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SUPREME COURT OF ARKANSAS

No. CR-95-872

TOMMY MOSLEY PETITIONER V. STATE OF ARKANSAS RESPONDENT	Opinion Delivered: January 24, 2019 PRO SE THIRD PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [GARLAND COUNTY CIRCUIT COURT, NO. 26CR94-486] PETITION DISMISSED.

SHAWN A. WOMACK, Associate Justice

Petitioner Tommy Mosley filed his third petition requesting this court to reinvest jurisdiction in the trial court so that he may file a petition for writ of error coram nobis. Because Mosley reasserts the same grounds as in his previous petition, but without providing additional facts sufficient to provide grounds for the writ, we dismiss the petition. *See Chatmon v. State*, 2017 Ark. 229.

I. *Alleged Grounds for the Writ*

In his latest petition, Mosley proposes four grounds for issuance of the writ. First, he alleges that he was denied counsel after trial and on appeal so that he could present ineffective-assistance-of-counsel and prosecutorial-misconduct claims in a pro se posttrial motion that he filed. In the remaining three proposed grounds for the writ, Mosley asserts

that the prosecution withheld (1) evidence concerning his vehicle that had been seized, (2) statements made by the victim, (3) the victim's underwear worn prior to the rape, (4) DNA results, and (5) medical test results.

II. *Standard*

A writ of error coram nobis is an extraordinarily rare remedy in which the petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. *Jackson v. State*, 2018 Ark. 227, 549 S.W.3d 356. 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 trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of the judgment. *Id.*

The writ is allowed under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Wooten v. State*, 2018 Ark. 198, 547 S.W.3d 683. A writ of error coram nobis is available for addressing certain errors that are found in one of four categories: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. *Id.* The writ is only granted to correct some error of fact, and it does not lie to correct trial error or to contradict any fact already adjudicated. *Smith v. State*, 200 Ark. 767, 767, 140 S.W.2d 675, 766 (1940).

Our standard of review for granting permission to reinvest jurisdiction in the circuit court to pursue a writ of error coram nobis requires that this court grant permission for a petitioner to proceed only when it appears the proposed attack on the judgment is

meritorious. *Howard v. State*, 2012 Ark. 177, 403 S.W.3d 38. In making such a determination, we must look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. *Id.*

III. *Denial-of-Counsel Claim*

In his second petition to reinvest jurisdiction in the trial court to proceed with a petition for the writ, Mosley raised claims based on ineffective assistance of counsel and withheld evidence and his lack of representation for those claims. *Mosley v. State*, 2018 Ark. 152, 544 S.W.3d 55. As we noted in our opinion dismissing that petition, ineffective assistance of counsel is not a ground for the writ. *Id.* Mosley again argues these rejected claims, and he attempts to expand his argument by characterizing these claims as a denial of counsel. He contends that, because denial of counsel is fundamental error, he should be permitted to bring that claim in coram nobis proceedings. Mosley, however, makes only conclusory allegations that he was denied counsel without providing facts to support that claim. His claims amount to claims of ineffective assistance despite his attempt to label them otherwise.

IV. *Withheld-Evidence Claims*

In his second petition, Mosley alleged two related claims that the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), withheld evidence concerning the vehicle Mosley was driving and the victim's statements about an accident that had occurred and damaged the vehicle. Mosley contended that this withheld evidence would have bolstered his

testimony that his fight with the victim occurred before consensual sex and would have discredited the victim's testimony that they fought immediately before and during the rape.

