

SUPREME COURT OF ARKANSAS

No. CR 09-609

HUTSON BURKS
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered April 21, 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 2007-598]

PETITION DENIED.

PER CURIAM

In 2008, a jury found petitioner Hutson Burks guilty of aggravated robbery and theft of property, and it imposed sentences of 324 months' imprisonment and 216 months' imprisonment on the respective charges. This court affirmed the judgment. *Burks v. State*, 2009 Ark. 598, 359 S.W.3d 402. Petitioner has now filed a petition in this court seeking leave to file a petition in the circuit court for writ of error coram nobis.¹ Petitioner has failed to show that the writ is warranted, and we therefore deny the petition.

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

¹For clerical purposes, the petition was assigned the same docket number as the direct appeal.

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)). This court will grant permission for a petitioner to proceed only when it appears the proposed attack on the judgment is meritorious. *Whitham v. State*, 2011 Ark. 28 (per curiam); *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).

In this case, petitioner asserts grounds for the writ on three bases: (1) that after his conviction, it was discovered that the prosecution used illegal means to secure the testimony of witness Emma Mickles; (2) that the prosecution committed violations of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide a pretrial statement of Mickles; (3) that the prosecution committed a *Brady* violation in failing to provide a statement of petitioner's codefendant, Stella Hill.

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). The remedy is exceedingly narrow and 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 has previously recognized that a writ of error coram nobis was available to address errors found in four categories: insanity at the

time of trial; a coerced guilty plea; material evidence withheld by the prosecutor; a third-party confession to the crime during the time between conviction and appeal. *Webb v. State*, 2009 Ark. 550 (per curiam).

Petitioner's first ground for relief turns on the use of Mickles's testimony. As in his direct appeal, he protests that the prosecution's agreement with Mickles for her testimony was illegal. He alleges that it was only after his conviction that the illegal tactics were discovered and that after his conviction Mickles negotiated a greater reduction in her sentence.² Yet, the issue was not unknown at trial, even if the specific results of the agreement had not been confirmed and this court had not ruled on the legality of the agreement. Trial counsel filed a motion to suppress Mickles's testimony based upon the proposed agreement for a reduced sentence. The issue of whether petitioner was able to effectively cross-examine Mickles was one that was addressed at trial and addressed again on appeal. Petitioner's claim does not fall within one of the recognized categories of error.

Petitioner's next two grounds for the writ concern allegations that the prosecution suppressed statements by Mickles and Hill. Allegations of a *Brady* violation fall within the third recognized category of error. The fact that petitioner alleges a *Brady* violation, however, 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 a *Brady* violation

²In our opinion on petitioner's direct appeal, we noted that Mickles had originally requested a ten-year reduction in sentence, but that the circuit court had granted a twelve-year suspended sentence on her prior conviction through a writ of error coram nobis.

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. *Thrash v. State*, 2011 Ark. 118 (per curiam). 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 neither instance does petitioner identify the specific statement that he contends was suppressed. Counsel was obviously aware that the prosecution was to call Mickles, and the record contains what appears to be a reference to Hill³ during a pretrial hearing in which the prosecutor indicated that he would require more time to obtain information about her testimony implicating petitioner. Defense counsel expressed a request for the witness's statement at that hearing.

Petitioner alleges that there were inconsistencies in Mickles's testimony and the allegedly withheld pretrial statement. But, because he does not identify the statement that he contends was withheld, he has failed to demonstrate that the evidence that he alleges was withheld would be sufficient to have prevented rendition of the judgment. Defense counsel cross-examined Mickles concerning her agreement with the prosecution, about statements she had made in testimony that were inconsistent with her previous guilty plea, and about statements within her testimony at trial that were inconsistent. Petitioner has not

³The reference was to someone who had been arrested and confessed to the bank robbery.

demonstrated that any inconsistencies in other prior statements by Mickles would have been any more effective in discrediting her testimony.

Petitioner alleges that Hill, who entered a plea of nolo contendere to charges that she participated in the crime, made a statement that he was not with her on the day of the robbery. He does not provide a copy of the statement that he alleges was withheld, however. Appellant contends that, had the statement been available to the defense, it would have impeached Mickles's testimony that he and Hill were together on the day of the crime. Yet, two bank employees also identified petitioner as having robbed them on the day in question. Even accepting petitioner's claim as to the contents of the statement, he again fails to demonstrate that the evidence would have prevented rendition of the judgment.

This court is not required to accept the allegations in a petition for writ of error coram nobis at face value. *Scott v. State*, 2009 Ark. 437 (per curiam). The application should make a full disclosure of specific facts relied upon and not merely state conclusions as to the nature of such facts. *Id.* In making a determination to grant permission to reinvest jurisdiction in the trial court, this court looks to the reasonableness of the allegations and to the existence of the probability of the truth of those allegations. *Webb v. State*, 2009 Ark. 550 (per curiam) (citing *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003)).

Petitioner fails to provide facts sufficient to meet his burden to show that the writ is warranted. He does not demonstrate the existence of specific material evidence, much less that any particular evidence was withheld from the defense by the prosecution. Moreover, he does

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not demonstrate that the evidence that he alleges to have been withheld, if it could be more specifically identified, would have been sufficient so as to grant relief. Accordingly, we deny the petition.

Petition denied.