

SUPREME COURT OF ARKANSAS

No. CR 87-209

SANDERS M. CARTER

PETITIONER

V.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered November 10, 2011

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 87-63]

PETITION DENIED.

PER CURIAM

Petitioner Sanders Carter brings a petition before this court that requests that we reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis. Because petitioner does not state facts that are a sufficient basis to establish a meritorious claim for the writ, we deny the petition.

This court affirmed petitioner's conviction on charges of rape, aggravated robbery, and burglary. *Carter v. State*, 295 Ark. 218, 748 S.W.2d 127 (1988). Petitioner unsuccessfully challenged that conviction through a number of different proceedings for various postconviction remedies, including two petitions under Act 1780 of 2001 Acts of Arkansas. *See Carter v. State*, 2010 Ark. 29 (per curiam); *Carter v. State*, CR 03-148 (Ark. Feb. 19, 2004) (unpublished per curiam). Both of those petitions failed because petitioner did not establish that there was DNA evidence available with an unbroken chain of custody.

In the petition now before the court, petitioner asserts a violation of the requirements 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 found in only four categories: insanity at the time of trial; a coerced guilty plea; material evidence withheld by the prosecutor; a third-party confession to the crime during the time between conviction and appeal. *Webb v. State*, 2009 Ark. 550 (per curiam). Hence, petitioner's attempt to fall within the third category of recognized error.

Petitioner indicates that evidence was withheld from the defense, but, as the State points out in its response, the documents and testimony that he points to did not exist at the time of trial. The gist of petitioner's argument is that a deposition by the State Crime Lab's serologist provided false testimony at trial. Petitioner has compared the agency case number listed on the report that the defense marked as an exhibit at trial and the case number listed on documents that he obtained in his Act 1780 proceedings, and he has noted a discrepancy. Petitioner's "withheld" evidence consists of this information concerning the evidence tested that references a different case number.

Petitioner's claim fails to fall within the third previously-recognized category of error; as the State asserts, petitioner has not identified any withheld information that was available at or before trial. While the issue here does not present a *Brady* violation, there does appear to have been a hidden error, however, in that there are references to two different case numbers. The crux of the issue that petitioner presents is a question of whether there was an unrecognized break in the chain of custody—that is, whether the samples about which the serologist testified were the right ones. To that extent, petitioner presents an issue that does have the potential, under certain circumstances, to be the type of hidden error that may be cognizable in a

proceeding for the writ. Petitioner yet fails to demonstrate that the claim he would make concerning that issue is meritorious.

The remedy in a proceeding for a writ of error coram nobis is exceedingly narrow and 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. *Burks v. State*, 2011 Ark. 173 (per curiam). To warrant a writ of error coram nobis, a petition must bring forth some fact, extrinsic to the record, that was not known at the time of trial. *Pinder v. State*, 2011 Ark. 401 (per curiam). If the samples tested in this case were mislabeled as asserted, then petitioner has identified a hidden error of fact. Having passed that hurdle, he yet has to demonstrate that the error would have been sufficient to prevent rendition of the judgment.

This court will grant permission to proceed with a petition for the writ only when it appears the proposed attack on the judgment is meritorious. *Whitham v. State*, 2011 Ark. 28 (per curiam). The State contends that petitioner has failed to explain how this hidden fact, the break in the chain of custody, would have prevented the rendition of the judgment had it been known to the trial court. If there were a break in the chain of evidence *before* the report was generated, some impact on the outcome of the trial appears to be obvious. While the blood-type evidence presented by the serologist at petitioner's trial is not evidence as strong as current DNA analysis, the serologist's report concerning the rape kit analysis supported the victim's testimony by failing to eliminate petitioner as the rapist. As the State notes, the victim's testimony appears from a cold record to have been compelling, but whether that evidence, if eliminated by a break in the

chain of custody, was sufficient to undermine the judgment is a factual question to be determined by the trial court.

Petitioner, however, does not establish that the break in the chain of custody occurred before the report was generated. This court is not required to accept the allegations in a petition for writ of error coram nobis at face value. *Scott v. State*, 2009 Ark. 437 (per curiam). The report provides the correct names for the victim and the defendant. There was testimony concerning the evidence that was collected that is consistent with the items listed in the report.¹ These facts point toward a break in the chain of custody that occurred after the report was generated, and that did not, as petitioner alleges, impact the reliability of the evidence presented by way of that report.

It is a petitioner's burden to show that the writ is warranted. *Id.* Petitioner has not met that burden in this case, because he has not demonstrated that the facts that he alleges were hidden would have prevented rendition of the judgment. A scrivener's error after the report was concluded may indeed have resulted in some confusion concerning the location of the evidence from petitioner's trial and prevented additional testing, but that same error would not compromise the testing that was performed, as petitioner now asserts.

The State additionally alleges that petitioner has failed in his obligation to diligently pursue the claim, because petitioner has had the documents that demonstrate the error for some time. As petitioner has not demonstrated that his claim, if established, would be meritorious,

¹Petitioner asserts that there were some inconsistencies in that certain hairs were not listed as evidence, but those items on which the testimony indicated the hairs were found were included in the list of evidence collected at the crime scene.

we need not consider whether the petition was brought in a diligent manner. *See Dickerson v. State*, 2011 Ark. 247 (per curiam). We note, however, that the discrepancy in the police department case numbers was not the type of error that would have been readily apparent, even through a careful review of the documents individually, and would have only been discovered through studied and deliberate comparison concerning that particular detail.

Petition denied.