When dismissing the second petition, this court noted that Mosley must establish the three elements of a *Brady* violation to show grounds for the writ: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Mosley*, 2018 Ark. 152, 544 S.W.3d 55. We held that Mosley failed to establish the second element because he did not indicate when he learned that the State had concealed the victim's statement. *Id.* Additionally, he failed as to the third element because the evidence that Mosley alleged had been withheld, even if it impeached the victim concerning the fight, failed to impeach the victim's testimony concerning whether the intercourse was consensual because the victim's graphic description of the act was supported by medical testimony about her injuries. *Id.*

In resurrecting these claims in his new petition, Mosley alleges that he learned of the victim's statement from the State's response to his pro se motion for a bill of particulars and that this court used an inappropriate test to determine whether he may have been prejudiced by the alleged suppression. Interwoven with these arguments are allegations of trial error, a double-jeopardy violation, and ineffective assistance of counsel.

Mosley's new facts and arguments do nothing to further his claim that this evidence was withheld. Mosley admitted that he knew about the evidence concerning the vehicle and the victim's statement well before trial. Assertions of error that were raised at trial, or

which could have been raised at trial, are not within the purview of a coram nobis proceeding. *Carner v. State*, 2018 Ark. 20, 535 S.W.3d 634. When the defense was made aware of the potential violation prior to trial, there was no fundamental error of fact extrinsic to the record. *Jackson*, 2018 Ark. 227, 549 S.W.3d 356. For a *Brady* violation to have occurred, the petitioner must first establish that the material was available to the State prior to trial and the defense did not have it. *Carner*, 2018 Ark. 20, 535 S.W.3d 634. Mosley's new allegations concerning these *Brady* violations do not provide additional facts sufficient to provide grounds for the writ.[1]

Mosley's remaining proposed grounds for the writ are based on his allegations that the victim's underwear worn prior to the rape, photographs of the vehicle taken by police officers, DNA results, and medical test results were withheld. Mosley fails to show that such evidence exists, and, because he fails to identify specific extant items of evidence that were withheld, he does not establish that (1) if the evidence does exist, it was favorable and that (2) it was not evidence that, through no negligence or fault of the defendant, was not brought forward before rendition of the judgment. Claims without a factual basis are not grounds for the writ. *Jackson*, 2018 Ark. 227, 549 S.W.3d 356.

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[1]Because Mosley's claim fails on the second element, we need not address Mosley's assertion that this court applied the wrong test for prejudice in its analysis of the third element of a *Brady* violation, but we note that the case Mosley cited for the appropriate test, *House v. Bell*, 547 U.S. 518 (2006), concerned the standard for invoking an actual-innocence exception to the procedural-bar rule for federal habeas cases, and it was not concerned with either *Brady* violations or coram nobis proceedings.

Mosley admits that the victim's underwear was never found. He states that the photos of the vehicle "have never been fully disclosed," yet he does not state when he became aware of the existence of undisclosed photos that he claims would show dents in the vehicle, and he does not provide copies of those photos. Additionally, he does not identify the specific DNA analysis reports or colposcopic images that he asserts were withheld.

Mosley alleges, without producing the reports, that there were DNA reports indicating the victim had sex with another man before the rape occurred. While he also alleges that he testified at trial that the victim had sex with this man while he waited nearby, the record shows otherwise. As to the colposcopic images he alleged were withheld, there was testimony at trial by a doctor who observed tears to the opening of the victim's vagina and other signs of forced sexual intercourse. The defense conducted a cross-examination of the doctor and referenced the doctor's report. Mosley does not show that the defense was unaware of any part of the victim's medical exam or the doctor's report on the exam at the time of trial, or that the defense could not easily have obtained any images made and retained in support of the doctor's conclusions in his report.

Mosley's latest allegations in his petition do not appear either reasonable or truthful. A court is not required to accept the allegations in a petition for writ of error coram nobis at face value. *Wooten*, 2018 Ark. 198, 547 S.W.3d 683. A petitioner seeking to reinvest jurisdiction in the trial court to proceed with a coram nobis petition bears the burden of presenting facts to support the claims for the writ because an application for the

writ must make a full disclosure of specific facts relied on and not merely state conclusions as to the nature of such facts. *Martinez-Marmol v. State*, 2018 Ark. 145, 544 S.W.3d 49. Mosley fails to demonstrate that any of his proposed attacks on the judgment are meritorious. Accordingly, we decline to permit a renewal of Mosley's application for permission to proceed with a coram nobis petition, and the instant petition is dismissed.

