ARKANSAS SUPREME COURT

No. CR 08-637

	Opinion Delivered **January 30, 2009**
JESSIE EARL HILL, III Appellant v. STATE OF ARKANSAS Appellee	PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL, TO FILE ENLARGED BRIEF, TO SUPPLEMENT ADDENDUM AND FOR ORAL ARGUMENT; PRO SE APPEAL FROM THE CIRCUIT COURT OF OUACHITA COUNTY, CR 95-156, HON. CAROL C. ANTHONY, JUDGE MOTIONS FOR APPOINTMENT OF COUNSEL AND ENLARGED BRIEF MOOT; MOTIONS TO SUPPLEMENT ADDENDUM AND FOR ORAL ARGUMENT DENIED; APPEAL AFFIRMED.

PER CURIAM

In 1995, appellant Jessie Earl Hill, III, was convicted by a jury of first-degree murder in Ouachita County. He was sentenced as a habitual criminal to 720 months' imprisonment to run consecutively to the sentence of life without parole that he received in a Grant County capital murder case. No appeal of the judgment was taken as appellant's pro se motion to file a belated appeal was denied. *Hill v. State*, CR 96-710 (Ark. Nov. 4, 1996) (per curiam).

In 2008, appellant filed in the trial court a pro se motion that sought to correct a sentence imposed in an illegal manner and for a new trial. He then filed a pro se petition for writ for error coram nobis. In a single order, the circuit court denied appellant's motion to correct an illegal

sentence, request for a new trial, and petition for error coram nobis relief. Appellant timely filed a notice of appeal from the order, and the pro se appeal has been lodged in this court. After the matter had been fully briefed by both sides, appellant filed the instant pro se motions for appointment of counsel, to enlarge the argument section of his brief, to supplement the addendum, and for oral argument.

As to the motion to appoint counsel, postconviction matters are considered civil in nature for which there is no absolute right to counsel. *Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (per curiam). We will nevertheless appoint counsel if an appellant makes a substantial showing that he is entitled to relief in a postconviction appeal and that he cannot proceed without counsel. *Howard v. Lockhart*, 300 Ark. 144, 777 S.W.2d 223 (1989) (per curiam). Although the motion would have been denied as appellant fails to make a showing of entitlement to counsel, the motion is nevertheless moot due to appellant's having filed his brief without assistance of appointed counsel.

Next, appellant seeks to file an enlarged argument section in his brief-in-chief. The motion is moot because appellant submitted a brief that complied with the page limit in Arkansas Supreme Court Rule 4-7(b)(2).

Appellant also moves to supplement the addendum with affidavits. According to the motion, appellant "acquired" the affidavits on August 10, 2008, and mailed them to the circuit court for filing. The motion does not identify the affiants, the nature of the affiants' statements, or the purported purpose for which appellant obtained the affidavit. Further, appellant fails to show that the affidavits were a part of the trial court record pursuant to Arkansas Supreme Court Rule 4-7(c)(2), and the motion is denied.

Last, appellant makes a request to present an oral argument in this matter pursuant to

Arkansas Supreme Court Rule 5-1. The rule requires that the request be made contemporaneously when any party files its brief in this court. Appellant's request was untimely as it was filed on November 4, 2008, and not contemporaneously with the parties' briefs that were filed on July 7, 2008, August 5, 2008, and August 18, 2008. Moreover, it is clear that the briefs and record adequately submit the facts and legal arguments presented, and granting an oral argument would not significantly aid the decision-making process. Ark. Sup. Ct. R. 5-1(a)(3). The motion is therefore denied.

Having disposed of the motions, we turn to appellant's appeal from the trial court's order. The order denied the motion to correct a sentence imposed in an illegal manner and for a new trial, as well as the petition for writ of error coram nobis. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). For the reasons set out herein, we find no error and affirm the decision of the trial court.

Appellant's stated points on appeal and the substance of the arguments contained in the appellate brief present an amalgam of issues that follow no discernable format, or necessarily correlate to the pleadings filed in the circuit court. To organize and condense the matters raised on appeal, the issues are summarized as (1) lack of subject-matter jurisdiction, (2) ineffective assistance of counsel, (3) various errors that occurred at trial, (4) various constitutional violations, (5) scientific testing of evidence presented at trial,[1] and (6) prosecutorial misconduct.

[1]The request for scientific testing under Act 1780 was initially raised in the motion to correct a sentence imposed in an illegal manner, and then reiterated in the petition for writ of error coram nobis.

