Cite as 2009 Ark. 309 (unpublished)

# ARKANSAS SUPREME COURT

**No.** CR 07-1318

ROBERT T. MAXWELL
a/k/a G-DOFFEE
Petitioner

v.

STATE OF ARKANSAS
Respondent

**Opinion Delivered** May 21, 2009

PRO SE PETITION TO REINVEST JURISDICTION IN TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [CIRCUIT COURT OF PULASKI COUNTY, CR 2006-2198]

PETITION DENIED.

**PER CURIAM**

In 2007, petitioner Robert T. Maxwell, who is also known as G-Doffee, was found guilty by a jury of first-degree unlawful discharge of a firearm from a vehicle and four counts of second-degree discharge of a firearm from a vehicle. He was sentenced as a habitual offender to an aggregate term of life imprisonment plus fifteen years. We affirmed. *Maxwell v. State*, 373 Ark. 553, 285 S.W.3d 195 (2008).

Now before us is petitioner's pro se petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.[1] The 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).

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

A writ of error coram nobis, an extraordinary remedy that is rarely granted, 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.*

After a conviction has been affirmed, the writ is appropriate to secure relief from a judgment when a petitioner can demonstrate that a fundamental error of fact existed that was not addressed, or could not have been addressed, at trial because it was extrinsic to the record and somehow hidden or unknown to the petitioner. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004); *State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000). Moreover, a petitioner must show that had the fact been known to the trial court, it would have prevented rendition of the judgment, and that it was not brought forward before rendition of judgment through no negligence or fault of the petitioner. *Cloird v. State*, *supra*; *State v. Larimore*, *supra*.

Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). The court is not required to accept the allegations contained in a petition at face value. *Cloird v. State*, *supra*. "The mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of specific facts relied upon and not merely state conclusions as to the nature of such facts." *Cloird v. State*, 357 Ark. at 450, 182 S.W.3d at 479 (quoting *State v. Larimore*, 341 Ark. at 407, 17 S.W.3d at 93).

Here, petitioner sets out six grounds for coram nobis relief. In the first two arguments, petitioner contends that a fundamental error occurred when the prosecutor failed to disclose to petitioner prior to trial the names and expected testimony of two material prosecution witnesses. Petitioner complains that the trial testimony of one witness, Cedric Barnes, was coerced and amounted to inadmissible hearsay. He also contends that the testimony of both witnesses, Barnes and Ronald Andrejack, presented circumstantial evidence of petitioner's guilt that petitioner would be able to refute.

Although petitioner couches the claims in terms of material evidence being withheld by the prosecutor, these arguments concern sufficiency of the evidence and alleged trial errors. Claims of insufficient evidence to support a criminal conviction, including the requisite mental state as an element of a crime, and trial errors pertaining to discovery matters do not fall within one of the four categories providing coram nobis relief. *Pitts. v. State*, *supra*. These claims are direct challenges to the judgment and properly brought in a direct appeal. *McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam).

In petitioner's third argument, he contends that another person confessed to committing the crimes and complains again that there was insufficient evidence introduced at trial to sustain his conviction. One of the four categories for coram nobis relief concerns a third-party confession to the crime during the time between conviction and appeal. *Pitts. v. State*, *supra*; *Brown v. State*, 330 Ark. 627, 955 S.W.2d 901 (1997) (per curiam).

Petitioner avers that his wife and codefendant, Princess Smith, confessed to the crimes after petitioner was convicted. Petitioner's averment has no factual basis. The record in the

direct appeal reveals that Princess testified during the trial that she was responsible for all the shots that were fired and that petitioner was completely innocent of the crimes.

Moreover, error coram nobis relief is limited to cases in which a third party confessed to the crime during the time between conviction and appeal. *Brown v. State*, *supra* (citing *Davis v.State*, 325 Ark. 96, 925 S.W.2d 768 (1996); *Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990)). Relief will not be granted if a coram nobis petition concerns a confession that is not made "within that narrow window of time in which the judicial system is best in a position to weigh with accuracy the merit of the petitioner's claim." *Brown v. State*, 330 Ark. at 631, 955 S.W.2d at 902 (citing *Penn v. State*, *supra*). Princess's trial testimony failed to comply with this timing requirement.

