

SUPREME COURT OF ARKANSAS

No. CR 11-1301

NICKOL E. CARTER
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 26, 2012

PRO SE MOTIONS FOR
PHOTOCOPYING AT PUBLIC
EXPENSE AND FOR EXTENSION OF
TIME [PULASKI COUNTY CIRCUIT
COURT, CR 09-564, HON. HERBERT T.
WRIGHT, JUDGE]APPEAL DISMISSED; MOTIONS
MOOT.**PER CURIAM**

Appellant Nickol E. Carter entered a negotiated plea of guilty in the Pulaski County Circuit Court to four counts of aggravated robbery, four counts of possession of a firearm by certain persons, and one count of robbery. In exchange for his guilty plea, appellant was sentenced to 420 months' imprisonment in the Arkansas Department of Correction with an additional 150 months' suspended imposition of sentence, and the State nolle prossed five counts of theft of property and five counts of possession of a firearm by certain persons. No appeal was taken from this judgment.

On May 25, 2011, appellant filed in the trial court a petition for writ of error coram nobis, in which he alleged that his guilty plea had been coerced and that the State had withheld material evidence.¹ The circuit court denied the petition, and appellant timely filed an appeal in

¹Where, as here, the judgment of conviction was entered on a plea of guilty or nolo contendere, or where the judgment of conviction was not appealed, the petition for writ of error coram nobis is filed directly in the trial court. See *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

this court. Now before us are appellant's pro se motions for photocopying at public expense and for an extension of time in which to file his brief on appeal. Because we determine that appellant could not prevail if his appeal were allowed to proceed, we dismiss the appeal, and the motions are moot.

An appeal of a circuit court order denying postconviction relief, including a denial of a petition for writ of error coram nobis, will not be allowed to proceed where it is clear that the appellant could not prevail. See *Pierce v. State*, 2009 Ark. 606 (per curiam) (citing *Buckbanna v. State*, 2009 Ark. 490 (per curiam)); *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam). The standard of review of a denial of a petition for writ of error coram nobis is whether the circuit court abused its discretion in denying the writ. *Benton v. State*, 2011 Ark. 211 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Loggins v. State*, 2012 Ark. 97 (per curiam); *Coley v. State*, 2011 Ark. 540 (per curiam); *Rayford v. State*, 2011 Ark. 86 (per curiam); *Barker v. State*, 2010 Ark. 354, ___ S.W.3d ___. 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 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. *Loggins*, 2012 Ark. 97 (citing *Pitts*, 336

Ark. at 583, 986 S.W.2d at 409).

The remedy in a proceeding for a writ or error coram nobis is exceedingly narrow, and it is appropriate only when an issue was not, or could not have been, addressed at trial because it was somehow hidden or unknown, and that issue would have prevented the rendition of the judgment had it been known to the trial court. *See Burks v. State*, 2011 Ark. 173 (per curiam); *see also Cloird v. State*, 2011 Ark. 303 (per curiam); *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam). The burden is on the petitioner to establish a fundamental error of fact, extrinsic to the record. *See Williams v. State*, 2011 Ark. 541 (per curiam). Coram-nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Loggins*, 2012 Ark. 97; *Cloird*, 2011 Ark. 303; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

The bulk of appellant's petition in the circuit court concerned evidence that he alleged had been withheld by the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, appellant first alleged that the State withheld evidence from one of the robbery scenes, a Subway restaurant, which appellant claimed showed that the robber was left-handed and was not wearing gloves. Furthermore, appellant contended that the State failed to inform the defense that the Arkansas Crime Lab tested a fingerprint lifted from a cup at the Subway restaurant, rather than the cup itself, nor was the defense "told about such an analysis taking place and offered a chance to have state of independent fingerprint testing done."² Appellant also alleged that the State withheld a forensic report that showed that fingerprints taken from a doorway at the scene of

²The Arkansas State Crime Lab found that the fingerprint lifted from the cup matched appellant's fingerprints. Appellant did not explain how testing the cup, rather than the printed lifted directly from the cup, would have changed this determination.

