Cite as 2012 Ark. 339

SUPREME COURT OF ARKANSAS

No. CACR 98-1523

	Opinion Delivered September 20, 2012
KENDRICK THOMPSON 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 [PULASKI COUNTY CIRCUIT COURT, CR 98-105] PETITION DENIED.

PER CURIAM

In 1998, petitioner Kendrick Thompson was found guilty of rape in a trial to the bench and sentenced as a habitual offender to 480 months' imprisonment. The Arkansas Court of Appeals affirmed. *Thompson v. State*, CACR 98-1523 (Ark. App. July 7, 1999) (unpublished).

Now before us is petitioner's pro se petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.[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. *Williams v. State*, 2011 Ark. 541 (per curiam); *Pinder v. State*, 2011 Ark. 401 (per curiam); *Dickerson v. State*, 2011 Ark. 247 (per curiam); *Cox v. State*, 2011 Ark. 96 (per curiam); *Fudge v. State*,

[1]The petition was assigned the docket number for the direct appeal of the judgment of conviction, CACR 98-1523.

2010 Ark. 426; *Grant v. State*, 2010 Ark. 286, 365 S.W.3d 849 (per curiam) (citing *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61); *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. *Coley v. State*, 2011 Ark. 540 (per curiam); *Pinder*, 2011 Ark. 401; *Rayford v. State*, 2011 Ark. 86 (per curiam); *Whitham v. State*, 2011 Ark. 28 (per curiam); *Fudge*, 2010 Ark. 426; *Barker v. State*, 2010 Ark. 354, ___ S.W.3d ___; *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. *Coley*, 2011 Ark. 540 (citing *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (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. *Pitts*, 336 Ark. at 583, 986 S.W.2d at 409. 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. *Coley*, 2011 Ark. 540; *Pinder*, 2011 Ark. 401; *Cloird v. State*, 2011 Ark. 303 (per curiam); *Smith v. State*, 2011 Ark. 306 (per curiam); *Biggs v. State*, 2011 Ark. 304 (per curiam); *Grant*, 2010 Ark. 286, 365 S.W.3d 849; *see also Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam); *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). The petitioner has the burden of

demonstrating a fundamental error of fact extrinsic to the record. *Williams*, 2011 Ark. 541; *Pinder*, 2011 Ark. 401; *Webb v. State*, 2009 Ark. 550 (per curiam); *Sanders*, 374 Ark. 70, 285 S.W.3d 630. Coram-nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Coley*, 2011 Ark. 540; *Cloird*, 2011 Ark. 303; *Smith*, 2011 Ark. 306; *Gardner v. State*, 2011 Ark. 27 (per curiam); *Barker*, 2010 Ark. 354, ___ S.W.3d ___; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

Petitioner first enumerates myriad claims of trial error, including the validity of the Information and arrest warrant and delay in first appearance. Mere trial error, however, does not form a basis for granting a writ of error coram nobis. An issue that was known at the time of trial and was addressed, or could have been addressed, is not one cognizable in an error-coram-nobis proceeding. *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 v. State*, 2012 Ark. 44 (per curiam).

Petitioner also contends that he has newly discovered evidence that warrants issuance of a writ of error coram nobis. The alleged newly discovered evidence consists of petitioner's claim that he has learned that he was convicted and sentenced by means of the unlawful conduct of various individuals acting "under color of state law." Petitioner offers no evidence to sustain the claim. His allegations are conclusory in nature and seem to be intended to cover the entire legal proceeding against him beginning with his arrest and continuing

through his sentencing. It is well settled that an allegation of newly discovered evidence in itself is not a basis for coram-nobis relief. *Cooper v. State*, 2010 Ark. 471 (per curiam); *Scott v. State*, 2010 Ark. 363 (per curiam); *Webb*, 2009 Ark. 550 (citing *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam)). There is a distinction between fundamental error that requires issuance of the writ and newly discovered information that might have created an issue to be raised at trial had it been known. *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998) (per curiam). Petitioner has not shown that there was any information extrinsic to the record that, even if it had been known at the time of trial, would somehow have created an issue sufficient to call into question the outcome of the trial. He has fallen far short of establishing that there is newly discovered evidence sufficient to have precluded the entry of the judgment. As a result, he has established no ground to issue a writ of error coram nobis.

Petitioner next contends that the prosecution failed to disclose evidence of exculpatory value, allowed witnesses to commit perjury, and conspired with the trial judge and his defense attorney to deny him a fair trial. He also alleges that the trial judge had an "actual interest" in the case, but the exact nature of that interest is not asserted. Petitioner argues that these claims constitute a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

This court has previously recognized that a writ of error coram nobis was available to address errors pertaining to material evidence withheld by the prosecutor. *Camp v. State*, 2012 Ark. 226 (per curiam); *Webb*, 2009 Ark. 550; *Hogue v. State*, 2011 Ark. 496 (per curiam). There are three elements of a *Brady* violation: (1) the evidence at issue must be

favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Howard v. State*, 2012 Ark. 177, ___ S.W.3d ___; *Sanders*, 374 Ark. at 72, 285 S.W.3d at 633 (citing *State v. Larimore*, 341 Ark. 397, 404, 17 S.W.3d 87, 91 (2000)). Petitioner has not presented facts to establish any of the three requirements.

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). Petitioner has not shown that the prosecutor withheld evidence, suborned perjury, or otherwise committed a violation of *Brady*.

Woven throughout his lengthy petition, petitioner alleges that his attorney was ineffective at trial. The allegations are not a basis for the writ. This court has consistently

held that allegations of ineffective assistance of counsel are outside the purview of a coram-nobis proceeding. *Rodgers*, 2012 Ark. 193; *Martin*, 2012 Ark. 44; *Butler v. State*, 2011 Ark. 542 (per curiam); *Benton v. State*, 2011 Ark. 211 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam); *Scott*, 2009 Ark. 437; *McArty*, 335 Ark. 445, 983 S .W.2d 418.

Petitioner makes numerous references in his petition to the sufficiency of the evidence and credibility of trial witnesses. Such issues are also not cognizable in coram-nobis proceedings. *Butler*, 2011 Ark. 542. The sufficiency of the evidence and credibility of witnesses are matters to be addressed at trial. *See Martin*, 2012 Ark. 44; *see also Cooper*, 2012 Ark. 471; *Grant*, 2010 Ark. 286; *Flanagan v. State,* 2010 Ark. 140 (per curiam).

We further find that petitioner did not exercise due diligence in bringing his claims almost fourteen years after he was convicted. 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. That failure alone would constitute good cause to deny the petition. *See Pinder*, 2012 Ark. 45.

Petition denied.

BROWN, J., not participating.