

Cite as 2011 Ark. 27

SUPREME COURT OF ARKANSAS

No. CR 05-472

WALLACE A. GARDNER
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered January 27, 2011

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 2004-1077]

PETITION DENIED.

PER CURIAM

In 2004, petitioner Wallace A. Gardner was found guilty by a jury of capital murder and aggravated robbery. He was sentenced as a habitual offender to an aggregate term of life imprisonment without parole. We affirmed. *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006).

In 2009, approximately three and one-half years after the mandate was issued following affirmance of the judgment, petitioner filed in the trial court an unverified pro se petition to vacate the judgment pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied, and this court dismissed an appeal from the order on the ground that the Rule 37.1 petition was not timely filed. *Gardner v. State*, 2010 Ark. 344 (per curiam).

Now before us is petitioner's pro se petition requesting that this court reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.¹ The 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. *Fudge v. State*, 2010 Ark. 426 (per curiam); *Grant v. State*, 2010 Ark. 286, 365 S.W.3d 894 (per curiam) (citing *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 62); *see also 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. *Fudge*, 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. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). We have held that a writ of error coram nobis was 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. Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Barker*, 2010 Ark. 354; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005). The function of the writ is

¹For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis was assigned the same docket number as the direct appeal of the judgment, CR 05-472.

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. *Grant*, 2010 Ark. 286 (citing *Newman*, 2009 Ark. 539); 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. *Webb v. State*, 2009 Ark. 550 (per curiam); *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Venn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)).

Petitioner's grounds for issuance of the writ may be summarized as follows: his attorney made errors in her representation of him at trial; his defense attorney had a conflict of interest that caused her not to consult with him and not to advocate his cause; his attorney withheld specific information from the jury that would have resulted in a not-guilty verdict had the jury been aware of the information; the trial judge and prosecutor conspired with defense counsel to withhold evidence; the evidence was insufficient to sustain the judgment of conviction; perjured testimony was used to obtain his conviction; he was denied his rights under the Constitution to due process and equal protection of law; his arrest was illegal; evidence used against him was obtained by an illegal search; he was not brought before a judicial officer following his arrest within the time set by the prevailing rules of procedure; coercive police

procedures were used to induce certain persons to confess and make statements prejudicial to him; the prosecutor was allowed by the court to make statements prejudicial to petitioner in voir dire of the jury and in the prosecutor's opening statement; he was denied a speedy trial.

We first note that ineffective assistance of counsel is not a ground for issuance of a writ of error coram nobis. *Fudge*, 2010 Ark. 426; *Grant*, 2010 Ark. 286. Any claims that petitioner desired to raise concerning counsel's representation of him should have been made in a timely petition for postconviction relief under Criminal Procedure Rule 37.1. *Grant*, 2010 Ark. 286.

With respect to petitioner's assertion that his attorney wrongfully withheld information from the jury, it appears that petitioner has misconstrued the ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), which he cites as authority. The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Petitioner's claims pertain to his attorney's alleged failure to allow the jury to become aware of information that petitioner believes would have been favorable to the defense. *Brady* does not concern decisions made by a defendant's own counsel.

As to petitioner's many allegations of trial error and violations of the Constitution, 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 *Fudge*,

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210 Ark. 426; *see also Flanagan v. State*, 2010 Ark. 140 (per curiam). Again, a coram nobis proceeding is limited to the four categories set out above.

This court will grant permission to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis only when it appears the proposed attack on the judgment is meritorious. *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003). Here, petitioner has stated no ground to grant the writ.

Petition denied.