Cite as 2011 Ark. 401

SUPREME COURT OF ARKANSAS

No. CR 02-1289

	Opinion Delivered September 29, 2011
STEVEN PINDER PETITIONER V. STATE OF ARKANSAS RESPONDENT	PRO SE PETITION TO REINVEST JURISDICTION IN THE CIRCUIT COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [COLUMBIA COUNTY CIRCUIT COURT, CR 2002-30] PETITION DENIED.

PER CURIAM

On August 20, 2002, petitioner Steven Pinder was found guilty of two counts of rape and sentenced to life imprisonment by a Columbia County jury. We affirmed. *Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004). We subsequently affirmed the trial court's denial of Pinder's petition for postconviction relief. *Pinder v. State*, CR 07-710 (Ark. May 22, 2008) (unpublished per curiam).

Now before us is petitioner's petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.[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. *Dickerson v. State*, 2011 Ark. 247 (per curiam); *Cox v. State*, 2011 Ark. 96 (per curiam); *Fudge v. State*, 2010 Ark. 426 (per curiam).

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

Petitioner bases his entire petition on evidence that was allegedly withheld from the defense by the prosecutor, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which is one of the four categories under which we have held that the writ is allowed.[2] *See Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam). This evidence as alleged by petitioner consists of (1) audio and video tapes of witness interviews that petitioner requested prior to trial, (2) evidence that the State police had conducted an illegal search of petitioner's home, (3) evidence of prior false rape allegations made by the victim against another family member, (4) an accurate record of the trial for use in petitioner's direct appeal, (5) an email to the victim from her boyfriend, and (6) a medical report by Dr. Jerry Jones of Arkansas Children's Hospital that found that the victim in this case was a virgin and "did retain her hymen." Because we find that all of the claims raised by petitioner were known to him at trial, were not in existence at the time of trial, have not been diligently advanced, or were otherwise noncognizable, his petition is denied.

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Newman v. State*, 2010 Ark. 10 (per curiam). 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. *Sanders*, 374 Ark. 70, 285 S.W.3d 630. To warrant a writ of error coram nobis, a petitioner has the burden of bringing

[2]As noted in *Sanders*, the other three 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.

forth some fact, extrinsic to the record, that was not known at the time of trial. *See Dickerson*, 2011 Ark. 247; *Cox*, 2011 Ark. 96.

At least three of the six pieces of evidence that petitioner has proffered were known, or could have been known, to him at trial. First, petitioner admits that he "became aware of [sic] July 31, 2002, of several audio and video recorded interviews conducted by Arkansas State Police officers." Petitioner further admits that he mentioned these tapes to the trial court at the August 1, 2002 pretrial hearing, and the trial court ordered any such tapes turned over to petitioner by August 5, 2002. Petitioner's trial did not begin until August 20, 2002. As such, he cannot claim that he was unaware of these tapes "at the time of trial," and this claim cannot establish a ground for a writ of error coram nobis. *See Rayford v. State*, 2011 Ark. 86 (per curiam).

Similarly, any evidence that the State Police conducted a search of petitioner's home would have been known to petitioner when evidence from that search was introduced at trial, and this evidence will not support coram-nobis relief. *See Dickerson*, 2011 Ark. 247; *Rayford*, 2011 Ark. 86. It does not matter whether that search was illegal, as petitioner alleges, as issues of trial error, even those of constitutional dimension, could have been raised at trial or in some other legal proceeding; such issues are not cognizable in a coram-nobis proceeding. *See Gardner v. State*, 2011 Ark. 27 (per curiam); *Fudge*, 2010 Ark. 426. This includes claims that a search was illegal. *See Gardner*, 2011 Ark. 27.[3]

[3]Petitioner couches his illegal-search claim in *Brady*-claim terms by suggesting that the State withheld evidence that the search was illegal. However, even were we to ignore that the allegedly illegal search and any evidence of it would have been known at trial, such evidence would not be exculpatory or impeaching, inasmuch as it would not go to petitioner's guilt or innocence or undermine the testimony of a witness. Thus, petitioner cannot establish a

Petitioner was also aware at trial of evidence of false rape allegations made by the victim against another family member. By his own admission, these allegations were made "some nine months prior" to appellant's trial, and they were ruled inadmissible under Arkansas's rape-shield laws at a pretrial hearing.[4] Petitioner has failed to identify any evidence regarding these allegations that was not known at trial, and no relief is warranted on this claim. *See Webb v. State*, 2009 Ark. 550 (per curiam).

For reasons similar to the above, petitioner's claim that the State withheld a true and accurate copy of the trial record for petitioner to use during his direct appeal fails. As stated, to warrant a writ of error coram nobis, a petitioner has the burden of bringing forth some fact, extrinsic to the trial record, which was not known at the time of trial. *See Dickerson*, 2011 Ark. 247; *Cox*, 2011 Ark. 96. By definition, the trial record cannot be extrinsic to itself. *Cf. Webb*, 2009 Ark. 550 (holding that allegations that the trial court committed errors during the proceedings were not extrinsic to the record).

The fifth piece of evidence that petitioner claims was withheld by the State is an email sent to the victim from her boyfriend, which allegedly reads, "Now that you got your dad out of the way, we can spend some time together." Petitioner claims that the prosecuting attorney

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Brady violation on this evidence, assuming such evidence even exists. *See Strickler v. Green*, 527 U.S. 263, 281–82 (1999).

[4] Much of petitioner's argument on this piece of evidence is an attack on the trial court's ruling that the evidence was inadmissible. Such attacks are allegations of trial error, which should have been raised at trial and on direct appeal, and are not cognizable in a petition for writ of error coram nobis. *See Fudge*, 2010 Ark. 426.

"came to possess" this email and failed to disclose it to the defense. Petitioner does not, however, establish that the email existed at the time of trial. Inasmuch as the writ functions to secure relief from "a judgment rendered while there existed some fact that would have prevented its rendition had it been known," *Williams v. State*, 2011 Ark. 203 (per curiam), it stands to reason that a petitioner who is asserting a *Brady* violation must establish that the allegedly withheld evidence existed at the time of trial. Where, as here, a petitioner fails to establish that fact, that evidence cannot support coram-nobis relief.

Finally, petitioner's sixth proffered basis for coram-nobis relief is that the State withheld a medical report written by Dr. Jerry Jones at Arkansas Children's Hospital based on a January 18, 2002 examination of the victim. The State argues that petitioner has not shown diligence in advancing his claim on this point. We agree.

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 (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.* Petitioner admits that he has known of this report since November 2003, yet his petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis was not filed with this court until May 16, 2011, seven-and-one-half years later. He has offered no explanation for this delay. In the absence of a valid excuse

for delay, a coram-nobis petition is subject to denial. *Scott v. State*, 2010 Ark. 363 (per curiam). Petitioner has fallen far short of demonstrating diligence vis-a-vis this medical report.

Based on all of the foregoing, we find no good cause stated by petitioner to grant leave to proceed with a petition for writ of error coram nobis. Accordingly, the petition is denied.

Petition denied.