Cite as 2011 Ark. 134

SUPREME COURT OF ARKANSAS

No. CR 10-369

Opinion Delivered March 31, 2011

CHARLES WAYNE GREEN
Appellant

v.

STATE OF ARKANSAS
Appellee

MOTION TO REINVEST CIRCUIT COURT WITH JURISDICTION TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS

MOTION DENIED

PER CURIAM

On February 18, 2010, petitioner Charles Wayne Green was found guilty by a Randolph County jury of four counts of rape and one count of terroristic threatening, and he was sentenced to fifty-six years' incarceration in the Arkansas Department of Correction. Petitioner timely filed an appeal from that verdict, and that appeal remains pending before this court. Petitioner has now filed a motion asking that we hold his pending appeal in abeyance and reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.[1] Because petitioner has failed to show that the writ is warranted, the motion is denied.

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). The filing of the transcript in an appellate court deprives a trial court of jurisdiction. *See Sherman v. State*, 326

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

Ark. 153, 931 S.W.2d 417 (1996); *see also Watkins v. State*, 2010 Ark. 156 (per curiam) (applying the same rule to a petition under Arkansas Rule of Criminal Procedure 37.1 (2010)). Thus, a petition to reinvest jurisdiction is necessary after the transcript is lodged on appeal because a circuit court can only entertain a petition for writ of error coram nobis after this court grants permission. *See generally Kelly*, 2010 Ark. 180 (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).

Specifically, petitioner contends that the prosecuting attorney failed to disclose that the victim in petitioner's case had been arrested twice previously—once for misdemeanor possession of marijuana, to which she pleaded guilty,[2] and once for theft of property, for which no charges had been filed as of the date that petitioner's trial began. Petitioner contends that this evidence, had it been properly disclosed to petitioner, could have been used to discredit the victim by showing that she had a motive to tailor her testimony to please the prosecuting attorney.

In response, the state contends that neither of the undisclosed arrests would have been admissible for impeachment purposes under Arkansas Rule of Evidence 608 (2010), and the state supports this argument by citing our holding in *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994), for the proposition that allegations of theft were not evidence of a "proclivity for untruthfulness." Petitioner contends that the state has miscast his argument, that Rule 608 is not the issue, and that this evidence would have been admissible because we have stated that a defendant has wide latitude to show bias or prejudice on the part of a

[2] The guilty plea was entered on March 3, 2010, fifteen days after the start of petitioner's trial.

witness. *See Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995). Thus, petitioner asserts that the state's failure to disclose this evidence prior to trial amounted to a *Brady* violation.

We note, however, that 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.* In the instant case, even if we were to assume, *arguendo*, that petitioner was correct, and the state's failure to inform him of the victim's prior arrests was a *Brady* violation, he still would have not demonstrated the type of error necessary to merit coram nobis relief.

At petitioner's trial, the victim gave detailed testimony that petitioner had digitally, orally, vaginally, and anally raped her on at least four occasions when she was between seven and eight years old. She recalled each instance of rape in specific detail. She also testified that petitioner threatened to harm her or her mother if the victim told anyone, and, following the fourth rape, petitioner threatened to "do the same thing to [her] baby sister" if she told anyone about the attack.

During cross-examination, trial counsel questioned the victim about inconsistencies between what she had told investigators initially and what she had testified at trial, specifically

focusing on discrepancies between what the victim told investigators that petitioner had done to her and what she said on direct examination. Despite any inconsistencies, the jury returned with a guilty verdict on all four rape counts as well as on the charge of terroristic threatening.

We have consistently held that a rape victim's testimony alone is sufficient and is substantial evidence to support a rape conviction. *Hickey v. State*, 2010 Ark. 109 (citing *Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006)); *see Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007). Inconsistencies in the rape victim's testimony are matters of credibility that are left for the jury to decide. *Hickey*, 2010 Ark. 109; *Ward*, 370 Ark. 398, 260 S.W.3d 292. Here, the jury concluded that the victim, despite any inconsistencies in her recollections, was credible. The question is therefore whether additional evidence in the form of the victim's prior arrests would likely have changed this determination. We do not believe that it would have.

Even if petitioner had been able to present these arrests to the jury, he has presented no evidence that the guilty plea for the misdemeanor marijuana charge was entered, or that the sentence imposed for the plea was more lenient, pursuant to an agreement with the state that the victim testify against petitioner. Nor has petitioner shown that the as-then-uncharged theft of property was dropped by the state following the victim's testimony. In short, he has not demonstrated any evidence to suggest that the victim was biased or was testifying in a manner that was anything other than truthful. We therefore fail to see how this same judgment would not have been rendered or would have been prevented had the petitioner

been informed of the victim's arrests prior to trial. Thus, the defense was not prejudiced by the alleged *Brady* violation.

Motion denied.