Petition dismissed.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. Mosley's denial-of-counsel claim is serious, and we should remand this claim to the circuit court for a hearing to address it.

The relevant factual allegations are as follows. It was undisputed at trial that on or about August 29, 1994, Mosley and Sherry Christian traveled in Mosley's vehicle to the home of Greg Branch. Mosley maintains that Christian and Branch had sex while they were at Branch's home. It was undisputed that later that same evening, Christian and Mosley left Branch's home in Mosley's vehicle.

From this point, Christian alleged that Mosley and Christian got into a fight in Mosley's car, and then, against Christian's will, Mosley drove the car "down Spring Street, past Cotter School" into a secluded area; he then raped Christian on the hood of the car. At trial, Christian testified that after the rape, Mosley "backed (the car) into a pile of sticks." According to Mosley's petition, Christian made this same representation in a statement she gave the police that was never turned over to the defense before trial.

Mosley's alleged version of events is quite different. Mosley alleges that after they left Branch's home, they traveled to James Sutherland's trailer on "Mill Creek Road." Mosley alleges that Sutherland owed Mosley $50, that Sutherland had recently been paid and had just gotten off work, and that Mosley and Christian needed "gas money and money for (more) drugs." (Parenthetical in original.) Mosley acknowledges that, after they left Sutherland's home, he and Christian got into a fight in the car. Mosley maintains that during the fight, Christian grabbed the steering wheel and caused the vehicle to crash into a large pile of sticks and branches while the vehicle was traveling approximately forty miles per hour. Mosley alleges that this accident occurred on the "Weyerhauser Property." Mosley alleges that the pile of sticks was a known landmark at the time, heaped there by loggers working on a then active logging project. Mosley alleges that, as part of the accident, a small log on top of the pile of branches flew up and struck the front bumper of his vehicle, leaving a large dent. Mosley alleges that after the crash, Mosley and Christian made up and then went to a swimming hole where, approximately 500 yards from the place where the accident occurred, they had consensual sex.

Christian subsequently reported the incident to police. Mosley was arrested on September 2, 1994. When the police asked Mosley whether he owned a vehicle, Mosley replied that he did and that it was parked at a gas station for which Mosley gave the address. Investigators Sarah Love, Ray Shoptaw, and, according to Mosley's petition, Christian herself went to the location Mosley described where Christian identified the vehicle as that involved in the alleged incident.

Attorneys Becker, Harris, and Harmon were appointed to represent Mosley. It appears undisputed that, for reasons yet to be explained, the vehicle in question was released and sold on September 10, 1994, before any defense counsel inspected the vehicle. Mosely faults the police and prosecution for this questionable circumstance, but he also attributes fault to his own counsel. Mosley alleges that his counsel failed to prevent the release and sale of the vehicle and that his attorneys conveyed to him that they would refuse to pursue numerous favorable points related to the vehicle itself, Christian's description of events, and the release and sale of the vehicle. Mosley alleges that his attorneys had a conflict of interest, specifically maintaining that his counsel's expressed refusal to pursue these points was the product of their embarrassment over failing to inspect or to prevent the release and sale of the vehicle.

According to Mosley's petition, he filed motions before the circuit court to have his counsel relieved and that the circuit court did, in fact, relieve Mosley's counsel from his representation. Mosley alleges that he was permitted to proceed pro se until March 20, 1995, when the court declared Mosley "mentally incompetent" and re-appointed the exact same attorneys to represent Mosley who had been relieved due to the conflict of interest. Mosley alleges that these attorneys represented him at trial over his objection, and specifically that his counsel refused to pursue the aforementioned points at trial, over his objections. The State does not contest these allegations.

