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SUPREME COURT OF ARKANSAS

No. CR09-609

HUTSON BURKS PETITIONER v. STATE OF ARKANSAS RESPONDENT	**Opinion Delivered** May 2, 2013 PRO SE PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [PULASKI COUNTY CIRCUIT COURT, CR 07-598] PETITION DENIED.

PER CURIAM

In 2008, a jury found petitioner Hutson Burks guilty of aggravated robbery and theft of property in the armed robbery of two bank employees as they were filling an ATM machine. He was sentenced to 324 months' imprisonment and 216 months' imprisonment on the respective charges. We affirmed the judgment. *Burks v. State*, 2009 Ark. 598, 359 S.W.3d 402.

In 2010, petitioner filed a petition in this court seeking to have jurisdiction reinvested in the trial court to consider a petition for writ of error coram nobis. The petition was denied. *Burks v. State*, 2011 Ark. 173 (per curiam). Now, approximately two years after the petition was denied, petitioner again seeks leave to have jurisdiction reinvested in the trial court to consider a coram-nobis petition.[1] Petitioner has again failed to show that the writ is warranted.

[1]As with the first such petition, the petition was assigned the same docket number as the direct appeal in the case.

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. *Sparks v. State*, 2012 Ark. 464 (per curiam); *Grant v. State*, 2010 Ark. 286, 365 S.W.3d 849 (per curiam) (citing *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61); *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Sparks*, 2012 Ark. 464; *Coley v. State*, 2011 Ark. 540 (per curiam); *Fudge v. State*, 2010 Ark. 426 (per curiam); *Barker v. State*, 2010 Ark. 354, 373 S.W.3d 865; *Larimore v. State*, 341 Ark. 397, 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. *Coley*, 2011 Ark. 540 (citing *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam)).

We have held that a writ of error coram nobis is 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. *Pitts*, 336 Ark. at 583, 986 S.W.2d at 409. 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. *Sparks*, 2012 Ark. 464; *Coley*, 2011 Ark. 540; *Pinder v. State*, 2011 Ark. 401 (per curiam); *Cloird v. State*, 2011 Ark. 303 (per curiam); *see also Sanders v. State*, 374 Ark. 70, 285 S.W.3d

630 (2008) (per curiam); *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). The petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. *Williams v. State*, 2011 Ark. 541 (per curiam); *Pinder*, 2011 Ark. 401; *Webb v. State*, 2009 Ark. 550 (per curiam); *Sanders*, 374 Ark. 70, 285 S.W.3d 630. Coram-nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Sparks*, 2012 Ark. 464; *Cloird*, 2011 Ark. 303; *Smith*, 2011 Ark. 306; *Gardner v. State*, 2011 Ark. 27 (per curiam); *Barker*, 2010 Ark. 354, 373 S.W.3d 865; *Penn v. State,* 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

As grounds for the writ, petitioner alleges that, after he was convicted, it was discovered that the prosecution relied on the false testimony of the two victims to obtain the conviction. He states that the victims testified at trial that they were never asked to participate in a photo or physical lineup to identify the perpetrator of the crime when in fact they had participated in a photo lineup and had picked another man as the culprit. He asserts that the prosecution wrongfully withheld the information from the defense, which could have been used to impeach the victims' testimony that he was the perpetrator. Petitioner argues that the prosecution's conduct constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

This court has previously recognized that a writ of error coram nobis was available to address errors pertaining to material evidence withheld by the prosecutor. *Camp v. State*, 2012 Ark. 226 (per curiam); *Webb*, 2009 Ark. 550; *Hogue v. State*, 2011 Ark. 496 (per curiam). There are three elements of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the

evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Howard v. State*, 2012 Ark. 177, ___ S.W.3d ___; *Sanders*, 374 Ark. at 72, 285 S.W.3d at 633.

Petitioner has not presented facts to support a *Brady* violation. The fact that a petitioner alleges a *Brady* violation alone is not sufficient to provide a basis for error-coram-nobis relief. *Camp*, 2012 Ark. 226. 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. *Id.* To merit relief, a petitioner must demonstrate that there is 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 this probability must be based on facts to substantiate the claim. *See id.* It is a petitioner's burden to show that the writ is warranted, *Scott v. State*, 2009 Ark. 437 (per curiam), and this court will grant permission for a petitioner to proceed with a petition for writ of error coram nobis only when it appears that the proposed attack on the judgment is meritorious. *Hogue*, 2011 Ark. 496. We are not required to accept the allegations in a petition for writ of error coram nobis at face value. *Goff v. State*, 2012 Ark. 68, ___ S.W.3d ___ (per curiam). Petitioner here has not shown that the prosecutor withheld evidence, suborned perjury, or otherwise committed a violation of *Brady* because he has presented no substantiation of any kind that the violation occurred.

First, petitioner does not state when or how he discovered that the victims had viewed

a photo lineup, nor does petitioner otherwise provide factual substantiation for the claim that the prosecution withheld information from the defense. It is the petitioner's burden to show that the writ is warranted, *Thompson v. State*, 2012 Ark. 339 (per curiam), and a bare assertion with no factual support does not justify reinvesting jurisdiction in the trial court to consider a petition for writ of error coram nobis. There is a distinction between fundamental error which requires issuance of the writ and newly discovered information which might have created an issue to be raised at trial had it been known. *Jacksonv v. State*, 2010 Ark. 81 (per curiam) (citing *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998) (per curiam)); *see also Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam). Petitioner's mere statement that the victims gave false testimony at trial does not give rise to a showing of fundamental error that requires issuance of the writ. *Jackson*, 2010 Ark. 81.

In its response to the petition, the State argues that the petition should be denied on the basis that petitioner was not diligent in bringing his claims for relief. We find that the State's argument has merit.

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. *Flanagan v. State*, 2010 Ark. 140 (per curiam); *Deaton v. State*, 373 Ark. 605, 285 S.W.3d 611 (2008) (per curiam). 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. *Anderson v. State*, 2012 Ark. 270, ___ S.W.3d ___. Petitioner was convicted in 2007. He filed his first petition

in 2010 in this court to reinvest jurisdiction in the trial court to consider a coram-nobis petition. In 2013, he filed this second petition. Again, there is no explanation as to when petitioner alleges that he learned about the victims' alleged false testimony, and there is no statement as to why petitioner did not bring his claim to this court in his first petition. Under these circumstances, it cannot be said that petitioner acted with diligence in bringing his claims. Even if petitioner here had stated a ground for the writ, which he failed to do, he also failed to meet any of the requirements of due diligence. That failure alone would constitute good cause to deny the petition. *See Thompson*, 2012 Ark. 339.

Petition denied.

Hutson Burks, pro se petitioner.

No response.