

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 25, 2005 Session

EDWARD JEROME HARBISON v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Hamilton County
No. 171319 Rebecca J. Stern, Judge**

No. E2004-00885-CCA-R28-PD - Filed June 27, 2005

In 1983, a Hamilton County Criminal Court jury convicted the petitioner, Edward Jerome Harbison, of first degree murder and sentenced him to death. The supreme court affirmed the conviction on direct appeal. See State v. Harbison, 704 S.W.2d 314 (Tenn. 1986). Subsequently, the petitioner filed a post-conviction petition. The trial court denied post-conviction relief, and this court affirmed. See Edward Jerome Harbison v. State, No. 03C01-9204-CR-00125, 1996 Tenn. Crim. App. LEXIS 307 (Knoxville, May 20, 1996). Upon alleged discovery of new evidence, the petitioner moved to reopen his post-conviction petition. The trial court converted the motion to a petition for writ of error coram nobis and denied relief. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Rosemarie L. Bryan, Chattanooga, Tennessee, and Dana C. Hansen, Knoxville, Tennessee, for the appellant, Edward Jerome Harbison.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Angele M. Gregory, Assistant Attorney General; William H. Cox, III, District Attorney General; and H. C. Bright, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On the night of January 15, 1983, Frank Russell came home to find his wife dead in their home. The house was in disarray and had been burglarized, and there were signs of a struggle. After an investigation, the police went to the home of Janice Duckett, who was the petitioner's girlfriend and David Schreane's sister. There, the police recovered items taken from the Russells' home. The

police questioned David Schreane, who led the police to a marble vase. Testing on the vase revealed the presence of blood. The police also found fragments consistent with the vase in the petitioner's car and questioned the petitioner, who confessed to killing the victim. According to the confession, the petitioner and Schreane went to the Russell home, found no one home, and began putting items from the home into Schreane's car. The victim returned home, discovered the two men inside, and struggled with the petitioner. The petitioner hit the victim several times with the marble vase, breaking all of the bones in the victim's head. At trial, the petitioner testified that he did not kill the victim and was at Janice Duckett's apartment on the night of the crime. He stated that he confessed to killing the victim because the police threatened to arrest Janice Duckett and take away her children. Janice Duckett also testified at trial that the petitioner was at her home on the night of the murder. The jury convicted the petitioner.

The supreme court affirmed the petitioner's conviction in 1986, and this court affirmed the denial of post-conviction relief in May 1996. In February 1997, counsel was appointed to represent the petitioner in a petition for habeas corpus relief in federal district court. In October 1997, the Chattanooga Police Department sent counsel two hundred six previously undisclosed documents about its investigation of the case. In March 2001, the district court denied the petition for habeas corpus relief.¹ In June 2001, the petitioner's attorneys filed a motion to reopen his post-conviction petition in the Hamilton County Criminal Court, claiming the petitioner was entitled to relief in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). In December 2001, the petitioner's attorneys filed an amended petition, arguing that the petitioner was entitled to relief under Apprendi and that the petitioner received the ineffective assistance of counsel during the direct appeal of his convictions because the attorney representing him on direct appeal also represented Ray Harrison, who the petition claimed had been a prime suspect in the victim's murder. The amended petition also raised for the first time a claim that the state withheld the Chattanooga Police Department records in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). According to the amended petition, some of the police department records were exculpatory because they indicated David Schreane and Ray Harrison, not the petitioner, broke into the Russells' home and killed the victim. On February 13, 2003, the state filed a response to the allegations in the petition, arguing that the petitioner's Brady claim was time-barred. On April 22, 2003, the petitioner filed a motion requesting that the trial court treat his motions to reopen as a writ of error coram nobis.

