IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED IN OPEN COURT
DATE: 3-29-01
TIME: 10:55 A.M.
INITIALS: BMW

PHILIP R. WORKMAN,

Petitioner,

v

DK# 94-2577-G

RICKY BELL,

Respondent

PETITION FOR WRIT OF ERROR CORAM NOBIS;
MOTION FOR STAY OF EXECUTION

COMES NOW your petitioner, Philip R. Workman, through his undersigned counsel of record, pursuant to 28 U.S.C. § 1651, and prays this court issue a writ of error coram nobis, setting aside the judgment entered in this case on October 29, 1996. In support of this petition, your petitioner would show unto the court as follows:

1. Petitioner was convicted of first degree felony murder in the Criminal Court of Shelby County, Tennessee, on March 31, 1982, in a case styled State of Tennessee v. Philip R. Workman, Dk. No. B 81209. Petitioner was sentenced to death.

2. On July 18, 1994, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee, Western Division. Jurisdiction was proper in this court pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 2254. A final judgment denying habeas corpus relief was entered by this Honorable court on October 29, 1996, after the District Court granted summary judgment. However, material

facts were hidden from this Honorable Court by the State of Tennessee which warrant the issuance of a writ of error coram nobis. The following facts will explain why issuance of the writ is appropriate in this case in order to set aside the final judgment entered in this court denying habeas corpus relief

MATERIAL FACTS

3. Documentation supporting material facts is being provided to the court in an appendix filed contemporaneously herewith.

4. On August 5, 1981, Workman robbed a Wendy's restaurant on Thomas Street in North Memphis, as it closed around 10:00 p.m. As Workman gathered the restaurant's money, an employee tripped a silent alarm. Memphis police officers, Ronald Oliver, Aubrey Stoddard and Stephen Parker responded. When Workman attempted to run, Oliver died from a gunshot wound to the chest.

5. In order to convict Workman of capital murder under Tennessee law, the jury had to find that the bullet that killed Oliver came from Workman's gun. To establish this critical fact, the prosecution presented the testimony of Harold Davis, Stoddard and Parker. Officers Stoddard and Parker denied that they ever fired their weapons or saw Workman shoot Oliver.

6. Mr. Harold Davis testified at the trial that he saw Workman aim at Oliver and shoot him. Davis was the only witness that testified that he actually saw Workman shoot Oliver.

7. We now know, 18 years later, that Harold Davis committed perjury before the jury which led to Workman's sentence of death. In a video taped interview taken

September 24, 1999, Ms. Vivian Porter states that on the night of the shooting, Davis and she rode in a car. As they drove past the Wendy's, they saw numerous police cars parked on the Wendy's lot, but they did not stop. Porter affirms that Davis and she did not drive onto the Wendy's lot, nor did they park their car on the side of the road and walk onto the lot. Rather, they drove past the Wendy's and later learned the news that it was the site of the robbery and police shooting. (See Affidavit of Porter, App. at 7).

8. On November 20, 1999, Mr. Harold Davis in an emotional videotaped interview, recanted his trial testimony. Davis now admits that his trial testimony that he saw Workman shoot Oliver is a lie and that he committed perjury at Workman's trial because he was coerced by authorities.

9. Davis' recantation makes sense in light of other facts surrounding the robbery. Davis claimed at trial that he parked his car on the Wendy's lot, saw the Oliver shooting, and remained at the scene as a bunch of additional police officers arrived. (Tr. 853-854). Police officers and police documents establish that, as Davis now admits, neither he nor his car were on the Wendy's lot. As a matter of fact photographs taken immediately after the shooting by the media demonstrate Davis' car was not there. At roll call for the shift during which Oliver died, police were instructed to be alert for a black male who was robbing fast food restaurants in the area at closing time (Tr. 873). Davis is a black male and would have necessarily attracted the attention of police officers who were looking for a black male suspect. Davis claimed at trial that he parked his car on the vacant Wendy's parking lot, saw Workman shoot Oliver, and remained there as a "bunch" of additional police officers arrived. (TR. 853-854). The

initial responding officer, however, first surveyed the scene for any potential suspects, determined that none were in the vicinity and he then ran to assist Oliver and Stoddard. (TR. 720). After the additional officers arrived, they took statements from every person who witnessed either the robbery or the shootout on the parking lot and recorded those statements in police reports. The police reports nowhere mention Davis or any person who could have been him.

10. To credit any assertion that Davis was present to witness the Oliver shooting, one must believe that police, alert for a black male who was robbing Wendy's restaurants at closing time, failed to see a black male in the middle of a vacant Wendy's parking lot after the Wendy's had been robbed at closing time.

11. Thus, not only is Davis' recantation material, it is also credible since it is corroborated by the affidavit of Vivian Porter and other facts surrounding the crime scene.

12. Additionally, state authorities failed to produce exculpatory evidence which established that Workman did not shoot Oliver. Workman's gun was loaded with .45 caliber aluminum jacketed hollow point, silver tip bullets. Because such bullets expand upon impact, they rarely exit a body they strike. In the rare instance when a silver tip bullet exits a body it strikes, it creates an exit wound significantly larger than the entry wound.

13. The bullet that killed Lieutenant Oliver created an entry wound to Oliver's left chest and a smaller exit wound to the right of his back. Recognizing that these wounds were inconsistent with wounds caused by silver tip bullets, the United States

court of Appeals for the Sixth circuit stated:

> If a .45 caliber hollow point bullet had gone all the way through Lt. Oliver's chest and emerged in one piece, we have no doubt that the exit wound would have been larger than the entry wound. It hardly follows, however, that Lt. Oliver could not have been shot with the type of ammunition Workman was firing, because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece.

