

SUPREME COURT OF ARKANSAS

No. CR 09-1353

JAMES BUTLER

PETITIONER

v.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered December 15, 2011

PRO SE PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [GARLAND COUNTY CIRCUIT COURT, CR 2008-268]

PETITION DENIED.

PER CURIAM

In 2008, petitioner James Butler was charged with engaging in sexual acts with a nine-year-old girl. At trial, multiple witnesses, including the victim, the victim's mother, medical professionals, law enforcement officials, and others, testified about the events. Additionally, petitioner's prior conviction for first-degree violation of a minor was admitted into evidence along with the testimony of the prior victim, who was petitioner's biological daughter. He was found guilty of two counts of rape and sentenced to two consecutive terms of life imprisonment. We affirmed. *Butler v. State*, 2010 Ark. 259.

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 in the case.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

¹For clerical purposes, the petition was assigned the docket number for the direct appeal of the judgment of conviction, CR 09-1353.

coram nobis after a judgment has been affirmed on appeal only after we grant permission. *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*, 2010 Ark. 426; *Grant v. State*, 2010 Ark. 286, ___ S.W.3d ___ (per curiam) (citing *Newman v. State*, 2009 Ark. 539, ___ S.W.3d ___); see also *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. *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. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). We have held that a writ of error coram nobis was 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. *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, ___ S.W.3d ___; 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. *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. *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); *Venn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

As grounds for issuance of the writ, petitioner contends the following: (1) the prosecutor withheld forensic evidence from the court of the victim's diminished capacity and her mental problems in order to obtain an arrest and search warrant; (2) no weapon or sex toys were found where the crimes were alleged to have been committed; (3) petitioner was not questioned about the offenses; (4) pictures of "piercings" were used as evidence of rape; (5) the prosecution was allowed to introduce pictures of the victim's genitalia; (6) witnesses for the prosecution were unable to state where the rapes occurred; (7) the prosecution contended that petitioner had sexually abused the victim from the time she was two years of age until she was ten, but petitioner did not know her before she was five; (8) the victim exhibited obvious diminished mental capacity, was "bi-polar," and not competent to testify; (9) the prosecution used petitioner's twenty-year-old prior conviction to inflame the minds of the jurors; (10) rules of due process were violated by numerous continuances that resulted in petitioner's being held in custody for seventeen months before trial; (11) there was admitted abuse of the victim by a third party; (12) the victim's father was never found and questioned by the prosecution; (13) the Fifth,

Sixth, and Fourteenth Amendments were violated; (14) petitioner was denied an evidentiary hearing; (15) there was a lack of communication between petitioner and his attorney, and counsel failed to investigate the case; (16) petitioner's attorney did not advise him about time limitations in seeking postconviction relief; (17) the appellate court denied petitioner's petition pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010) without a proper review of the brief and abstract;² (18) petitioner has been denied access to the transcript of his trial.

The assertions that the evidence was insufficient to sustain the judgment are not grounds for the writ. Claims that the evidence was insufficient to warrant a finding of guilt are a direct attack on the judgment that is properly made at trial and on the record on appeal. Whether the evidence was sufficient to sustain a judgment is not an issue cognizable in an error coram nobis proceeding. *Cooper v. State*, 2010 Ark. 471 (per curiam); *Flanagan v. State*, 2010 Ark. 140 (per curiam). Likewise, issues of mere trial error are not grounds for the writ. *Flanagan*, 2010 Ark. 140.

With respect to petitioner's allegations of ineffective assistance of counsel, such assertions are also outside the purview of a coram-nobis proceeding. *Benton v. State*, 2011 Ark. 211 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam) (citing *Mills v. State*, 2009 Ark. 463 (per curiam)). Such allegations should have been raised in a timely postconviction proceeding pursuant to Arkansas Rule of Criminal Procedure 37.1, and a petition for writ of error coram nobis is not a substitute for proceeding for postconviction relief in a timely petition or an

²Petitioner appealed to this court from the dismissal by the trial court of his Rule 37.1. petition. The appeal was dismissed on the ground that the petition filed in the trial court was not timely filed. *Butler v. State*, 2011 Ark. 218 (per curiam).

opportunity to raise new allegations that could have been raised under the rule. *Benton*, 2011 Ark. 211.

As stated, to warrant a writ of error coram nobis, a petitioner has the burden of bringing forth some fact that was not known at the time of trial. *Cox*, 2011 Ark. 96. 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. *Grant*, 2010 Ark. 286, ___ S.W.3d ___ (citing *Newman*, 2009 Ark. 539, ___ S.W.3d ___); *see also Sanders*, 374 Ark. 70, 285 S.W.3d 630 (2008); *Cloird*, 357 Ark. 446, 182 S.W.3d 477. The allegations advanced by petitioner are attacks on the sufficiency of the evidence, complaints of trial error, and allegations of ineffective assistance of counsel. He does not argue that there was any fact extrinsic to the record that could not have been known at the time of trial. His one claim that the prosecution withheld evidence to obtain search and arrest warrants rests on the allegation that the prosecution did not inform the court before trial of a report that said that the victim showed no physical signs of rape, was hyperactive, and had mental health issues. Petitioner does not allege that the defense was not aware of the report at the time of trial or that it was withheld from the defense.

As to petitioner's contention that a third party admitted to abuse of the victim, he does not demonstrate that there was a confession to the offenses of which he was accused and convicted. Coram-nobis relief is limited to a third-party confession to the crime for which the defendant was convicted during the time between the conviction and appeal. *Pitts*, 336 Ark. at 583, 986 S.W.2d at 409.

Petition denied.