On October 13, 2003, the trial court held a coram nobis hearing. According to the trial court's order denying error coram nobis relief, the purpose of the hearing was "to allow the parties to present evidence related to the timeliness of the asserted Brady claims and related matters." Judge William B. Mitchell Carter testified that he was one of two attorneys who represented the petitioner at trial and that his co-counsel for the case was deceased. He filed many motions in the case, including motions for discovery and exculpatory evidence, which were granted by the trial court. Judge Carter stated that the petitioner insisted on using an alibi defense. However, the use of an alibi

¹The Sixth Circuit Court of Appeals affirmed the district court's denial of the petition. See Edward Jerome Harbison v. Bell, ___ F.3d ___, No. 02-5392, 2005 U.S. App. LEXIS 7432 (6th Cir. Apr. 29, 2005).

defense was “complicated” by the fact that the petitioner had confessed to killing the victim. At trial, the petitioner denied killing the victim and stated that his confession was coerced because the police had threatened to arrest his girlfriend and put her children in foster care. Judge Carter was aware of allegations that the victim had been involved in selling stolen property before her death, but he did not pursue the allegations during his investigation of the petitioner’s case.

The petitioner introduced into evidence two hundred six documents provided by the Chattanooga Police Department and had Judge Carter read some of the police reports into evidence. According to the reports, a man named David Boss gave a statement to police about the victim’s murder. In the statement, Mr. Boss related that the victim had sold stolen property to Charlene Harrison, Ray Harrison’s wife, and that Ray Harrison had tried to sell the victim a ring one week before the victim was killed. Mr. Boss also told police that Charlene Harrison told Mr. Boss that Ray Harrison was in the Russell house at the time of the murder. However, Mrs. Harrison told David Boss that Ray Harrison did not kill the victim. Judge Carter testified that he was aware Ray Harrison was a suspect in the case but he was unable to recall specific information about Harrison. He acknowledged that the police department records indicated that a week before the victim’s death, Ray Harrison was mad at the victim over a “ring deal” that had “gone bad.” Judge Carter testified that he could not remember if he had had the Chattanooga Police Department records while he was representing the petitioner, that having the records might have affected his investigation of the case, and that the police department documents might have been helpful to the defense.

William Gerald Tidwell, Sr., testified that he was appointed to represent the petitioner in the post-conviction proceeding. He said that before the post-conviction evidentiary hearing, he tried to obtain the Chattanooga Police Department’s records regarding the petitioner’s case but received none. He said that he only recently had become aware of the police department’s records for the case and recently had learned that the victim may have been involved in selling stolen property. He also stated that he had not known while representing the petitioner that Charlene Harrison placed Ray Harrison at the scene of the crime. He said that if he had had this information, he would have brought it up during the petitioner’s post-conviction evidentiary hearing. He said that he also had been unaware that the petitioner’s codefendant, David Schreane, had threatened to accuse the petitioner of killing the victim if the petitioner did not stop contacting Schreane’s girlfriend. Finally, Mr. Tidwell stated that the police department records showed Ray Harrison had at one time agreed to take a polygraph examination regarding the victim’s death if Harrison’s attorney, Rodney Strong, could be present. However, Harrison later refused to take the polygraph test. He said that Rodney Strong represented the petitioner on direct appeal. Mr. Tidwell acknowledged that if he had known Mr. Strong had represented Ray Harrison and if he had known about the significant role Ray Harrison played in the case, he would have raised a conflict of interest issue in the post-conviction proceeding.

On cross-examination, Mr. Tidwell testified that he never received an indication that the Chattanooga police were trying to conceal evidence in the petitioner’s case. He did not recall ever seeing the documents introduced at the coram nobis hearing. During his representation of the petitioner, he had no indication that Rodney Strong was biased against the petitioner.

Rodney Strong testified that he handled the petitioner's motion for new trial and represented the petitioner on direct appeal. He stated that when he was appointed to the petitioner's case, he met with the petitioner and reviewed the trial transcript. Mr. Strong testified that he had no recollection of representing Ray Harrison. However, he acknowledged that a Chattanooga Police Department record indicated he had represented Harrison.² He said that during the petitioner's direct appeal, he had been unaware that Ray Harrison was connected to the petitioner's case and had not known that Charlene Harrison had placed Ray Harrison at the scene of the crime. He said that if he had been aware that he represented Ray Harrison and that Harrison was connected to the petitioner's case, he would not have accepted the appointment to represent the petitioner. He said that if he represented Ray Harrison, it had not affected his representation of the petitioner. He related that he did not raise a Brady issue in the petitioner's new trial motion because he had been unaware of the police department records. On cross-examination, Mr. Strong stated that he did not remember "dealing with Harrison" and that he had never known the Chattanooga Police Department to hide police records.

