Cite as 2010 Ark. 154

ARKANSAS SUPREME COURT

No. CR01-644

	Opinion Delivered April 1, 2010
GYRONNE BUCKLEY PETITIONER V. STATE OF ARKANSAS RESPONDENT	PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION TO FILE RESPONSE TO RESPONDENT'S RESPONSE TO PETITION [CIRCUIT COURT OF CLARK COUNTY, CR 99-13] PETITION AND MOTION GRANTED.

PER CURIAM

In 1999, petitioner Gyronne Buckley was found guilty by a jury of two counts of delivery of a controlled substance and sentenced to two consecutive terms of life imprisonment. This court reversed and remanded for resentencing. *Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000). In the resentencing proceeding, two consecutive terms of 336 months' imprisonment were imposed for an aggregate sentence of 672 months' (fifty-six years) imprisonment. We affirmed. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002).

Subsequently, petitioner timely filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2003). The petition was denied without a hearing. On appeal, this court reversed and remanded the matter to the trial court.

Buckley v. State, CR 04-554 (Ark. June 16, 2005) (unpublished per curiam). On remand, the trial court conducted a hearing and once again denied postconviction relief. We affirmed. *Buckley v. State*, CR 06-172 (Ark. May 24, 2007) (unpublished per curiam).

In 2007, petitioner filed in this court a petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis. The petition was denied. *Buckley v. State*, CR 01-644 (Ark. Oct. 11, 2007) (unpublished per curiam).

Now before us is a second petition to proceed in the trial court with a coram nobis petition.[1] After a judgment has been affirmed on appeal, a petition filed in this court for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis only after we grant permission. *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61. The State filed a response to the petition, and petitioner tendered a response to the State's response with a motion seeking leave to file his response. The motion is granted.

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002) (per curiam). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Id.* 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

[1]For clerical purposes, the instant petition was assigned the same docket number as the appeal from the resentencing proceeding, CR 01-644.

to the circuit court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Newman*, 2009 Ark. 539, 354 S.W.3d 61 (citing *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008) (per curiam)).

The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Id.* 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. *Id.*

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. *Newman*, 2009 Ark. 539, 354 S.W.3d 61. In making such a determination, we look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. *Id.* Although there is no specific time limit for seeking a writ of error coram nobis, due diligence is required in making an application for relief. *Id.* In the absence of a valid excuse for delay, the petition will be denied. Due diligence requires that (1) the defendant be unaware of the fact at the time of the trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; and (3) the defendant, after discovering the fact, did not delay bringing the petition. *Id.* The requirements are a sequence of events, each of which a petitioner must show to prove due diligence. *Id.*

Petitioner's second petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis centers around a claim that was also raised in the first petition. That is, that the videotaped statement of confidential informant Corey Livsey, who testified at petitioner's trial in 1999 and at the resentencing proceeding, was wrongfully withheld from the defense. In an evidentiary hearing held on petitioner's Rule 37.1 petition, South Central Drug Task Force Agent Linda Card testified that she and Agent Keith Ray had interviewed Livsey prior to the 1999 trial. Henry Morgan, the prosecuting attorney in the trial, testified at the hearing that he never received the videotaped statement and that Card had never told him of its existence. He conceded that the tape was not provided to the defense at trial. Petitioner said in the first petition that he was unable to produce the tape referred to in the Rule 37.1 hearing because it had not been given to him, despite an agreement his attorney in the Rule 37.1 proceeding made with the prosecution to provide it to him. While we found that petitioner had exercised due diligence in pursuing the issue, we declined to reinvest jurisdiction in the trial court to consider the claim pertaining to the tape on the ground that petitioner could not establish that the videotaped interview contained any exculpatory evidence that could have prevented rendition of the judgment of conviction.

After the original petition was denied, petitioner obtained in 2009 a copy of the videotape in the course of a federal court proceeding.[2] A copy of the videotape is appended

[2]In 2008, petitioner initiated a petition for writ of habeas corpus in the federal court in *Buckley v. Norris*, No. 5:08 CV001268 JLH/JTR. That court noted that under 28 U.S.C. § 3365 (b)(1)(A), a petitioner must exhaust his available state-court remedies as a prerequisite

to the petition now before us. Petitioner points in detail to numerous inconsistences between Livsey's statements in the interview conducted by agents Card and Ray prior to petitioner's trial in 1999 and his testimony at petitioner's trial and in the resentencing proceeding. Petitioner contends that the defense could have used these significant discrepancies to impeach Livsey, the key witness against petitioner, and undermine his credibility with the jury.

Suppression of material exculpatory evidence by a prosecutor falls within one of the four categories of coram nobis relief. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999). The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Strickler v. Greene*, 527 U.S. 263 (1999), the Court revisited *Brady* and declared that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 373 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In *Strickler*, the court also set out the three elements of a true Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is

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to filing a federal habeas action. As a matter of comity, the federal court declined to review petitioner's *Brady* claim regarding the newly discovered videotape of the interview with Livsey until this court had the opportunity to review the claim and correct any error. As the basis of our denial of petitioner's original petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis was the fact that the videotape could not be produced, the federal court ruled that the habeas action should be held in abeyance until this court had considered the *Brady* claim.

impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *See Pierce v. State*, 2009 Ark. 606 (per curiam). Although the prosecution may not have been specifically aware of the exculpatory evidence, information held by the police is imputed to the prosecution. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985). 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. *Sanders*, 374 Ark. 70, 285 S.W.3d 630.

The State urges this court to reject petitioner's claim that he is entitled to have jurisdiction reinvested in the trial court. The State argues that, even if the videotape was not disclosed to the defense and would have provided material with which to impeach Livsey, petitioner has failed to establish that there is a reasonable probability that the judgment would not have been rendered had the tape been known to the defense at the time of trial. The State further asserts that the many discrepancies between Livsey's testimony and what he said on the videotape do not refute the principal point of Livsey's account that petitioner sold Livsey controlled substances. The State also points out that Livsey's testimony was not the only evidence of petitioner's guilt.

The State's arguments are not persuasive when the significant role played by witness Livsey in petitioner's conviction is considered. Because Corey Livsey was a key witness at petitioner's 1999 trial and at the resentencing proceeding and the videotape reveals a number

of discrepancies between Livsey's account of his dealings with petitioner in the videotaped interview and his sworn testimony, it cannot be said without an evidentiary hearing that the allegations of a *Brady* violation are without merit. Accordingly, we find good cause to reinvest jurisdiction in the trial court so that it may consider petitioner's petition for writ of error coram nobis on the sole issue of the alleged *Brady* violation.

Petition and motion granted.