

ARKANSAS SUPREME COURT

No. CR 00-565

STEVEN BADER
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered February 12, 2009

PRO SE MOTION FOR
CONTINUANCE AND PETITION TO
REINVEST JURISDICTION IN THE
TRIAL COURT TO CONSIDER A
PETITION FOR WRIT OF ERROR
CORAM NOBIS [CIRCUIT COURT OF
BENTON COUNTY, CR 98-440]

PETITION DENIED; MOTION MOOT.

PER CURIAM

In 1999, a jury found petitioner Steven Bader guilty of first-degree murder and sentenced him to forty years' imprisonment in the Arkansas Department of Correction. In addition, petitioner's probation on three additional charges was revoked as a result of the conviction. This court affirmed the judgment. *Bader v. State*, 344 Ark. 241, 40 S.W.3d 738 (2001). Petitioner has now filed in this court a pro se petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.¹ After a judgment has been affirmed on appeal, a petition filed in this court for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

Petitioner filed a motion for continuance after the State filed a response to his petition. In the motion, petitioner requests additional time in which to file a reply to the State's response. We

¹For clerical purposes, the instant petition was assigned the same docket number as the direct appeal.

do not consider the motion because it is clear from the petition that petitioner has not raised claims cognizable in a petition for writ of error coram nobis.

Petitioner asserts grounds for issuance of the writ based upon his claim that the victim died of causes other than the beating petitioner was accused of inflicting. Petitioner questions the sufficiency of the evidence used to convict him on that basis, and includes in his petition allegations of judicial bias that resulted in improper statements to the jury, trial error in that prejudicial pictures that he had not been allowed to view before trial were introduced into evidence, and ineffective assistance of counsel. None of petitioner's claims asserts facts not known at the time of trial.

The function of the writ of error coram nobis 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 (2004). For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *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 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. *Id.* at 583, 986 S.W.2d at 409.

Petitioner attempts to raise the third category by alleging that the prosecutor "withheld" the photos because he did not see them prior to introduction at trial. He does not claim that counsel was

unaware of the photos. Moreover, he does not allege that the photos or the information concerning the cause of the victim's death were not available at trial. The photos were introduced at trial. The record indicates that the doctor who provided the information petitioner cites concerning the cause of death of the victim testified as to those facts at petitioner's trial. None of the facts petitioner cites were hidden at the time of trial. Each of the facts petitioner presents in his claims was brought forward before rendition of the judgment and was not extrinsic to the record.

Petitioner's claims concerning sufficiency of the evidence, improper statements by the trial court, and ineffective assistance of counsel are claims that could have been raised on appeal or in a proceeding under Arkansas Rule of Criminal Procedure 37.1. A claim of ineffective assistance of counsel in itself is not a ground to grant a writ of error coram nobis. *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam). A claim is not cognizable in a petition for writ of error coram nobis if it may be properly raised in a timely petition for postconviction relief pursuant to Rule 37.1 or on direct appeal. *See id.*

Petitioner failed to set out a claim cognizable in an error coram nobis petition. Accordingly, we deny the petition and petitioner's motion for a continuance is moot.

Petition denied; motion moot.

Brown, J., not participating.