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WILLIAM R. KYR, CLERK
By Temilka G. G...
6/25/01

IN THE CRIMINAL COURT OF TENNESSEE AT MEMPHIS
THE THIRTIETH JUDICIAL DISTRICT
DIVISION III

PHILIP R. WORKMAN,)	
Petitioner,)	
vs.)	No. P-3908
STATE OF TENNESSEE,)	POST CONVICTION
Respondent.)	Death Sentence

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR
A WRIT OF ERROR CORAM NOBIS, MOTION TO REOPEN POST-CONVICTION
PETITION, AND MOTION FOR A STAY OF EXECUTION

This matter comes before this Court on a PETITION FOR WRIT OF ERROR CORAM NOBIS, A MOTION TO REOPEN POST-CONVICTION PETITION, AND A MOTION FOR A STAY OF EXECUTION filed by the Petitioner, Philip R. Workman, who is scheduled to be executed on March 30, 2001 at 1:00 a.m. As a basis for relief, Petitioner alleges that newly-discovered scientific evidence establishes his innocence of the felony murder for which he was convicted in 1982. After considering Petitioner's allegations, supporting memoranda, the State's response, and the record as a whole, this Court concludes that the Petitioner is not entitled to relief, and hereby denies all motions.

FINDINGS OF FACT

Petitioner was convicted of first-degree felony murder in the Criminal Court of Shelby County on March 31, 1982. He was sentenced to death by a jury of his peers. The Tennessee Supreme Court affirmed the conviction and sentence, State v. Workman, 657 S.W.2d 44 (Tenn. 1984), and the United States Supreme Court denied certiorari, Workman v. Tennessee, 469 U.S. 873 (1984).

Workman applied for post conviction relief in state court in 1986. The trial court denied relief, and the Criminal Court of Appeals affirmed the denial in 1987. The Tennessee Supreme Court denied permission to appeal, and the United States Supreme Court denied certiorari.

Workman filed a second post-conviction petition, which was denied, and the denial was affirmed by the Criminal Court of Appeals. Workman v. State, 868 S.W.2d 705 (Tenn. Crim. App.

1993).

In 1992, Workman filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Tennessee. The district court denied the petition in 1996, and the United States Court of Appeals affirmed the denial. Workman v. Bell, 160 F.3d 276 (6th Cir. 1998).

Petitioner also filed numerous other pleadings in federal court.

Petitioner filed his present motions, in which he seeks a writ of error coram nobis, to reopen his post-conviction petition, and to stay his execution, on March 28, 2001. Oral arguments were held March 29, 2001.

PETITION FOR A WRIT OF ERROR CORAM NOBIS

Petitioner first seeks a writ of error coram nobis. Tenn. Code Ann. § 27-7-103 provides that a person convicted of an offense must pursue this avenue of relief within one year after his judgment becomes final. Having exceeded this period by nearly twenty years, Petitioner clearly is not entitled to relief.

While Petitioner concedes he is well beyond the proper time for filing such writ, Petitioner argues that this Court should consider his claims because a witness at Petitioner's trial committed perjury, and because Petitioner was unaware of an x-ray of Lt. Oliver's body, which the Petitioner claims proves that he could not have fired the shot that killed Lt. Oliver. The Petitioner cites Burford v. State, 845 S.W.2d 204 (Tenn. 1992) in support of his argument that the statute of limitations should be disregarded. The Petitioner's reliance on Burford is misplaced.

In Burford, the petitioner was convicted of robbery with a deadly weapon in 1985. Because Burford had five prior convictions for armed robbery dating back to 1976, the State used the 1985 conviction along with the 1976 convictions to have Burford sentenced as a habitual criminal, and as a result, he was sentenced to life in prison. In 1988, the trial court vacated four of the five 1976 convictions. In 1990, Burford filed for post-conviction relief, after the three year statute of limitations had run. Burford claimed that he was not time barred because the facts that gave claim for relief, i.e. that he was no longer a persistent offender because four of his convictions had been vacated, were not apparent until after the statute of limitations had run. The Tennessee Supreme

Court agreed with Burford's argument, and reversed the trial court's denial of the post-conviction petition.

