Cite as 2012 Ark. 401

SUPREME COURT OF ARKANSAS

No. CR 11-852

Opinion Delivered October 25, 2012

JIMMY EDD LEE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

PRO SE APPEAL FROM THE LAFAYETTE COUNTY CIRCUIT COURT, CR 05-03, HON. JOE E. GRIFFIN, JUDGE

AFFIRMED.

PER CURIAM

This appeal arises from the denial of appellant Jimmy Edd Lee's petition for writ of error coram nobis that he filed in the trial court concerning his 2006 conviction on a charge of possession of drug paraphernalia with intent to manufacture methamphetamine. The judgment in that case reflects that appellant entered a guilty plea to that charge and received a period of probation, which, in a later order, was revoked. *See Lee v. State*, CACR-07-684 (Ark. App. Dec. 5, 2007) (unpublished).

In 2011, appellant filed a petition for writ of error coram nobis and an amended petition, along with some exhibits that were apparently intended to supplement the petition. In the petitions, appellant alleged that the prosecutor had withheld information about certain police reports that appellant contended exonerated him and could have been used to impeach the officer's testimony about events as reflected in other later reports. Appellant asserted that, because this information was withheld, the trial court was not presented with a sufficient factual basis on which to accept the plea and that he would not have entered the plea if he had been

aware of the information.[1] He also included a claim that he was not convicted of the charge indicated on the judgment because the trial court did not specify that the substance manufactured was methamphetamine. On appeal, appellant contends that the trial court's decision that the petition was without merit as to these claims was erroneous.[2] We cannot conclude that the trial court's decision to deny the petition was an abuse of discretion or that appellant established that his sentence was illegal, and we affirm.

The standard of review of a denial of a petition for writ of error coram nobis is whether the circuit court abused its discretion in denying the writ. *Carter v. State*, 2012 Ark. 186 (per curiam); *Benton v. State*, 2011 Ark. 211 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam). An abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *Estrada v. State*, 2011 Ark. 479 (per curiam).

The remedy in a proceeding for a writ of error coram nobis is exceedingly narrow and 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. *Burks v. State*, 2011 Ark. 173 (per curiam). To warrant a writ of error coram nobis, a petitioner has the burden of bringing forth some fact,

---

[1]Although the judgment references a different case, it appears that appellant may have intended to enter an *Alford*-type plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), in an attempt to preserve his right to later assert actual innocence.

[2]The State contends that the trial court did not consider the amended petition, and appears to contend that appellant did not receive rulings on some of the matters addressed in this opinion. The only material included in the amended petition, however, did not pertain to the issues raised on appeal. In addition, to the extent that one of the claims raised on appeal is stated as a question of an illegal sentence that implicates an issue of subject-matter jurisdiction, that type of claim may be raised at any time. *See White v. State*, 2012 Ark. 221, 408 S.W.3d 720; *see also Gavin v. State*, 354 Ark. 425, 125 S.W.3d 189 (2003) (noting that a lack of subject-matter jurisdiction may be raised at any time by either party, or by this court on its own motion).

extrinsic to the record, that was not known at the time of trial. *Martin v. State*, 2012 Ark. 44 (per curiam). A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Carter*, 2012 Ark. 186; *Loggins v. State*, 2012 Ark. 97 (per curiam); *Grant v. State*, 2010 Ark. 286, 365 S.W.3d 894 (per curiam).

Appellant's claims that the prosecution withheld evidence of a prior police report alleged a violation of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Some allegations of a *Brady* violation may fall within one of the four categories of error that this court has previously recognized as grounds for the writ.[3] *See McFerrin v. State*, 2012 Ark. 305 (per curiam).