Also, as noted, sufficiency of the evidence is a direct challenge to the judgment and does not warrant coram nobis relief. *McArty v. State*, *supra*. Here, neither the alleged postconviction confession nor the allegation of insufficiency of the evidence is grounds for coram nobis relief.

The fourth ground for a writ of error coram nobis concerns another prosecution witness, Officer Blaine. Petitioner asserts that the prosecutor failed to disclose to petitioner prior to trial the substance of Blaine's expected trial testimony and that Blaine's trial testimony was inadmissible and provided only circumstantial evidence of petitioner's guilt. Petitioner further maintains that the prosecutor suppressed Blaine's patrol car surveillance tape which would have provided exculpatory evidence.

Suppression of material exculpatory evidence by a prosecutor is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and falls within one of the four categories of coram nobis relief. *Pitts v. State*, *supra*. The three-prong test to determine whether such suppression has occurred requires showing that (1) the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching, (2) the evidence was suppressed by the State, either willfully or inadvertently, and (3) prejudice ensued. *Brady v. Maryland*, *supra*; *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam). To merit relief, 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. *Sanders v. State*, *supra*.

Petitioner's claim that a surveillance tape from Blaine's patrol car existed is based solely upon the statement of James Havorath, an unknown person who is not a party to this matter or a witness who testified at trial. This allegation need not be accepted at face value. *Cloird v. State*, *supra*. In addition, petitioner's contention is insufficient to refute Blaine's trial testimony that the surveillance camera in his patrol car was not working at the time this incident occurred. No factual basis supports petitioner's claim of material suppression of exculpatory evidence by the prosecutor.

Petitioner also claims in this point that Blaine gave inadmissible and circumstantial trial testimony and that the prosecutor failed to disclose the substance of the officer's testimony prior to trial. These allegation do not fall within the four categories of coram nobis relief. *Pitts v. State*, *supra*.

In his fifth ground to issue a writ of error coram nobis, petitioner sets out the testimony of Johnny Bowmen. Petitioner claims that Bowmen was a potential material witness who could have proved petitioner's innocence. He further claims that the prosecutor withheld the material exculpatory testimony of this potential witness and the jurors were thus precluded from hearing all the material and exculpatory facts related to the case.

In this argument, petitioner challenges the sufficiency of the evidence which does not provide a basis to grant a petition for writ of error coram nobis. *McArty v. State*, *supra*. And, although he maintains that the prosecutor withheld material exculpatory evidence, he offers no substantiation for that averment. Petitioner's mere claim of a *Brady* violation is insufficient to issue the writ. *Cloird v. State*, *supra*.

In his sixth argument, petitioner claims that the conditions of his wife's incarceration caused her to have a miscarriage. He contends that his wife was physically and sexually assaulted by jail employees, and also contends that he was beaten when he protested his wife's treatment. Petitioner maintains that, as a result, he lost his job, car, house and bank accounts and had nightmares about the treatment he claims that his wife received. He further alleges that he was denied mental health treatment, experienced memory loss and became delusional. All of these allegations form the basis for petitioner's claim that he was insane at the time of his trial. Insanity at the time of the trial is one of the four categories for which a writ of error coram nobis can be issued. *Pitts v. State*, *supra*.

As pointed out above, allegations contained in an error coram nobis petition need not be taken at face value. *Cloird v. State*, *supra*. Apart from the accusations set out by petitioner,

no evidence supports his insanity claim. Prior to trial, petitioner was ordered to undergo a mental health evaluation. The examining psychologist's only diagnosis was that petitioner was malingering. The report also ruled out any type of mental disease or defect that would have prevented petitioner from understanding the proceedings against him or assisting in his own defense. Petitioner provides no factual basis to warrant relief on this point.

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*, *supra*. Here, petitioner fails to make a showing that the allegations contained in his petition 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, we need not reach the issue of whether petitioner exercised due diligence in proceeding for the writ.

Petition denied.