Cite as 2011 Ark. 118

SUPREME COURT OF ARKANSAS

No. CR 86-161

ANTHONY F. THRASH
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered March 17, 2011

MOTION TO REINVEST CIRCUIT COURT WITH JURISDICTION TO CONSIDER PETITION FOR WRIT OF ERROR CORAM NOBIS [DESHA COUNTY CIRCUIT COURT, CR84-48]

MOTION DENIED.

PER CURIAM

Petitioner Anthony F. Thrash received a life sentence on a capital felony murder conviction in Desha County Circuit Court for the death of Tommy Bruce Gill, and this court affirmed the judgment. *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987). Petitioner, through counsel, has filed the pending motion to reinvest jurisdiction in the trial court to consider a writ of error coram nobis,[1] having previously filed two such motions that this court has denied. *See Thrash v. State*, CR 86-161 (Ark. June 5, 2003) (unpublished per curiam); *Thrash v. State*, CR 86-161 (Ark. Feb. 11, 1999) (unpublished per curiam). Petitioner again fails to state facts sufficient to warrant issuance of the writ, and we therefore deny the motion.

The basis for each of petitioner's three petitions to proceed with a petition for error coram nobis relief has been his claim that the prosecution withheld evidence of an agreement between the prosecution and petitioner's accomplice, Deidra Gaddy, for her testimony at

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

petitioner's trial. In his most recent petition, petitioner provides a letter that he contends is newly discovered evidence of the alleged agreement and asserts that, under a new standard of review applicable to the pending petition, he has made an adequate demonstration to proceed in the circuit court.

A prisoner who appealed his judgment and who wishes to attack his conviction by means of a petition for writ of error coram nobis must first request that this court reinvest jurisdiction in the trial court. *Kelly v. State*, 2010 Ark. 180 (per curiam). A petition to reinvest jurisdiction in the trial court is necessary after a judgment has been affirmed on appeal because the circuit court may entertain a petition for the writ only after this court grants permission. *Id.* (citing *Mills v. State*, 2009 Ark. 463 (per curiam)).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Whitham v. State*, 2011 Ark. 28 (per curiam); *Grant v. State*, 2010 Ark. 286, 365 S.W.3d 894 (per curiam). This exceedingly narrow remedy is 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. *McCoy v. State*, 2011 Ark. 13 (per curiam) (citing *Clark v. State*, 358 Ark. 469, 192 S.W.3d 248 (2004)). This court will grant permission for a petitioner to proceed in the trial court with a petition for writ of error coram nobis only when it appears the proposed attack on the judgment is meritorious. *Whitham* , 2011 Ark. 28; *Buckley v. State*, 2010 Ark. 154 (per curiam). It is a petitioner's burden to show that the writ is warranted. *Scott*

v. State, 2009 Ark. 437 (per curiam).

This court has 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. *Gardner v. State*, 2011 Ark. 27 (per curiam); *Webb v. State*, 2009 Ark. 550 (per curiam). Petitioner alleges an error falling within the third category because he alleges violations of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Assuming that petitioner could demonstrate the *Brady* violation as he alleges, he did not establish the type of error to merit coram nobis relief.

The State asserts that the petition should be dismissed as an abuse of the writ because petition has failed to provide new facts to warrant relief on the same claim that he previously presented to this court. With this latest petition, petitioner does, however, include allegations that the prosecuting attorney sent a plea offer to Gaddy shortly after she was arrested, and he includes a letter from the prosecuting attorney in support of the allegation. While petitioner may have presented new facts in his petition, he does not present facts that support a different result in this case.

The fact that petitioner alleges a *Brady* violation is not alone sufficient to provide a basis for error coram nobis relief. *Harris v. State*, 2010 Ark. 489 (per curiam). Assuming that withheld evidence meets the requirements of *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. *Id.*

Petitioner asserts that a new standard is applicable, pointing to language in *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61, that references this last requirement. Petitioner, however, incorrectly concludes that this language reflects a different standard from that utilized in our previous reviews of the two prior petitions. It does not; the fundamental error referenced in our prior opinions is a *Brady* violation that must meet this same criteria.

As we explained in *Harris*, the significant new holding noted in *Newman* was that this court recognized that the cumulative effect of the suppressed evidence is considered to determine whether the allegedly suppressed evidence was material to the guilt or punishment of the individual. *Harris*, 2010 Ark. 489 (citing *Newman*, 2009 Ark. 539, 354 S.W.3d 61). That evidence must still rise to a level that demonstrates 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. *See id.*; *see also State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000) (clarifying contradictory language in previous opinions and applying the standard that "there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the exculpatory evidence been disclosed at trial").

As with the prior two petitions, petitioner's claim here fails because Gaddy's testimony was impeached at trial through a reading of the grant of immunity and questioning on cross examination about her pending trial for the same murder. As was indicated in our previous opinions, the defense was not shown to be prejudiced by the alleged *Brady* violation, and disclosure of an existing agreement between the prosecution and Gaddy at trial was simply not likely to have produced a different result. Petitioner may have asserted new facts, but those facts do not cure the deficiencies in his claim.

Motion denied.