When a petitioner who seeks the writ has stated a possible *Brady* violation, he must then demonstrate (1) that the withheld evidence was available to the State before trial; (2) that the withheld evidence was favorable to the defense; (3) that prejudice ensued; (4) that there was 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; and (5) that the defendant raised the possible *Brady* violation in a timely manner. *See Howard v. State*, 2012 Ark. 177, 403 S.W.3d 38. The fact that a petitioner alleges a *Brady* violation alone is not sufficient to provide a basis for error coram nobis relief. *McFerrin*, 2012 Ark. 305. Assuming that the alleged withheld evidence meets the requirements of a *Brady* violation and is both material and prejudicial, in order to justify issuance of the writ, the withheld material evidence must also be such as to have prevented rendition of the judgment had it been known at the time of trial. *Camp v. State*, 2012

[3]The State contends that, as an initial matter, appellant should not be permitted to seek the writ on the basis of withheld evidence where he entered a guilty plea on the charge. The situation here is similar to that in *Barker v. State*, 2010 Ark. 354, 373 S.W.3d 865, and, as in that case, the issue was not addressed below and there has been no adversarial development of the issue in the briefs. We again decline to address the issue.

Ark. 226 (per curiam). In addition, a petitioner must demonstrate due diligence in making application for the writ, which, in cases asserting a *Brady* violation, requires that the petitioner raised the possible *Brady* violation in a timely manner. *See Howard*, 2012 Ark. 177, 403 S.W.3d 38.

In this case, appellant failed to establish that the State withheld any evidence or that appellant raised his claims concerning withheld evidence in a timely manner. As the trial court noted in its order, the defense filed pleadings in the case, in particular those concerning a motion to dismiss for lack of probable cause, that included assertions that the police had taken positions in affidavits for the arrest warrant and earlier reports that were inconsistent with those taken later. The defense was therefore aware of the reports that appellant referenced in his petition for the writ and of discrepancies in the officer's statements. It does not appear that the reports were withheld from the defense, and, if the reports had been previously withheld, because the defense had been made aware of the reports prior to entry of appellant's plea, appellant could not demonstrate due diligence in only now acting on that information.[4] We cannot say that the trial court abused its discretion in determining that there was no withheld evidence, and, even if there had been evidence withheld, appellant did not diligently pursue his remedies in that regard.

Appellant also contends on appeal that he was deceived by the prosecution as to the charge that he had agreed to plead to and that there was no factual basis for the plea on which he was convicted. These claims are all tied to appellant's allegation that he believed that he

[4]Appellant contends that he did not become aware of the information until later, even if his attorney had been aware of the reports before the judgment. Because the information was referenced in the pleadings, it is clear, however, that appellant could have discovered the information with the exercise of due diligence.

entered his plea to, and the trial court took the plea on, a charge that did not specify methamphetamine as the controlled substance that was intended to be manufactured. But, even in the materials appellant referenced as an exhibit, which appear to include a part of the transcript of the plea hearing, the reference by the court is to the charge in the original information, which does identify methamphetamine as the controlled substance. Appellant provided no facts in his petition that would support his claim that he believed that he was entering a plea to a charge other than that listed on both the information charging him and the judgment. Rather, the facts that appellant set out support the proposition that appellant was advised that he was entering a plea to the charge shown on his judgment.

Appellant's claim that there was no factual basis for the plea, without a basis to support appellant's claim of withheld evidence, also fails. A challenge to the factual basis of the plea may be raised in a proceeding under Arkansas Rule of Criminal Procedure 37.1 (2006). *See O'Connor v. State*, 367 Ark. 173, 238 S.W.3d 104 (2006) (per curiam). If there were no hidden facts that would have prevented such a claim, then, clearly, the claim was cognizable in a Rule 37.1 proceeding. A petition for writ of error coram nobis is not a substitute for proceeding under Rule 37.1. *Estrada*, 2011 Ark. 479.

We agree that appellant stated no basis for the writ to issue in any of the claims that he presented. The trial court did not abuse its discretion in denying the writ. Accordingly, we affirm.

Affirmed.

Jimmy Edd Lee, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.