The case at hand differs drastically from Burford. In the present case, Petitioner is filing for a writ of error coram nobis, a very narrow remedy. Additionally, no new facts are in his petition that have not already been alleged in previous court proceedings.

This Court finds that the holding in State v. Mixon, 983 S.W.2d 661, 670-71 (Tenn. 1999), is more appropriately applied to the Petitioner's situation. In Mixon, the Court reiterated that a writ of error coram nobis is a very narrow remedy whose time limitation is appropriate and is not subject to extension. The Court in its opinion stated:

The administration of justice and the integrity of our court system demand, in addition to fair treatment under the law, a certain degree of finality to criminal judgments. Since a convicted defendant had no other avenue for seeking relief at common law, it was entirely appropriate for due diligence to be the only time limitation on the writ; however, criminal procedure has drastically changed in the past thirty years. Convicted defendants now have the right to move for a new trial, the right to appeal, the right to seek post-conviction relief, and the right to file habeas corpus petitions. The post-conviction statute now provides a method by which courts may address claims of actual innocence which are based upon newly discovered scientific evidence. Finally, defendants who discover new non-scientific evidence of actual innocence too late to file a motion for a new trial or a petition for writ of error coram nobis may always seek executive clemency. Clearly, the writ of error coram nobis is no longer a convicted defendant's only hope for relief. Mixon, 983 S.W.2d at 670-71.

Petitioner has not cited a single opinion in which Tennessee's appellate courts have granted relief when a petitioner filed a petition for a writ of error coram nobis outside the one-year period, and this Court is unaware of any such opinions. As the Court noted in Mixon, defendants now have many judicial and non-judicial avenues of relief to pursue when they believe that they have been wrongly convicted. In this case, Petitioner has pursued numerous claims in both state and federal court over a period of almost twenty years. Given these facts, this Court finds that Petitioner's has presented no arguments that merit the granting of a petition for writ of error coram nobis almost twenty years after the running of the statute of limitations on such an action. Therefore, Petitioner request for a writ of error coram nobis is hereby DENIED. Likewise, this Court finds no basis to grant Petitioner's request for Declaratory Judgment.

MOTION TO REOPEN POST-CONVICTION PETITION

At the outset, this Court notes that the only authority for filing a motion to reopen a post-conviction petition is Tenn. Code Ann. § 40-30-217. Post-conviction relief is purely a statutory creation. There is no constitutional right to post-conviction relief. Oliphant v. State, 806 S.W.2d 215, 217 (Tenn. Crim. App. 1991). Hence, there is no constitutional right to reopen a post-conviction petition.

Tenn. Code Ann. § 40-30-217 outlines the procedure for filing a motion to reopen. It states in pertinent part:

- (a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:
 - (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized at the time of trial; or
 - (2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which petitioner was convicted; or
 - (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
 - (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.
 - (b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a).
- Tenn. Code Ann. § 40-30-217 (1997).

The only provisions which even arguably apply under the circumstances of the present case are Tenn. Code Ann. §§ 40-30-217(a)(2) and (4).

In support of his claim that he is entitled to relief, Petitioner avers that he has new scientific evidence, consisting of an x-ray of Lt. Oliver's chest, that proves he did not fire the bullet that killed Lt. Oliver. Specifically, the Petitioner contends that the x ray which the State provided him on March 2, 2000, demonstrates that the fatal bullet did not fragment in Lt. Oliver's body, but instead exited in one piece. According to Petitioner, this is crucial evidence which establishes that the fatal

bullet could not have come from his gun and, therefore, must have been the result of "friendly fire."

