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SUPREME COURT OF ARKANSAS

No. CR-98-1180

MICHAEL ANTONIO DAVIS PETITIONER	Opinion Delivered May 30, 2019
V.	PRO SE SECOND PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS; MOTION REQUESTING COURT TO SEEK DISCOVERY INFORMATION [PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION, NO. 60CR-98-28]
STATE OF ARKANSAS RESPONDENT	PETITION DENIED; MOTION MOOT.

JOSEPHINE LINKER HART, Associate Justice

Pending before this court is Michael Antonio Davis's pro se second petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis. Also pending is Davis's motion requesting discovery. In this second petition, Davis alleges that the prosecution withheld evidence with respect to agreements entered into between the prosecutor and a witness for the State, John Frawley, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Davis contends that the prosecutor misled the jury in the opening statement in which the jury was informed that Frawley, despite his cooperation with the State, would be required to serve a prison sentence in the Arkansas Department of Correction (ADC). Davis asserts that, under the terms of the agreements between Frawley

and the State, the prosecutor had recommended that Frawley serve a two-year sentence in a regional-punishment facility rather than in the ADC. To support his allegation, Davis attached to his petition copies of the agreements that Davis alleges were withheld from the defense. Assuming the factual allegations in Davis's petition are true, he establishes the first prong of *Brady*. However, Davis's petition does not establish the prejudice prong of *Brady*; even if Frawley had not been permitted to testify at all, there would not be a reasonable probability of a different outcome in light of the rest of the evidence presented at trial.

In 1998, Davis was found guilty of aggravated robbery, kidnapping, and theft of property, and he was sentenced as a habitual offender to consecutive terms of imprisonment of thirty years, life, and ten years. We affirmed the judgment. *Davis v. State*, CR 98-1180 (Ark. April 13, 2000) (unpublished per curiam). In 2005, Davis filed in this court his first petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis on the basis that Davis's "jail-house confession," which was the subject of Frawley's trial testimony, could not have occurred because records subsequently discovered by Davis demonstrated that Davis had not been housed with Frawley in the county jail. According to Davis's first petition for error coram nobis relief, the State had withheld these records in violation of *Brady*. We denied Davis's petition. *Davis v. State*, CR 98-1180 (Ark. Oct. 27, 2005) (unpublished per curiam). As stated, Davis raises a new contention in this second coram nobis petition.

When a writ of error coram nobis is sought after the judgment has been affirmed on appeal, as in this case, the trial court may entertain the petition only after this court grants permission. Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Roberts v. State*, 2013 Ark. 56, 425 S.W.3d 771. A writ of error coram nobis is an extraordinarily rare remedy. *Id.* Indeed, it is more known for its denial than its approval. *Id.* In order for the writ to issue following the affirmance of a conviction and sentence, the petitioner must show a fundamental error of fact extrinsic to the record. *Id.* The function of the writ is to secure relief from a judgment rendered while there existed some fact that would have prevented rendition of the judgment had it 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 petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. *Id.*

A writ of error coram nobis is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Id.* The writ is available for addressing errors 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.*; *Hill v. State*, 2017 Ark. 121, 516 S.W.3d 249. We will reinvest jurisdiction in the trial court to consider error coram nobis relief only when the proposed attack on the judgment is meritorious. *Roberts*, 2013 Ark. 56, 425 S.W.3d 771. In making this determination, we

look to the reasonableness of the allegations in the petition and to the probability of the truth thereof. *Id.*

Davis alleges in his petition that Frawley was the only material witness to connect Davis to the crime and that, had the defense known about the terms of the agreements between Frawley and the prosecutor, Frawley's testimony would have been discredited. Davis asserts that the prosecutor, in violation of *Brady*, intentionally misled the jury during opening remarks and elicited false testimony from Frawley regarding his exposure to a term of imprisonment in the ADC.

The mere fact that a petitioner alleges a *Brady* violation is not sufficient to provide a basis for error coram nobis relief. *Wallace v. State*, 2018 Ark. 164, 545 S.W.3d 767. There are three elements of a *Brady* violation: (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; (3) prejudice must have ensued. *Carner v. State*, 2018 Ark. 20, 535 S.W.3d 634 (citing *Strickler v. Greene*, 527 U.S. 263 (1999)). When a petitioner alleges a *Brady* violation as the basis for his or her claim of relief in coram nobis proceedings, the facts alleged in the petition must establish that there was evidence withheld that was both material and prejudicial such as to have prevented rendition of the judgment had it been known at the time of trial that such evidence existed. *Martinez-Marmol v. State*, 2018 Ark. 145, 544 S.W.3d 49. 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. *Id.* The burden is on the petitioner in

an application for a writ of coram nobis to make a full disclosure of specific facts that substantiate the merit of a *Brady* claim. *Mosley v. State*, 2018 Ark. 152, 544 S.W.3d 55.

In support of his *Brady* claim, Davis attached to his petition copies of documents titled "agreed recommendation of punishment." The agreements specify that prosecutors would recommend that Frawley serve a two-year sentence in a regional-punishment facility (RPF), and that this punishment was to be served consecutively to other sentences that would be imposed in three separate pending criminal cases.[1] Davis asserts that by failing to disclose that Frawley would serve time in an RPF as opposed to the ADC as the prosecutor's comments suggested, the prosecution deprived Davis of additional impeachment evidence he could have used to discredit Frawley's testimony. Obviously, RPF time is a "sweeter deal" than ADC time, so if we assume the veracity and completeness of the attachments to Davis's petition, his petition establishes the first prong of *Brady*.

However, Davis's claim simply does not satisfy the prejudice prong of *Brady*; the evidence would not have created a "reasonable probability" of a different outcome. A review of the trial transcript and introduced exhibits reveals that, after the perpetrators robbed the victim of her money and belongings (including her cell phone) and left her tied up in the woods, they drove off in the victim's green Mercedes. Nearly immediately after

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[1]The case numbers listed in the agreements in which it was recommended that Frawley receive consecutive sentences for the charged offenses are 60CR-98-851, 60CR-98-764, and 60CR-98-793. The agreements also seem to recommend a concurrent sentence for at least one count charged in case number 60CR-98-793.

the victim was left in the woods, her cell phone was used to call Davis's mother at her residential address. There was no existing relationship between the victim and the defendant's mother nor any alternative explanation as to why the victim's stolen cell phone would be used to call the defendant's mother other than that the defendant took the phone and made the call. Another witness testified that a man she knew and another man named "Michael" picked her up in a green Mercedes matching the victim's vehicle on the night of the crime, and that the men had a "big wad of cash" with them. Moreover, the arresting officer testified that when he approached Davis, Davis told the officer his name was Kevin Alexander. After admitting his name was actually Michael Davis, Davis told the officer, without prompting, "I didn't do any of that stuff, and you can't prove it." When the officer responded, "what stuff," Davis replied, "I didn't do that stuff with that woman."[2] The burden is on Davis to substantiate the merit of a *Brady* claim, which requires a showing of a reasonable probability of a different outcome. *Mosley*, 2018 Ark. 152, 544 S.W.3d 55. Davis fails to meet that burden in light of the additional evidence presented at trial.

Petition denied; motion moot.

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[2] It is unclear if any issue was ever made of a potential *Miranda* violation, but this evidence is certainly contained in the trial record. The arresting officer characterized Davis's statements as spontaneous, and the defense raised no objection.