Cite as 2011 Ark. 541

SUPREME COURT OF ARKANSAS

No. CR 90-247

	Opinion Delivered December 15, 2011
MICHAEL WAYNE WILLIAMS PETITIONER v. STATE OF ARKANSAS RESPONDENT	PRO SE PETITION AND AMENDED PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [PULASKI COUNTY CIRCUIT COURT, CR 89-2201] PETITION DENIED.

PER CURIAM

In 1990, petitioner Michael Wayne Williams was found guilty of murder in the first degree, kidnapping, and aggravated assault. He was sentenced to life plus twenty-six years' imprisonment. We affirmed. *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991).

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 with respect to the first-degree murder conviction.[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. *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

[1]For clerical purposes, the petition was assigned the docket number for the direct appeal of the judgment of conviction, CR 90-247.

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)).

Petitioner's sole ground for issuance of the writ is the claim that exculpatory evidence was withheld from the defense at his trial in 1990. We find no basis for a writ of error coram nobis and deny the relief sought.

The first-degree-murder conviction pertained to the shooting death of Virginia McGee. Testimony at trial revealed that petitioner went to McGee's home in search of his girlfriend, who was McGee's niece. Ms. McGee and her boyfriend, Willis Stewart, were asleep in a back bedroom when they awoke to find petitioner standing in the door, holding a gun. Ms. McGee got up and demanded that petitioner leave. She and petitioner moved down a hallway toward the front door, arguing all the while. Mr. Stewart testified that he heard gunshots and then petitioner ran back down the hallway, again demanding to know the whereabouts of his girlfriend. Petitioner then fled the house, and Stewart found McGee in a front bedroom with gunshot wounds to her body. A police detective testified that petitioner told him that he went to McGee's home looking for his girlfriend, disconnected the telephone wires to the house, forced a door open, and went to the back of the house where he found McGee and Stewart asleep. According to petitioner's statement to police, petitioner and McGee then argued as she escorted him toward the front of the house. The two shoved each other at the front door, and McGee told petitioner that he was not the only one who had a gun. As she started to walk across the living room, petitioner shot twice. Dr. Fahmy Malak, the Chief Medical Examiner with the Arkansas State Crime Laboratory, testified that McGee was shot once in the abdomen

and once in the lower back. He stated that both wounds contained gunpowder residue, indicating that the shots were fired at close range. On appeal, petitioner argued that the shots were fired in frustration and that he did not intend to kill McGee.

As grounds for a writ of error coram nobis, petitioner states that in 2010 he obtained a copy of the autopsy report on the victim and learned for the first time that one of the two wounds on the victim's body did not contain gunpowder residue. He contends that the medical examiner gave false testimony that both wounds had residue, and the fact that there was no residue in one of the wounds was withheld by the prosecution. Petitioner further asserts that Dr. Malak's trial testimony concerning placement of the wounds did not agree with police reports concerning the wounds and that Dr. Malak had a history of giving false testimony in trials. He argues that, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution's suppression of evidence that did not support Dr. Malak's testimony was a violation of due process of law.

To establish a *Brady* violation, three elements are required: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Larimore*, 341 Ark. at 404, 17 S.W.3d at 91. Petitioner has appended to his petition a page from the autopsy report on the victim which states that one of the two wounds does not show apparent gunpowder residue. He does not contend that this report and police reports concerning the victim's wounds were not available to the defense at the time of trial.

Moreover, at trial, counsel for the defense said that she might be willing to enter into a

stipulation of the autopsy findings if there was a problem with scheduling the medical examiner's testimony. Clearly, the findings were available to the defense. If the medical examiner's testimony differed from the autopsy or a police report, the medical examiner was subject to cross-examination based on the reports.

Petitioner further offers nothing to show that the State in any way suppressed the autopsy report or the police reports. In addition, 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. *Buckley v. State*, 2010 Ark. 154, ___ S.W.3d ___ (per curiam). In order to carry his burden to show that the writ is warranted, a petitioner must demonstrate that, had the information that he alleges was withheld been available, the evidence would have been sufficient to have prevented rendition of the judgment. *Sanders v. State*, 2011 Ark. 199 (per curiam); *see also Harris v. State*, 2010 Ark. 489 (per curiam). Considering the evidence that at least one of the victim's wounds contained gunpowder residue, he has not met that burden, inasmuch as the jury could have concluded from the evidence of residue in one wound that petitioner was in close proximity to victim when he fired the gun. Petitioner has fallen far short of demonstrating that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information at issue been disclosed at trial. *Buckley v. State*, 2010 Ark. 154, ___ S.W.3d ___ (per curiam).

With respect to petitioner's assertions that the medical examiner had a history of mistakes and of giving unreliable testimony at trials other than petitioner's, the claims are not germane

to petitioner's allegation that he is entitled to a writ of error coram nobis. The facts of petitioner's case are at issue, not the facts of other cases.

It should be noted also that petitioner did not act with due diligence in bringing his claim for a writ of error coram nobis. 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. *Newman*, 2010 Ark. 10, ___ S.W.3d ___ (citing *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003)). 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. *Id.* The information petitioner relies on could have been brought forth at trial. He was not diligent in waiting twenty years to bring forth whatever claim he may have concerning the alleged *Brady* violations.

Petition denied.