actual conflict, or disqualify the judge and prosecutor for unrelated cases. He only alleges that this "questionable financial entanglement" "just looks really bad" and should therefore be treated by the law as if there were an actual conflict or bias. He alleges that the receipt of the money from the grant may have been illegal, but he does not establish that the judge's or prosecutor's failure to recuse in a non-drug-court case under those circumstances may have been illegal or sufficient to divest the court of jurisdiction.

Certiorari will not be used to look beyond the face of the record to ascertain the actual

merits of the controversy, to control discretion, to review a finding of facts, or to reverse a trial court's discretionary authority. *Weaver v. Simes*, 365 Ark. 289, 229 S.W.3d 15 (2006). This court has previously declined to disqualify a chancellor pursuant to our superintending authority where the petitioner did not allege that the chancellor acted illegally or that she acted without, or in excess of, her jurisdiction. *Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994). Petitioner has not made any allegations of a conflict or actual bias by the judge or prosecutor, or offered anything more than an appearance of impropriety. He has failed to develop a persuasive argument in support of his position that we should break new ground by exercising our discretion to issue the writ in this particular case without such a showing, and he has not established a basis for the writ that has been previously recognized.

Regarding his third basis for relief, petitioner contends that, because the court and prosecutor did not disclose the drug-court-grant financial arrangements, he was unable to include that issue in his postconviction-relief petition under Arkansas Rule of Criminal Procedure 37.1 (2011). Hence, he seeks to recall the mandate and, if not proceed in this court, proceed with that claim in further postconviction proceedings. A petitioner must ask this court to recall its mandate in order to file a second Rule 37.1 petition. *See Roberts v. State*, 2011 Ark. 502, ___ S.W.3d ___.

In his argument that this court should recall the mandate, petitioner contends that there are extraordinary circumstances. Petitioner, however, does not establish the criteria set forth in *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003), that would establish extraordinary circumstances sufficient to recall the mandate, most notably because petitioner's sentence is

not one of death, which invokes a heightened scrutiny. *See Kelly v. State*, 2010 Ark. 180 (per curiam). Without such heightened scrutiny, it is clear that petitioner has not established extraordinary circumstances that constitute the type of breakdown in the appellate process sufficient to support recall of the mandate. *See Williams v. State*, 2011 Ark. 534. Petitioner alleges that the prosecutor was more aggressive in seeking harsher, albeit not illegal, sentences in cases where the petitioner went to trial and that the judge and prosecutor did not act independently as a consequence of the economic relationship resulting from the drug-court grant. The facts that petitioner alleges, if true, simply do not rise to the level required to meet the criteria established to recall the mandate.

Petitioner has failed to meet the criteria necessary to grant the relief he requests. He has also failed to make an argument that can support an exception to the requirements for issuing any of the writs or remedies he requests. Accordingly, we deny the petition.

Petition denied.

John Wesley Hall, Jr., for appellant.

Dustin McDaniel, Att'y Gen., by: *John T. Adams*, Ass't Att'y Gen., for appellee.