Cite as 2009 Ark. 606

SUPREME COURT OF ARKANSAS

No. CR09-938

	Opinion Delivered December 3, 2009
DAVID PIERCE APPELLANT	PRO SE MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF [CIRCUIT COURT OF MILLER COUNTY, CR 2007-553]
v.	
STATE OF ARKANSAS APPELLEE	APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 2008, appellant David Pierce entered a plea of guilty to aggravated robbery and was sentenced to 240 months' imprisonment. He subsequently filed in the trial court a pro se petition seeking a writ of error coram nobis.[1] The trial court denied the petition, and appellant has lodged an appeal in this court. In the instant motion, he requests an extension of time to file his brief-in-chief.

From a review of the record, it is clear that appellant cannot prevail on appeal. Accordingly, the appeal is dismissed. The motion for extension of time is moot. An appeal

[1]In those instances, as here, where the judgment of conviction was entered on a plea of guilty or *nolo contendere*, or 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).

of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *See Buckhanna v. State*, 2009 Ark. 490 (per curiam) (citing *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (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 denying the writ. *Magby v. State*, 348 Ark. 415, 72 S.W.3d 508 (2002) (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). Here, the trial court did not abuse its discretion in denying the petition.

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). The function of the writ is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477. A writ of error coram nobis is appropriate when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

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

errors found in one of 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. *Sanders v. State*, 374 Ark. 70, 385 S.W.3d 630 (2008) (per curiam).

Appellant contended in the petition filed in the trial court that the judgment entered against him was subject to collateral attack pursuant to Arkansas Rule of Civil Procedure 60 and Federal Rule of Civil Procedure 60. He offered, however, nothing to demonstrate that the federal rule applied to his postconviction claims, and this court has consistently held that our Rule 60 does not provide an avenue for postconviction relief. *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008); *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); *McArty v. State,* 364 Ark. 517, 221 S.W.3d 332 (2006) (per curiam).

Appellant also referred in his petition to a "coerced confession" and stated that he was coerced into pleading guilty by threat and intimidation by the prosecutor and his attorney. The statements did not support issuance of the writ because he failed to offer any substantiation that he was subjected to any specific mistreatment. *See Turney v. State*, 239 Ark. 851, 395 S.W.2d 1 (1965). Rather, he contended that he was pressed into pleading guilty by fear that if he did not enter a plea he could face a penalty of up to life imprisonment. Appellant has not shown that his mere concern that he could be subject to a greater sentence by proceeding to trial rises to the level of coercion required to demonstrate that a writ of error coram nobis should issue to vacate his guilty plea.

At several points in the petition, appellant argued that material evidence was withheld by the State. Suppression of material exculpatory evidence by a prosecutor is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and falls within one of the four categories of coram nobis relief. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407. The three-prong test to determine whether such suppression has occurred requires showing that (1) the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching, (2) the evidence was suppressed by the State, either willfully or inadvertently, and (3) prejudice ensued. *Brady v. Maryland*, 373 U.S. 83; *Sanders v. State*, 374 Ark. 70, 385 S.W.3d 630. To merit relief, 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. *Sanders*, 374 Ark. 70, 385 S.W.3d 630. Here, appellant did not state the nature of the evidence that was withheld. As a result, he failed to meet the test set out in *Brady*.

Instead, appellant argued that the State failed to show that his conduct satisfied the elements of aggravated robbery. The sufficiency of the evidence was a matter to be settled in the trial court when appellant entered his plea. Claims of insufficient evidence to support a criminal conviction do not fall within one of the four categories providing coram nobis relief. *Pitts*, 336 Ark. 580, 986 S.W.2d 407. Challenges to the sufficiency of the evidence are a direct attack on the judgment of conviction that must be made at trial. *See McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983) (holding that challenges to the sufficiency of the

evidence are a direct attack on the judgment and thus not cognizable in postconviction proceedings under Arkansas Rule of Criminal Procedure 37.1).

Appellant argued throughout the petition that his attorney abandoned him, rendered ineffective assistance, and failed to advise him about the time limitations on filing a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.2(c). He complains that he was required to proceed with a coram nobis petition because it was too late to file a timely Rule 37.1 petition. With respect to appellant's assertions of ineffective assistance of counsel, such claims are properly brought pursuant to a timely petition for postconviction relief under Rule 37.1. Ark. R. Crim. P. 37.1(a); *Buckhanna v. State*, 2009 Ark. 490 (citing *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003) (citing *Strickland v. Washington*, 466 U.S. 668 (1984))). Ineffective assistance claims are outside the purview of a coram nobis proceeding, and a petition for writ of error coram nobis is not a substitute for proceeding under Rule 37.1.[2] *Mills v. State*, 2009 Ark. 463 (per curiam); *see also Scott v. State*, 2009 Ark. 437 (per curiam).

Finally, appellant urged the court to grant a hearing on the allegations contained in the coram nobis petition. As he did not set forth a claim cognizable for error coram nobis relief,

[2]A circuit court may treat any petition raising claims that are properly addressed in a petition for postconviction relief as a petition under Rule 37.1, regardless of the label given it by the petitioner. *Wilmoth*, 369 Ark. at 350, 255 S.W.3d at 422. Here, the time for appellant to file a petition under the rule had elapsed. The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and the circuit court could not have granted relief even if the petition had been considered under the rule. *See Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

no hearing was required, and the trial court did not err in denying the petition without a hearing. *See Deaton v. State*, 373 Ark. 605, 285 S.W.3d 611 (2008) (per curiam).

Appeal dismissed; motion moot.

***David Pierce*, pro se appellant.**

No response.