Cite as 2012 Ark. 186

another robbery did not match appellant's fingerprints, and appellant claimed that this report should have been provided so that the defense could have "forwarded [the] same prints to the Arkansas State Crime Lab for . . . a possible match to the real perpetrator(s) of this crime." Finally, appellant alleged that the defense was not informed that DNA-testing of a cigarette found at the scene of a third robbery did not match appellant's DNA, but did match the DNA of a Gerald Bennett, Jr., which appellant argued supported his contention that he did not commit this robbery.

We have repeatedly held that, to merit coram-nobis relief based on a *Brady* claim, a petitioner must demonstrate prejudice by establishing 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. *See Williams*, 2011 Ark. 541 (citing *Buckley v. State*, 2010 Ark. 154, ___ S.W.3d ___ (per curiam)). To meet this burden, a petitioner must show that, had the information that he alleges was withheld been available, that evidence would have been sufficient to have prevented rendition of the judgment. *Id.* (citing *Sanders v. State*, 2011 Ark. 199 (per curiam)); *see also Harris v. State*, 2010 Ark. 489 (per curiam). In its order denying relief, the circuit court found that appellant's claims that the evidence was withheld by the State were bare and conclusory, and appellant failed to demonstrate that any of the alleged evidence was withheld and could not have been obtained prior to trial.

More importantly, the circuit court held that appellant failed to demonstrate prejudice due to the alleged withholding of the evidence, which is required if coram-nobis relief is to be granted based on a *Brady* violation. As to the cup taken from the Subway robbery, the circuit

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court determined that this evidence, in light of appellant's own admission during his plea hearing that he committed the crime,³ would not have prevented the circuit court from accepting the guilty plea and imposing the negotiated sentence. Similarly, the court found that the mere fact that fingerprints and DNA that did not match appellant were found at the scene of two bank robberies would not have prevented the court from accepting appellant's plea.

Arkansas Rule of Criminal Procedure 24.4 (2009) requires that a court, before accepting a guilty plea, personally address a defendant and inform him as to the nature of the charge, the possible sentence that the defendant would face if he went to trial, the impact of any prior convictions on the possible sentence, and the fact that pleading guilty waives the right to a trial and to confront witnesses. Rule 24.5 requires the court to determine whether the plea is voluntary, whether it is the product of an agreement, and whether any threats or promises were made to induce the defendant's acceptance of the plea. Rule 24.6 requires that the court not accept the plea until the State has provided a factual basis therefor. All of these rules were followed during appellant's plea hearing. Moreover, we agree with the circuit court that none of the allegedly withheld evidence would have prevented the circuit court from accepting a plea under our rules of criminal procedure. Thus, we cannot say that the denial of appellant's petition for writ of error coram nobis was an abuse of discretion.

Along with the withheld-evidence claims, appellant's original petition for writ of error

³During the plea hearing, following the State's recitation of what it would prove if the case went to trial, appellant was asked if the State's assertions were true. He replied, "Yes, sir." Appellant was then asked whether he was pleading guilty because he was guilty of the specified crimes, to which he again replied, "yes, sir."

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coram nobis alleged that his guilty plea was coerced, inasmuch as he took the offer of 420 months' imprisonment in order to avoid a possible sentence, if convicted on all counts and enhancements, of four life terms plus 570 years. This argument is unavailing; it is well settled that a plea of guilty that is induced by the possibility of a more severe sentence does not amount to coercion. *Akin v. State*, 2011 Ark. 477 (per curiam) (citing *Thomas v. State*, 277 Ark. 74, 639 S.W.2d 353 (1982)); see *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981); *Adams v. State*, 253 Ark. 286, 485 S.W.2d 746 (1972); *Todd v. State*, 253 Ark. 283, 485 S.W.2d 533 (1972). Appellant's mere concern that he could be subjected to a greater sentence by proceeding to trial does not rise to the level of coercion, which is required in order to demonstrate that a writ of error coram nobis should issue to vacate an accepted guilty plea. See *Pierce v. State*, 2009 Ark. 606 (per curiam).

Because it is clear that appellant could not prevail if his appeal were allowed to proceed, inasmuch as the circuit court did not abuse its discretion in denying appellant's petition for writ of error coram nobis, we dismiss the appeal. Appellant's motions are accordingly moot.

Appeal dismissed; motions moot.