Moreover, Mosley alleges that he has never been provided a copy of the appellate brief filed on his behalf in his direct appeal, expressing his suspicion that no issue related

to the vehicle or his trial counsel's conflict was raised or pursued. Indeed, neither this court's opinion in Mosley's direct appeal nor the per curiam addressing his first error coram nobis petition alluded to any such issue. Mosley's second error coram nobis petition filed earlier this year raised the issue as an ineffective-assistance-of-counsel claim, which this court properly rejected as an inappropriate basis for error coram nobis. However, Mosley now raises the issue in the context of a denial-of-counsel claim, and in my opinion, error coram nobis should be available to address his allegations.

The writ of error coram nobis is allowed under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Wooten v. State*, 2018 Ark. 198, 547 S.W.3d 683. 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 trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of the judgment. *Jackson v. State*, 2018 Ark. 227, 549 S.W.3d 356. However, many of our cases, particularly our post-conviction cases, now embrace a holding to the effect that the writ of error coram nobis is available only for addressing certain errors that are found in one of four categories: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. *Wooten*, *supra*. Even so, this court has granted error coram nobis relief in situations outside these four grounds. *See, e.g.*, *Strawhacker v. State*, 2016 Ark. 348, 500 S.W.3d 176, *Pitts v. State*, 2016 Ark. 345, 501 S.W.3d 803.

As in *Pitts* and *Strawhacker*, the circumstances here warrant a hearing. It is necessary to determine the true nature of the circumstances alleged here relating to the handling of the vehicle, the relief and re-appointment of Mosley's trial counsel based on his alleged "mental incompetence," and the appointed attorneys' refusal to pursue the points on cross-examination. If Mosley's allegations are true, then there must be a remedy available to him. It bears re-emphasizing that Mosley acknowledged at trial that he engaged in intercourse with Christian. The only question for the jury was forcible compulsion/consent, and Christian was the only witness other than Mosley who was present for the events in question; any factual issue tending to cast doubt upon Christian's version of events would have been important for Mosley's defense. Furthermore, being denied counsel, or in the case of Mosley's allegations, being appointed counsel who willfully refuses to zealously pursue an individual's defense because of a known conflict of interest, arguably amounts to a "structural" error in the trial and appellate process. *See Reams v. State*, 2018 Ark. 324, 560 S.W.3d 441 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (Supreme Court addressing erroneous deprivation of the right to counsel of choice)). Moreover, while not specifically argued, Mosley's assertion that the trial court found him mentally incompetent and then proceeded to hold trial on these charges invokes the right to pursue error coram nobis even under our existing law.

It could also be argued that Arkansas jurisprudence regarding habeas corpus would not foreclose Mosley's claims had they been raised in the context of a habeas corpus petition. While the plain language of our habeas statute contemplates otherwise, our post-

conviction cases have attempted to narrow habeas relief such that it is only available to address situations in which a confinement order is invalid on its face or the issuing court was wholly without jurisdiction. This is a proposition with which I have expressed my fundamental disagreement. *See Stephenson v. Kelley*, 2018 Ark. 143, 544 S.W.3d 44 (Hart, J., dissenting).

To what forum, and in what terms, should Mosley bring his denial-of-counsel claim? Our constitution guarantees Mosley a remedy. Ark. Const. Art. 2, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws."). As long as Mosley is litigating this claim in an Arkansas court, seeking an Arkansas remedy, then I say error coram nobis should be available. While Mosley's claim is outside the four categories of error coram nobis prescribed by this court, I say those categories are too narrow. Moreover, even stated as a denial-of-counsel claim, Mosley's petition alleges facts that would warrant an error coram nobis hearing even under the existing four categories. This court should reinvest jurisdiction with the trial court to consider evidence on Mosley's claim. This would allow Mosley (and the State) to make a record on the handling of the vehicle, the relief and re-appointment of Mosley's trial counsel based on his alleged "mental incompetence," and the refusal to pursue the points on cross-examination, which is entirely appropriate and necessary considering the circumstances.

I dissent.