IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

# STATE OF TENNESSEE v. ABU-ALI ABDUR'RAHMAN

**No. M1988-00026-SC-DPE-PD**

**Filed April 5, 2002 (jsr)**

## ORDER

On March 22, 2002, Abu-Ali Abdur'Rahman filed a motion to recall the mandate issued by this Court in State v. Jones, 789 S.W.2d 545 (Tenn. 1990), and to consider post-judgment facts in support of the motion. Abdur'Rahman alleges that he has obtained new proof of racial discrimination by the prosecution in the selection of the jury in his 1987 capital murder trial and that this new proof establishes a violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). Specifically, he relies on prosecution notes obtained after issuance of the mandate, which allegedly demonstrate that the racially neutral reasons articulated by the prosecutor for removing certain African-American jurors were a pretext for racial discrimination. Abdur'Rahman requests that the Court consider the prosecution notes and an affidavit of one of the prospective jurors dismissed by the prosecutor as post-judgment facts under Tenn. R. App. P. 14.

On April 1, 2002, the State filed a response in opposition to the motion. The State asserts that the materials upon which Abdur'Rahman relies are not new evidence, that these materials are inappropriate for consideration by this Court, and that these materials do not establish extraordinary circumstances warranting recall of the mandate.

On April 2, 2002, Abdur'Rahman filed a reply to the State's response, reasserting that the materials establish a Batson violation. In addition, on that same day, the NAACP Legal Defense Fund, Inc., sought and was granted permission to file an amicus curiae brief in support of Abdur'Rahman's motion. On April 4, 2002, Abdur'Rahman filed a motion seeking a stay of execution, asserting that a stay is necessary to allow proper consideration of his motion to recall mandate.

After carefully considering the motions, the response, the reply, and the amicus curiae brief, a majority of this Court concludes that the motions are not well-taken. It appears that the materials upon which Abdur'Rahman relies in support of his motion to recall mandate were available to him as early as January of 1992, after the decision of the Court of Appeals in Capital Case Resource Center v. Woodall, No. 01A01-9104-CH-00150, 1992 Tenn. App. LEXIS 94 (Tenn. Ct. App. Jan. 29, 1992), which held that files maintained by the District Attorney General can be obtained under the Tennessee Public Records Act at the conclusion of the direct appeal in a criminal case. Exhibit 2 to Abdur'Rahman's reply to the State's response indicates that the prosecution's file, including the notes, were given to counsel for Abdur'Rahman at least by October 20, 1997, and apparently several years earlier during the state post-conviction proceedings. The delay in presenting this claim

is therefore inexplicable. See In re Byrd, 269 F.3d 561, 572 (6th Cir. 2001) (concluding that federal habeas petitioner was not entitled to bring a second or successive petition to raise a claim of perjured testimony, when "[h]e sat on this evidence, like a chicken waiting for an egg to hatch, for twelve years, despite repeated contact with both state and federal courts"). In any event, these materials do not contain post-judgment facts within the meaning of Tenn. R.App. P. 14. The materials do not relate to facts occurring after judgment nor do they describe facts which are unrelated to the merits, readily ascertainable, and not subject to dispute. See Tenn. R. App. P. 14(a); Advisory Commission Comments to Tenn. R. App. P. 14; Duncan v. Duncan, 672 S.W.2d 765, 767-69 (Tenn. 1984).

Furthermore, even if these materials are appropriate for consideration, they do not warrant recalling the mandate. The power to recall mandate is an extraordinary remedy and should be exercised sparingly. See, e.g., Calderon v. Thompson, 523 U.S. 538, 550, 118 S.Ct. 1489, 1498, 140 L.Ed. 2d 728 (1998) (stating that the power to recall mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies"). Moreover, to warrant a recall, the circumstances should be "sufficient to override the strong public policy that there should be an end to a case in litigation." Hines v. Royal Indemnity Co., 253 F.2d 111, 114 (6th Cir. 1958); see also Yocom v. Bratcher, 578 S.W.2d 44, 46 (Ky. 1979) ("There is a strong policy of repose which requires that mandates and the opinions which they effectuate carry a heavy seal of finality."). Abdur'Rahman is urging this Court to use the extraordinary remedy of recall to re-litigate issues previously determined not only by this Court, but according to the response of the State, by the federal district court as well. Contrary to the position of Abdur'Rahman, the materials presented do not conclusively establish that the racially neutral reasons offered by the prosecution for excusing the African-American jurors were merely pretextual in violation of Batson. Indeed, the materials support this Court's direct appeal decision on Abdur'Rahman's Batson claim.

Abdur'Rahman specifically contends that the notes indicate that the prosecutor struck two African-American jurors — Robert Thomas and Sharon Baker — for racially biased reasons. With regard to juror Thomas, he points to a "rating" system used by the prosecution that purportedly scored Thomas as "more acceptable than five white jurors and equally acceptable as five other white jurors" who were not removed. However, the handwritten notes on their face contain no indication of the criteria for the prosecution's "ratings" or the weight given to the individual "ratings" in exercising peremptory challenges. Moreover, Abdur'Rahman's motion appears to ignore the primary reason for excusing Thomas, credited by both the trial court and this Court, which was that the juror was "a close friend of defense counsel from whom he had solicited money for the church he had once pastored." Jones, 789 S.W.2d at 549. That explanation is fully supported by the notes which plainly state: "Lionel [Barrett] & he have known each other for several years. When he had church going he came to Lionel for a donation. He worked downtown delivering office supplies — thinks of Lionel as a friend." (Emphasis in original.) The notes also reflect numerous valid race-neutral reasons for the prosecutor's excusing juror Sharon Baker that were credited by both the trial court and this Court. These include Baker's demeanor and behavior during voir dire ("was sitting in the jury box reading a book during voir dire" and "she will not look at defendant") and her answers to questions (referred to a death sentence as a "killing"). See Jones, 789 S.W.2d at 549. In sum, Abdur'Rahman's contentions furnish no basis for the extraordinary remedy of recall of the mandate.

In closing, we feel compelled to respond to the dissent's comments on the perceived failure of state appellate review despite their irrelevance to the issues raised by the motion to recall. We emphasize that the brevity of an appellate opinion does not indicate that the appellate court did not thoroughly review the record and the relevant law in deciding the case. We have no doubt that at every level judges have thoroughly reviewed this case and pursued justice, as they are required to do by their oath of office.

Accordingly, the motion to recall mandate and the motion for stay of execution are hereby DENIED.

FOR THE COURT:

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Frank F. Drowota, III, Chief Justice

Concurring:
E. Riley Anderson, Janice M. Holder, William M. Barker, JJ.

Dissenting by Separate Order:
Adolpho A. Birch, Jr., J.