

IN THE TENNESSEE COURT OF CRIMINAL APPEALS

ROBERT GLEN COE)	
)	SHELBY COUNTY
Petitioner/Applicant)	<i>CAPITAL CASE</i>
)	No. W2000-0005-CCA-
28M-PD)	
v.)	
)	
STATE OF TENNESSEE)	
)	
Respondent)	

**APPLICANT'S REPLY TO ANSWER IN OPPOSITION
TO APPLICATION FOR PERMISSION TO APPEAL@**

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FILED

January 25, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

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APPLICANT, Robert Glen Coe, respectfully submits this reply to the State’s Answer in Opposition to Application for Permission to Appeal.

Mr. Coe’s principle argument as to why an appeal is warranted is the trial court erred by making findings of fact that the bloody clothing and bedding taken from Donald Gant, the initial suspect to the murder of Carey Medlin, do not warrant relief upon application of the recently decided *State v. Ferguson*, without the trial court having afforded Mr. Coe an evidentiary hearing.

The State in its Answer in Opposition concedes several key points. First of all, the State concedes that the trial court did not afford Mr. Coe an evidentiary hearing on the *Ferguson* claim. See Answer in Opposition, p. 3 (No evidence was adduced at the December 17, 1999 hearing). Secondly, the State does not contest that the police lost the potentially exculpatory evidence taken from Donald Gant, and the State concedes all of the other evidence that Gant was the perpetrator of the murder. See Answer in Opposition, p. 8, n.1 (For purposes of the appeal, the State accepts petitioner’s allegations as true). The State also does not deny Mr. Coe’s assertion that the key evidence against Coe was his confession, which was taken from a man

with a long history of mental illness, and everything in Coe's confession was already known to the authorities. *Id.*

Furthermore, the State does not dispute in its brief Mr. Coe's assessment of the law, namely that if a threshold showing of entitlement to reopen a post conviction petition is demonstrated, Mr. Coe would be entitled to an evidentiary hearing to develop the facts of his claim. Instead, the State makes these arguments:

1. The trial court did not find that the threshold requirements to reopen a post conviction proceeding had been met, but even if the trial court did find a threshold showing, the dismissal was warranted since *Ferguson* does not state a new rule of law.

2. Alternatively if *Ferguson* is a new rule of law it should not be retroactively applied.

3. The facts presented to the trial court, if taken as true, would not entitle Coe to relief.

First, the State argues that the trial court found no threshold showing of entitlement to reopen was made because in the concluding paragraph of the trial court's findings, the court stated "Petitioner, Robert Glen Coe, has failed to establish a valid statutory basis for granting his motion to reopen." (See, Order, p. 13, Answer in Opposition, p 4). The State has taken the line from the trial court's opinion out of context. Mr. Coe raised several claims, other than the *Ferguson* claim, many of which arguably the trial court found did not satisfy the threshold to reopen a post conviction petition. However, it is abundantly clear from Judge Colton's opinion that *State v. Ferguson* established a new rule of constitutional law: "The petitioner is correct in his assertion that the *Ferguson* ruling does hold that the due process principles of the Tennessee Constitution are broader than those of the United States Constitution and

that fundamental fairness, as an element of due process, requires that the State's failure to preserve evidence that could be favorable to the defendant be evaluated in the context of the entire record.@ (Order, pp. 4-5).

The focus of the trial court's analysis, was an application of the *Ferguson* case to the facts submitted to the court by sworn testimony. The trial court found that the police had a duty to preserve bloody clothing and bedding taken from Donald Gant because it was potentially exculpatory evidence (Order, p. 6). Judge Colton found that this evidence would be material to the preparation of Mr. Coe's defense. *Id.* The court further found that in losing the evidence the State breached its duty to preserve evidence. *Id.*

The trial court then went on to analyze the evidence in light of the *Ferguson* factors, and concluded that Mr. Coe would lose on the merits. It is therefore clear that Judge Colton's opinion did not state Mr. Coe failed to make a threshold showing. Rather, Judge analyzed the facts presented in the petition in light of *Ferguson* and denied Mr. Coe relief on the merits. However, there is no way for the trial court to properly make findings without affording Mr. Coe an evidentiary hearing.

