Cite as 2011 Ark. 151

SUPREME COURT OF ARKANSAS

No. CR 05-140

Opinion Delivered April 7, 2011

JOSE WILLIAMS
Petitioner

v.

STATE OF ARKANSAS
Respondent

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 2004-2379]

PETITION DENIED.

PER CURIAM

Petitioner Jose Williams was found guilty by a jury of aggravated robbery and misdemeanor theft of property. He was sentenced as a habitual offender to 144 months' imprisonment for the aggravated robbery and one month in the county detention facility for the theft of property. He was further sentenced to an additional sixty months' imprisonment pursuant to Arkansas Code Annotated § 16-90-120(a)–(b) (1987) for having used a firearm in the course of the aggravated robbery. The sentences for the aggravated robbery and firearm enhancement were ordered served consecutively, and the sentence for the misdemeanor to be served concurrently with the sentence for aggravated robbery. We affirmed. *Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005).

Evidence adduced at petitioner's trial revealed that in 2004 a woman working as a cashier at a convenience store in North Little Rock was robbed at gunpoint. She testified that

petitioner was the robber and that he threatened to shoot her. Her testimony was corroborated by a videotape of the robbery from the store's surveillance camera and the testimony of a witness, Melvin Jefferson, who gave petitioner a ride to the store. Jefferson testified that petitioner entered the store while he remained in the car. When petitioner emerged from the store, petitioner, who was holding a "big pistol," told Jefferson that he had "hit these folks."

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 in the case.[1] 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. *Cox v. State*, 2011 Ark. 96 (per curiam); *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 61); *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. *Rayford v. State*, 2011 Ark. 86 (per curiam); *Whitham v. State*, 2011 Ark. 28 (per curiam); *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

[1]For clerical purposes, the petition was assigned the docket number for the direct appeal of the judgment of conviction, CR 05-140.

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. 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. *Grant*, 2010 Ark. 286, 365 S.W.3d 894 (citing *Newman*, 2009 Ark. 539, 354 S.W.3d 61); *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. *Gardner v. State*, 2011 Ark. 27 (per curiam); *Barker*, 2010 Ark. 354, 373 S.W.3d 865; *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005); *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 sole ground for issuance of the writ is that there existed at the time of trial a "Police Investigation Report Sheet" that the prosecution wrongfully withheld from the defense. He states that he was accused by an unnamed witness for the State and that the police

report would have provided impeaching evidence, presumably to challenge the witness's testimony. Petitioner has appended to his petition a copy of a police report dated February 22, 2004, that gives a summary of one detective's visit to the scene of the aggravated robbery. Petitioner has underscored the final sentences that read, "By reviewing the tape, it revealed that there was no evidence to recover at the scene. Photographs were taken and the scene was released at 1116 hours. This investigation continues."

Petitioner does not explain why the defense was unable to obtain the police report at the time of trial or why the document was exculpatory. Even if it may be assumed from the underscoring of that part of the report that states that the tape reviewed by the detective revealed no evidence to recover from the scene, the detective's statement does not call into question the existence of a videotape from the surveillance camera that showed the robbery. The statement may merely indicate that there was no physical evidence of the robbery at the scene to be collected, such as a weapon or a discarded disguise.

The leading precedent concerning evidence not disclosed by the prosecution to the defense is *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a *Brady* violation, three elements are required: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Larimore*, 341 Ark. at 404, 17 S.W.3d at 91 (2000). In *Newman*, 2009 Ark. 539, 354 S.W.3d 61, 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. 2009 Ark. 539, 354 S.W.3d 61.

Assuming that withheld evidence meets these threshold requirements 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. 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. *Buckley v. State*, 2010 Ark. 154 (per curiam).

In order to carry his burden to show that the writ is warranted, petitioner must demonstrate that, had the police report that he alleges was withheld been available, it would have been sufficient to have prevented rendition of the judgment. *See Harris v. State*, 2010 Ark. 489 (per curiam). He has not met that burden. There was eyewitness testimony by the victim who identified petitioner as the robber as well as testimony from Jefferson who saw petitioner enter the store and emerge armed with a pistol. There was also the videotape that showed the robbery. Under these circumstances, it cannot be said that the police report cited by petitioner was sufficient to have prevented rendition of the judgment.

Petition denied.