This Court first notes that although Petitioner denies firing the fatal bullet, he has presented no persuasive proof regarding the source of the fatal bullet. During his 1992 post conviction hearing, the Petitioner alleged that Lt. Oliver "possibly" was killed by "friendly fire." Workman v. State, 368 S.W.2d 705, 710 (Tenn. Crim. App. 1993), app. denied, Nov. 29, 1993. To this date, nearly ten years have passed since the Petitioner first raised the claim that he did not fire the fatal bullet, and more than a year has passed since he obtained the x-ray he now asserts is new scientific proof, yet Petitioner still has failed to present any proof which even arguably demonstrates that an officer, witness, or anyone other than himself fired the fatal shot.

The x-ray in question shows that the bullet that killed Oliver likely went through the body intact. Without other evidence than the x-ray, it is impossible to discern the locations of the entry hole or exit wound on Lt. Oliver's body. Other evidence, however, proves that the bullet entered the left chest area, and exited out of the right back. Both the trial court and the habeas corpus court already were aware of the path of the bullet from the evidence that was presented to them in prior proceedings.

The Petitioner relies heavily on the affidavit of Dr. Sperry to show the importance of this newly discovered x-ray evidence. However, long before Dr. Sperry viewed the x-ray, in his 1995 affidavit, Dr. Sperry stated that the bullet that created the bullet wounds exited Lt. Oliver's body, and in doing so, created an exit wound smaller than the entry wound. Dr. Sperry stated at this time that he felt this smaller exit wound was inconsistent with the .45 silver tip hollow point bullets used by the Petitioner.

Dr. Sperry received the x-ray in question in March of 2000. Dr. Sperry stated that the x-ray established that the bullet did not fragment inside the victim, and that the bullet that killed the victim emerged from the victim's body intact. Of great significance to this Court is the fact that Dr. Sperry struck from his affidavit the line furnished by Petitioner's counsel that stated the x-ray established that a projectile created a wound track across the victim's chest. In its place, Dr. Sperry wrote by hand that the autopsy and photographs established that a projectile created a wound track across the victim's chest, and that the bullet did not fragment inside the victim's body. Moreover, the initial autopsy report, which has been in the Petitioner's possession for almost twenty years, did not reveal

the existence of any bullet fragments in Lt. Oliver's body. Dr. Sperry was able to reach his conclusion that to a reasonable degree of medical certainty that the bullet that killed the victim was not a .45 silver-tip hollow point bullet long before he ever viewed the x-ray.

In summary, the alleged newly discovered scientific evidence proves nothing that was not already known from the original autopsy and photographs.¹ Therefore, contrary to Petitioner's assertion, the new evidence does not in any way shape or form provide new proof that the bullet did not come from Petitioner's gun or that the Petitioner is innocent of the murder.

In support of his motion to reopen, Petitioner also relies heavily upon the assertion that Harold Davis, the only witness who testified that he saw the Petitioner fire the fatal bullet, perjured himself as a result of police coercion. Although Petitioner references various documents in support of this claim, this Court finds it extremely significant that a sworn statement or affidavit of Harold Davis has not been submitted to this Court, or any other court. Furthermore, the issue of the perjured testimony of Harold Davis was raised in Petitioner's first habeas corpus petition. As the United States Court of Appeals for the Sixth Circuit noted, before the first habeas corpus petition was filed, Petitioner's counsel had already made contact with Davis, who denied that his testimony was false or coerced. Additionally, the district court noted, as does this Court, that the recantation statement filed in the district court was not under oath, unlike Davis' testimony at trial. Furthermore, the district court found that the sworn statement of Vivian Porter, submitted to this Court in Petitioner's appendix to his motion to reopen, is in contradiction to the recantation statement filed by Davis.

Vivian Porter stated that Davis was with her the night Oliver was shot, and that they were at an entirely different location than Wendy's. Davis' recanted statement admits he was at Wendy's restaurant when Petitioner was confronted by the officers, although Davis said he didn't see any shots fired. Davis now says he was in his car at Wendy's, and although he recalls seeing Petitioner and a number of officers struggling before one officer fell back and pulled his gun, he was not able to determine who shot Oliver. *Workman v. Bell*, 227 F.3d 331, 341 (6th Cir. 2000).