Workman v. Bell, 178 F. 3d 759, 767 (6th Cir. 1998).

14. At the time of the Sixth Circuit opinion, the record did not establish that the fatal bullet emerged from Lt. Oliver whole because the state had previously failed to produce a post-mortem x-ray taken of Lt. Oliver's chest.

15. On June 2, 1995, Workman served in this case a federal subpoena upon the medical examiner for any x-ray taken of Lieutenant Oliver. (App. at 2) Although such x-ray existed, the state did not produce it. (App. at 2). Workman only learned of the existence of the x-ray on February 28, 2000, when the District Attorney's office for the 30th Judicial District mentioned it in papers filed with the Tennessee Board of Probation and Parole. Counsel immediately contacted the state and, on March 7, 2000, counsel obtained a copy of the x-ray. On March 4, 2000, counsel took the x-ray to Dr. Kris Sperry, the Chief Medical examiner for the State of Georgia. Dr. Sperry reviewed the x-ray and informed counsel that it compels the conclusion the Sixth Circuit considered critical -- the bullet that killed Oliver emerged from his body in one piece. (Affidavit of Sperry, App. at 4).

APPLICABILITY OF WRIT OF ERROR CORAM NOBIS

16. 28 U.S.C. § 1651(a) provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law.

17. In United States v. Morgan, 346 U.S. 502 (1954), the Supreme Court acknowledged that the writ of error coram nobis is part of the common law and is still available to courts as a remedy except where expressly abolished by statute:

> The writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the "validity and regularity" of the judgment, and was used in both civil and criminal cases. While the occasions for its use were infrequent, no one doubts its availability at common law.

U.S. v. Morgan, 346 U.S. at 507-508.

18. The jurisdiction to issue writs of error coram nobis was limited in scope; the power of the court thus to vacate its judgment for errors of fact existed in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular or invalid. U.S. v. Morgan, 346 U.S. at 509, n. 15.

19. The writ was developed by the judiciary in England during the Sixteenth Century. 18 Am. Jur.2d, Coram Nobis and Allied Statutory Remedies, § 1 (1985).

20. Essentially, the common law of writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial factual error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced. John S. Gillig, Kentucky Post Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure, 11.42, 83 Ky L.J. 265, 320 (1994-95).

21. The writ of error coram nobis was addressed to the very court which had rendered the judgment rather than to an appellate or other reviewing court:

> The writ was thus distinctive in that it required the reconsideration of a judgment by a court which had already made a final disposition of the cause; but it cast no aspersions on the competency or finding of the court in its first judgment, for it lay only to call upon facts which were unknown to the court at the time of judgment and which were not inconsistent with the record.

Note, The Writ of Error Coram Nobis, 37 Harv. L. Rev. 744 (1924).

22. Generally, at common law, the only time limitation upon the filing of the writ of error coram nobis was the requirement that a petitioner show that he or she had exercised due diligence in advancing the claim and seeking the remedy. 18 Am. Jur 2d Coram Nobis and Allied Statutory Remedies, § 31 (1985); *see also* U.S. v. Morgan, 345 U.S. 502, 507, (1954).

23. Rule 60(b) of the Federal Rules of Civil Procedure abolished writs of error coram nobis in civil cases governed by the rules of civil procedure. *See* F.R.C.v.P. 60(b). However, habeas corpus proceedings are not governed by the rules of civil procedure but are instead governed by the "Rules Governing § 2254 cases in the United States District Courts." Couple this with the requirement that any statute in derogation of the common law be strictly construed, there is no reason to believe that writs of error coram nobis are not available for habeas corpus proceedings since such proceedings are not civil proceedings governed by rules of civil procedure. *See* Robert C. Heard & Co., Inc. V. Krawill Machinery Corp., 359 U.S.297, 304-305 (1959). ("Any such rule of law, being in derogation of the common law, must be strictly construed for

no statute is to be construed as altering the common law, farther than its words import.")

24. It is clear that in this case, there has been so fundamental a mistake of fact and so fundamental a miscarriage of justice that the writ should be issued and the October 29, 1996 judgment of the District Court should be vacated. After all, Workman issued a subpoena in these proceedings in 1995, commanding that the medical examiner produce any x-rays of Lt. Oliver in his possession. The x-rays were not turned over and were not disclosed to petitioner as even existing.

25. It was only in February 2000, that the state mentioned such x-rays existed. When petitioner was finally provided the x-ray on March 2, 2000, Dr. Kris Sperry was able to determine conclusively that Philip Workman did not shoot Lt. Oliver since Oliver was not shot with a .45 caliber pistol. If these facts had been known at the time the court was considering this case, coupled with all the other newly discovered evidence, judgment would never have been entered for respondent.

26. Consequently, this court should issue the writ of error coram nobis and vacate its judgment of October 29, 1996. After vacating the final judgment, the court should enter a stay of execution pursuant to 28 U.S.C. § 2251 and then grant petitioner an evidentiary hearing.

WHEREFORE, PREMISES CONSIDERED, petitioner prays the writ issue and the final judgment be vacated. Petitioner further prays a stay be issued and such further relief be granted as the court deems appropriate.

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Respectfully Submitted

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