

ARKANSAS SUPREME COURT

No. CACR 05-1183

WALTER A. MCCULLOUGH
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered February 5, 2009

PRO SE PETITION AND
SUPPLEMENTAL PETITION TO
REINVEST JURISDICTION IN TRIAL
COURT TO CONSIDER A PETITION
FOR WRIT OF ERROR CORAM NOBIS
[CIRCUIT COURT OF CRAIGHEAD
COUNTY, WESTERN DISTRICT, CR
2004-820]

PETITIONS DENIED.

PER CURIAM

In 2005, petitioner Walter A. McCullough was found guilty by a jury of committing a terroristic act and first-degree battery. He was sentenced as a habitual criminal to an aggregate term of 960 months' imprisonment. The Arkansas Court of Appeals affirmed. *McCullough v. State*, CACR 05-1183 (Ark. App. Oct. 11, 2006).

In 2008, petitioner filed in this court a pro se petition and supplemental petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.¹ A petition to reinvest jurisdiction 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. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

Petitions for writ of error coram nobis are rarely granted. *Larimore v. State*, 341 Ark. 397,

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

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). These errors 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.*

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). A writ of error coram nobis is 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. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005). Conversely, issues which were, or could have been, raised at trial and on the record in the direct appeal of the judgment are settled and are not cognizable as grounds for the writ. *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998).

Here, McCullough's petitions contain a litany of alleged wrongs. He contends that (1) material exculpatory evidence was withheld by the prosecutor as part of a conspiracy with law enforcement as well as with trial counsel; (2) he was denied due process and equal protection of the law; (3) he is completely innocent of committing the crimes and cites Act 1780 of 2001; (4) he was convicted in violation of double jeopardy; (5) he received ineffective assistance of counsel; (6) he was denied justice because his direct appeal was improperly affirmed and insufficient evidence did not support his conviction; and (7) he was improperly prevented from pursuing a belated appeal from the denial of his postconviction petition pursuant to Arkansas Rule of Criminal Procedure 37.1.

Petitioner first argues a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in order to meet

one of the four criteria for error coram nobis relief set out in *Pitts v. State, supra*. He contends that employees of the prosecutor's office and police officers colluded to threaten and intimidate material defense witnesses. These threats were allegedly made to force the witnesses to give perjured testimony at trial in support of the prosecution's case against petitioner, resulting in suppression of material exculpatory evidence. He claims that at least one witness was "physically suppressed" so that the witness was prevented from appearing and testifying at the trial for the defense, and also contends that trial counsel and the prosecutor conspired in suppressing the testimony of at least one potential defense witness. Attached to the supplemental petition as exhibits are two affidavits in support of petitioner's suppression and perjured-testimony claims.

The facts presented here do not indicate that material evidence was suppressed by the prosecutor. The record in petitioner's direct appeal reveals that after entry of the judgment, he filed a motion for new trial. Therein, petitioner made the same allegations contained in the matter now before us regarding material exculpatory evidence allegedly being withheld by the prosecutor. The allegations contained in the motion for new trial dispositively demonstrate that the prosecutor's alleged actions of withholding material exculpatory evidence were not extrinsic to the record, or hidden or unknown to petitioner. *Echols v. State, supra*.

Moreover, petitioner raised the witnesses' credibility in the direct appeal. As questioning the witnesses' veracity was a matter settled at trial and on direct appeal, this claim does not present cognizable grounds for issuance of the writ. *Mosley v. State, supra*.

As to the remaining grounds set out in the instant petitions for coram nobis relief, the arguments presented do not involve any of the four categories of error for which the writ is available. *Pitts v. State, supra*; also see Ark. Code Ann. §§ 16-112-201–202 (Repl. 2006) (limiting Act 1780

to issues of scientific testing in a petition for writ of habeas corpus); *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001) (stating that constitutional issues must be raised at trial or on direct appeal as with other direct attacks on a judgment); *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam) (holding that claims of ineffective assistance of counsel are outside the purview of a coram nobis proceeding).

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*, 357 Ark. 446, 182 S.W.3d 477 (2004). Here, petitioner has failed to make a showing that the allegations contained in his petitions were meritorious or were grounds for reinvesting jurisdiction in the trial court to consider a petition for writ of error coram nobis. As no substantive basis exists for granting the petition or supplemental petition, we need not reach the issue of whether petitioner exercised due diligence in proceeding for the writ.

Petitions denied.