The first *Ferguson* factor considered by the trial court was the degree of negligence involved by the State in losing evidence. *Ferguson* itself says there is a presumption of negligence merely from the fact that the State lost potentially exculpatory evidence (*Ferguson*, p. 11, n. 10). However, the Court made a finding that the State's negligence was simple negligence and not gross negligence without conducting an evidentiary hearing. The degree of negligence by law enforcement in losing evidence simply cannot be ascertained without a hearing. Interestingly, the State in its Answer asserts that a hearing would not develop any proof since the officer who

lost the evidence is dead (a fact which is not in the record). Yet the trial court is not free to speculate as to what facts may be developed and what proof is out there that could be presented to establish the degree of the State's negligence. The presumption of negligence from the State's admitted loss of evidence meets the threshold burden to reopen under *Ferguson*; but a hearing is needed to develop the extent of negligence and apply *Ferguson*. The simple fact of the matter is that Mr. Coe is entitled to an evidentiary hearing *before* the court makes a finding as to the *degree* of negligence involved when the State loses evidence.

Also, a hearing is needed to determine the significance of the lost evidence. The trial court found that the lost bloody clothing from the initial suspect Donald Gant was significant enough certainly to meet a threshold showing: "Clearly this evidence was at least material to the preparation of the Petitioner's defense, and might have led jurors to entertain a reasonable doubt about Coe's guilt." (Order, p. 6). However, the *significance* of the bloody clothing cannot be developed without an opportunity to subpoena witnesses and put on proof.

In determining whether relief is warranted due to the State's loss of evidence, *Ferguson* discusses weighing the significance of evidence lost and the degree of negligence by the state in losing it. Once a threshold showing is made that the lost evidence has *some* significance, and there was presumably *some* negligence in losing it, Mr. Coe was entitled to a hearing to develop facts surrounding those factors so that the *Ferguson* case can be appropriately applied. Thus, the failure of the trial court to afford Mr. Coe an evidentiary hearing on this claim was error.

With respect to the State's assertion that *Ferguson* does not state a new rule of law and that it should not be retroactively applied, this argument is unsupported by the law and the *Ferguson* case itself. The Tennessee Legislature enacted TCA ' 40-30-222 to guide the courts in determining whether a new case creates a new rule of law that must be retroactively applied:

Interpretation - For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

TCA ' 40-30-222.

There is no question that *State v. Ferguson* decided September 20, 1999, announced a new rule of law. In *Ferguson*, the court discusses what consequences should flow from the State's loss or destruction of evidence alleged to have been exculpatory.[@] *Ferguson*, p. 6. The *Ferguson* opinion discusses how in *Arizona v. Youngblood*, 488 U.S. 51 (1988) the United States Supreme Court held the United States Constitution requires proving bad faith by law enforcement in the loss of

evidence before a due process violation is raised. *Ferguson*, p. 6. However, the Tennessee Supreme Court, based upon State constitutional grounds, rejected the *Arizona v. Youngblood* requirement of proving bad faith and held that the loss of evidence by the State must be looked at in the context of the entire record.

Because we deem the presentation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the *Youngblood* analysis in its pure form.

Ferguson, p. 10.

Thus, it is clear from the opinion itself that *Ferguson* is stating a new rule of law. It is further clear that prior to *Ferguson*, the law was unclear as to whether bad faith must be proven to state a claim for loss of evidence under the Tennessee Constitution as is required to make a federal constitutional claim. In *Ferguson*, the Tennessee Supreme Court specifically surveys what the law is in other jurisdictions with respect to law enforcement's loss of evidence in order to determine what law will be adopted in Tennessee. See *Ferguson*, pp. 7-9.

Furthermore, it is also clear that *Ferguson* must be retroactively applied. TCA ' 40-30-222 requires new rules of constitutional criminal law to be retroactively applied if the rule proscribes or requires observance of fairness safeguards that are implicit in the concept of ordered liberty. TCA ' 40-30-222. *Ferguson* is decided upon state constitutional grounds as necessary for the preservation of the defendant's fundamental right to a fair trial. *Ferguson*, p. 10; *Ferguson*, p. 12 ; *Ferguson*, p 9. *Ferguson* itself states that a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome. *Ferguson*, p. 3, n. 3 (Exhibit 6). Certainly the *Ferguson* rule, which is decided upon due process grounds as necessary

to protect the right of a defendant to a fundamentally fair trial, is a rule that requires observance of fairness safeguards that are implicit in the concept of ordered liberty which must be retroactively applied under TCA ' 40-30-222. Thus, the trial court correctly decided that *Ferguson* announced a new rule of constitutional law which must be retroactively applied.

CONCLUSION

WHEREFORE, this Court should grant Mr. Coe's application for permission to appeal and grant post conviction relief or, in the alternative, remand this case to the trial court to conduct an evidentiary hearing and rule on the issues contained herein on the merits. Mr. Coe respectfully requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing was served upon Erik W. Daab, Assistant Attorney General, Criminal Justice Division, 425 Fifth Avenue, North, Nashville, TN 37243, by placing a copy of same in the United States mail, postage prepaid this 18th day of January, 2000.