Appellant first contends that the trial court lacked subject-matter jurisdiction over his criminal trial. The basis for this contention is that the charge brought against him was by felony information that was filed in the circuit court by the prosecutor, and not brought by grand jury indictment. Although this argument has been raised innumerable times in criminal matters, it has no merit and "has never prevailed." *Ruiz v. State*, 299 Ark. 144, 165, 772 S.W.2d 297, 308 (1989). Appellant failed to establish that the trial court lacked subject-matter jurisdiction over his criminal case.

Next, appellant complains about ineffective assistance of counsel in virtually every pleading filed in the circuit court and in this court. However, ineffectiveness claims are outside the purview of a coram nobis proceeding, and an Act 1780 petition is limited to issues of scientific testing. *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam); *see* Ark. Code Ann.§§ 16-112-201–202 (Repl. 2006). Neither of the remedies sought by appellant in the trial court provide a substitute for a postconviction proceeding brought under Arkansas Rule of Criminal Procedure 37.1.[2]

Second, appellant presents various arguments related to the trial, including errors that allegedly occurred in appellant's case. His complaints include a defective felony information that was filed by the prosecutor, insufficient evidence to support his conviction, and entitlement to present affirmative defenses and argue accomplice liability. He presents at length the evidence that he claims supports his innocence, including testimony from myriad witnesses that would be presented if granted an evidentiary hearing or a new trial. However, sufficiency of the evidence,

Act 1780 concerns scientific testing of evidence to support a defendant's claim of actual innocence.

[2]Appellant subsequently filed a petition pursuant to Arkansas Rule of Criminal Procedure 37.1 for postconviction relief, which is the proper procedure to raise a claim of ineffective assistance of counsel. The trial court denied the Rule 37.1 petition, and appellant did not file an amended notice of appeal that encompassed the order denying the petition.

errors that occurred at trial, evidentiary matters and other direct challenges to a judgment are properly brought in a direct appeal. These issues are not properly raised in a motion to correct an illegal sentence or a petition for coram nobis relief.[3]

Third, appellant raises constitutional violation arguments in the circuit court and on appeal. These various arguments are not fully delineated, and the allegations often appear as an unrelated contention that is interspersed within another argument. For example, in appellant's brief to this court, he captions one argument as "due process" but argues entitlement to scientific testing. Even if these arguments had been comprehensible, constitutional issues must be raised at trial or on direct appeal as with other direct attacks on a judgment. *See Williams v. State,* 346 Ark. 54, 56 S.W.3d 360 (2001).

Appellant's next claim is a request for scientific testing pursuant to Act 1780 of 2001.[4] Act 1780 provides that a writ of habeas corpus can be issued based upon new scientific evidence proving that a person is actually innocent of the offense or offenses for which he or she was convicted.

A number of predicate requirements must be met before a circuit court can order that testing be done under the act. Ark. Code Ann. §§ 16-112-201–203. One requirement is that the type of scientific testing sought must not have been available at trial, but has become available through advances in technology. Ark. Code Ann. §§ 16-112-201(a)(1), 16-112-202. Also, the identity of

[3]*See e.g. Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001) (noting that direct attacks on a judgment are proper in direct appeals and not postconviction proceedings); *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001) (stating that a collateral attack on a conviction does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal); *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995) (recognizing that attacks on the sufficiency of the evidence and other evidentiary matters are properly brought in a direct appeal); *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997) (per curiam) (holding that the proper time in which to challenge an alleged defect in a felony information is prior to trial).

[4]Act 1780, as amended by Act 2250 of 2005, is codified as Arkansas Code Annotated §§ 16-112-201–208 (Repl. 2006).

the perpetrator must have been at issue during the investigation or prosecution of the offense being challenged. Ark. Code Ann. § 16-112-202(7). Appellant fails here to meet these requirements or show how testing would prove his actual innocence.

Appellant's thirty-nine-page motion filed below sought DNA and latent-fingerprint testing of the .22-caliber revolver identified as the murder weapon. He contended that testing for fingerprints would conclusively determine that another person, whom he identified as Martin Gossett, also fired the gun and actually killed the victim. In denying the motion, the trial court found that no testing was necessary under the circumstances. On appeal, appellant expands upon the type of scientific testing he seeks, but is limited to the tests requested in the original motion. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000) (holding that a party cannot change the nature and scope of his argument on appeal, but is bound by the extent and character of the objections and arguments presented at trial).