¹ This Court also notes that the autopsy report on Lt. Oliver clearly states that the exit wound is in a jagged form measuring .64" x .21", which is somewhat larger and more distorted than the entry wound, which is .50" in diameter. Clearly, .64 inches is larger than .50 inches, even if the exit wound was only .21 long. This goes against the Petitioner's and Dr. Sperry's assertion that the exit wound is smaller than the entry wound, and therefore could not have come from Petitioner's .45 silver-tip hollow point bullet.

In summary, the statements of the witnesses upon whom the Petitioner now relies are inconsistent with one another, which renders the proposed proof unpersuasive at best.

Examining the Petitioner's reliance on the alleged perjured testimony as a persuasive reason for this Court to grant his motion to reopen, this Court notes that Petitioner refers to Harold Davis as "the only eye witness to the shooting." Petitioner conveniently omits that along with Harold Davis, Officer Stoddard was beside Lt. Oliver when he was shot, and that Officer Parker arrived at the scene seconds thereafter. Furthermore, Petitioner himself testified during trial that he pulled the trigger, the gun fired, and he emptied his gun toward the officers. In post-conviction proceedings, Petitioner stated that he confessed that he fired the fatal shot that took Lt. Oliver's life. Even Davis, in his latest statement, asserts that Workman was on the scene and that he was struggling with one or more officers. *Id.*, at 342.

Finally, this Court must point out here that in the almost twenty years since the killing, there has been no testimony proffered by anyone that suggests that any other person besides Oliver and Workman fired handguns on the night in question. Contrary to Petitioner's assertion, Officer Stoddard was shot by the Petitioner, and did not fire his weapon. This was corroborated by the police report of the incident which indicated that after the shooting, an officer took possession of Stoddard's weapon, and found it fully loaded with six live rounds. Officer Parker also denied firing a weapon, although a police document indicates that Parker had a shotgun. However, absolutely no proof exists that Lt. Oliver was killed with buckshot. There was no other person at the scene with a firearm other than Petitioner, Oliver, Stoddard and Parker. Although Petitioner asserts that Oliver was killed by "friendly fire", there is absolutely no evidence in the record to support such an assertion.

Therefore, having carefully considered the pleadings as well as the attachments, this Court finds that Petitioner has failed to prove by clear and convincing evidence that he is "actually innocent" of the first-degree felony murder of Lt. Oliver. See Tenn. Code Ann. § 40-30-217(a)(2) and (4). Accordingly, Petitioner's motion to reopen post-conviction petition is hereby **DENIED**.

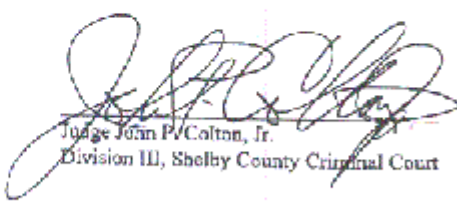
MOTION FOR STAY OF EXECUTION

Finally, Petitioner requests that this Court stay his execution. A trial court's authority to stay an execution which has been scheduled by the Tennessee Supreme Court is extremely limited. See Coe v. Sundowner, Davidson County, No. M2000-00897-SC-R9-CV (Tenn. 2000). Despite these limitations, this Court could have issued such a stay pursuant to Tenn. Code Ann. § 40-30-220(b) had it granted Petitioner's motion to reopen. Having denied said motion, and finding no other basis to grant a stay, the Petitioner's motion for a stay of execution is hereby **DENIED**.

CONCLUSION

For all the reasons discussed previously herein, this Court finds that the Petitioner is not entitled to any of the relief requested.

Entered this 29 day of March, 2001.


Judge John P. Colton, Jr.
Division III, Shelby County Criminal Court