

ARKANSAS SUPREME COURT

No. CR 07-824

THOMAS S. CAFFERY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 17, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF SALINE COUNTY, CR
2004-369, HON. GARY M. ARNOLD,
JUDGE

AFFIRMED.

PER CURIAM

In 2005, appellant Thomas S. Caffery entered a plea of guilty to second-degree battery, tampering with physical evidence, possession of cocaine with intent to deliver and failure to appear. He was sentenced to an aggregate term of 360 months' imprisonment. In 2007, appellant filed in the trial court a pro se petition for writ of error coram nobis. The trial court denied the petition and appellant has lodged an appeal here from that order.

Where a judgment of conviction was entered on a plea of guilty or nolo contendere, or the judgment of conviction was not appealed, a petition for writ of error coram nobis is filed directly in the trial court. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam). Denial of a writ of error coram nobis is reviewed by appeal. *Magby v. State*, 348 Ark. 415, 72 S.W.3d 508 (2002) (per curiam). The standard of review of the denial of a writ of error coram nobis is whether the trial court abused its discretion in granting or denying the writ. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *Id.*

Appellant alleged entitlement to an error coram nobis writ based upon: (1) a coerced guilty plea; (2) the imposition of invalid sentences.¹ Initially, we note that appellant's guilty plea hearing transcript was not brought up on appeal, and the testimony from the hearing was not abstracted or contained in appellant's addendum. Also, the record does not indicate that appellant filed a writ of certiorari to supplement the record on appeal to include the transcript of this hearing. We will, however, not require appellant to seek leave to supplement the record, as it is clear on the record before us that appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *State v. Larimore*, 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). Issuance of a writ may be 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, supra*.

For the writ to issue, appellant must show a fundamental error of fact extrinsic to the record. *See Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997). A writ of error coram nobis is appropriate only when an issue was not addressed, or could not have been addressed, at trial because it was somehow hidden or unknown and would have prevented the rendition of the judgment had it been known to the trial court. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005); *Brown v.*

¹It appears that appellant has abandoned on appeal the allegation of false testimony given by the prosecutor regarding the chain of custody of evidence. Issues raised below but not argued on appeal are considered abandoned. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

State, 330 Ark. 627, 955 S.W.2d 901 (1997).

Although couched in terms of a coerced guilty plea, the gravamen of appellant's complaint regarding entry of the guilty plea is that trial counsel rendered ineffective assistance. To support his ineffective assistance claim, he argues that counsel pressured him to accept a guilty plea so that counsel could be paid, failed to investigate facts surrounding the charges and failed to present a valid affirmative defense, thereby causing the affirmative defense to be unknown to the trial court at the time appellant entered his plea of guilty. As to sentencing, appellant alleges that the sentences imposed exceeded the presumptive sentences of the charges, causing the sentences to be invalid under *Blakely v. Washington*, 542 U.S. 296 (2004).²

Neither of these allegations of error is subject to review in a coram nobis proceeding. With respect to the claim that his attorney was ineffective, the claims of ineffective assistance of counsel could have been raised in a timely petition for postconviction relief pursuant to Criminal Procedure Rule 37.1. Claims of ineffective assistance of counsel are outside the purview of a coram nobis proceeding, *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam), and a coram nobis proceeding is not a substitute for proceeding under Rule 37.1. *McDonald v. State*, 295 Ark. 482, 688 S.W.2d 302 (1985). The issue of sentencing raised by petitioner was a matter which was known to petitioner at the time the plea was entered and thus could have been settled in the trial court. As a result, the claims do not constitute grounds on which the writ could issue. *See Pitts, supra; Penn v.*

²In *Blakely*, the defendant was found guilty by a jury of kidnapping. During the sentencing phase, the trial court additionally found that Blakely acted with deliberate cruelty. The additional factual findings increased Blakely's maximum sentence beyond the sentencing range established by the facts presented to the jury. The United States Supreme Court held that the state trial court's sentencing of Blakely in excess of the statutory maximum for the standard range for his offense violated Blakely's Sixth Amendment right to trial by jury.

State, 282 Ark. 571, 336 Ark. 580, 986 S.W.2d 407 (1999) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

In a petition for writ of error coram nobis, it is the petitioner's burden to show that the writ is warranted. *Cloird, supra*. Here, appellant has failed to make a showing that the allegations contained in his petition were meritorious and warranted issuance of a writ of error coram nobis. As no substantive basis existed for granting the petition, we need not reach the issue of whether appellant exercised due diligence in proceeding for the writ. The trial court did not abuse its discretion in denying the writ and its decision is affirmed.

Affirmed.