The transcript of appellant's trial shows that appellant took the witness stand in his own defense.[5] In his testimony, he admitted that on the night of the victim's murder, Mr. Gossett handed the gun in question to him. He admitted that Mr. Gossett did not accompany him and a third person to the victim's door where the shooting occurred. He admitted that he shot at least two times at the victim during the fatal confrontation. He also admitted that after the shooting, appellant gave the gun back to Mr. Gossett, who later threw the gun in a ditch.

Based on this testimony alone, it is clear that any testing conducted on the gun would not

[5]The record in appellant's criminal case, which included the trial transcript, was tendered to this court in conjunction with the motion for belated appeal. As a part of the public record already filed with the appellate court, the trial record need not be incorporated to form a part of the record before us. *Drymon v. State,* 327 Ark. 375, 938 S.W.2d 825 (1997) (per curiam); *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998) (per curiam). We may go to the record to affirm. *McGehee v. State, supra*.

yield the unassailable determination that appellant was innocent in this matter as required under sections 16-112-201(a)(1) and 16-112-202. Appellant admitted that he held the gun, and he admitted that he fired shots at the victim. Even if Mr. Gossett's fingerprints were on the gun, which would be expected based on appellant's trial testimony, the presence of those fingerprints would not exonerate appellant in the victim's murder. The mere presence or absence of fingerprints on the murder weapon could not prove or disprove who fired the fatal shot.

Appellant additionally failed to meet certain predicate requirements for testing. Under section 16-112-201(a)(1), the requested testing must not have been available at trial. Fingerprint analysis was available when appellant's trial was conducted, but he claims that the Automated Fingerprint Identification System ("AFIS") was not. Utilizing AFIS, as urged by appellant, would at most result in a comparison of any latent fingerprints to a wide database of suspects for identification purposes. But a comparison of fingerprints to a large number of individuals would not be necessary to identify the fingerprints on the gun that belonged to appellant and Mr. Gossett.

Also, section 16-112-202(7) requires that the identity of the perpetrator to be at issue during the trial, and that was not the case here. At no time did the prosecutor or appellant claim that an unknown person killed the victim. Moreover, this requirement is not satisfied simply by appellant's claim here that the fatal shot came from Mr. Gossett rather than himself. Appellant fails to demonstrate that he was entitled to scientific testing under Act 1780.

Finally, we consider appellant's claim for relief pursuant to a petition for writ of error coram nobis.[6] Denial of a coram nobis petition is reviewed by appeal under an abuse of discretion standard.

[6]Procedurally, where a judgment of conviction was not appealed, a petition for writ of error coram nobis is filed directly in the trial court. *Dansby v. State,* 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam). Here, appellant attempted to file a belated appeal from his conviction, which was denied. Jurisdiction thus remained in the trial court and appellant correctly filed the petition there.

Cloird v. State, 357 Ark. 446, 182 S.W.3d 477 (2004). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *Id.*

Appellant argues throughout his circuit court pleadings and on appeal that a vast conspiracy existed for the exclusive purpose of ensuring that he was convicted and incarcerated. As part of this conspiracy, appellant claims that the prosecutor withheld material and exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Prosecutorial misconduct of this nature forms one of the four possible categories for relief under a petition for writ of error coram nobis.[7] 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. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000).

Here, a review of the pleadings filed in the circuit court and on appeal fails to disclose any comprehensible or substantiated allegation of a *Brady* violation on the part of the prosecutor. Appellant's conclusory averments amount to nothing more than that. In denying the petition, the trial court found that appellant failed to show that the prosecutor wrongfully withheld any evidence. The circuit court was not required to accept the allegations in appellant's petition for writ of error coram nobis at face value. *Larimore, supra.*

In a petition for writ of error coram nobis, it is the petitioner's burden to show that the writ is warranted. *Cloird v. State, supra*. Appellant has failed to make a showing that the allegations

[7]The other categories are insanity at the time of trial, a coerced guilty plea, or a third-party confession to the crime during the time between conviction and appeal. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam).

contained in his petition or on appeal were meritorious and warranted issuance of a writ of error coram nobis. We find that the trial court did not abuse its discretion in denying the writ. As no substantive basis existed for granting the petition, we need not reach the issue of whether appellant exercised due diligence in proceeding for the writ.

Motions for appointment of counsel and enlarged brief moot; motions to supplement addendum and for oral argument denied; appeal affirmed.