Rosemarie Bryan testified that she was appointed to represent the petitioner in February 1997 and was currently representing him. She testified that in September 1997, she sent a letter to the Chattanooga Police Department, requesting records in the petitioner's case. In October 1997, the police department sent her its file. According to Ms. Bryan, the file contained "things that were fairly astoundingly amazing to us." In November 1997, Ms. Bryan filed the petitioner's petition for habeas corpus relief in federal district court. On cross-examination, Ms. Bryan testified that she did not file a petition for writ of error coram nobis in state court right away because the petitioner's federal habeas corpus case was still pending. She was unable to recall any specific discussions regarding whether to proceed in state court after the receipt of the documents. She stated that she raised a Brady issue in the habeas corpus petition and that the federal district court granted summary judgment for the State in March 2001.

Dana Hansen, Ms. Bryan's co-counsel in the instant case, testified that she began working on the petitioner's federal habeas corpus case in 1998. She said that at the time she and Ms. Bryan received the police department documents, they could not file another post-conviction petition in state court because state law allowed only one post-conviction petition and the petitioner had filed a post-conviction petition in 1989. She stated that when the Tennessee Supreme Court filed Workman v. State, 41 S.W.3d 100 (Tenn. 2001), it gave the petitioner an opportunity to seek relief through a petition for writ of error coram nobis.

The trial court denied the petition for writ of error coram nobis. The court disagreed with the petitioner's assertion that he did not have an avenue of relief until the Workman decision. The trial court stated that "[t]he statute permitting petitions for writs of error coram nobis is not by any

² According to the police department record, Ray Harrison agreed to take a polygraph test if his attorney, "Ron Rodney Strong," could be present during the test. We note that according to a second police record, "Attorney Rodney Strong came to the service center as previously scheduled and a car transported Ray Harrison to the service center." Although Mr. Strong testified that he had no recollection of having represented Harrison, he acknowledged that no other attorneys with the name Rodney Strong were practicing law at that time.

means new and litigants have continually argued the application of the due process clause to various statutes of limitations.” The court noted that the petitioner became aware of the alleged exculpatory evidence in October 1997 but waited approximately fifty months “before seeking any review in state court.” The trial court found that “the time within which the petition was filed exceeds the reasonable opportunity afforded by due process” and dismissed the petition on the basis that it was time-barred.

II. Analysis

The petitioner claims the trial court erred by dismissing his petition. He contends that when he filed his first petition and the trial court issued a colorable claim order, he “was provided an opportunity to present claims he was previously unable to present and/or not required previously to present to the state courts.” The petitioner also argues that Workman v. State, 41 S.W.3d 100 (Tenn. 2001), “afforded an avenue for relief pursuant to a writ of error coram nobis” and that the trial court erred by not following the balancing test announced in Burford v. State, 845 S.W.2d 204 (Tenn. 1992), in its analysis that his petition should be dismissed.

Tennessee Code Annotated section 40-26-105 provides, in pertinent part that

[t]he relief obtainable by [error coram nobis] shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

A petition for writ of error coram nobis relief must be filed within one year of the time the judgment becomes final in the trial court. Tenn. Code Ann. § 27-7-103; State v. Mixon, 983 S.W.2d 661, 671 (Tenn. 1999). Despite the statute of limitations, our supreme court held in Burford that due process requires balancing the “governmental and private interests involved.” 845 S.W.2d at 209. If the private interest outweighs the government’s interest in preventing stale and groundless claims, the statute of limitations must be tolled. Id.

A writ of error coram nobis is an “extraordinary remedy.” Mixon, 983 S.W.2d at 666. To establish that he is entitled to a new trial, the petitioner must show “that (1) there is newly discovered

evidence relating to matters litigated at the trial, (2) the petitioner was without fault in failing to present this evidence at the proper time, and (3) the evidence may have resulted in a different judgment had it been presented at the trial.” Harris v. State, 102 S.W.3d 587, 600 (Tenn. 2003).

In Workman, the petitioner was convicted of shooting and killing a police officer and sentenced to death. He filed a petition for writ of error coram nobis well outside the one-year statute of limitations and “raised serious questions regarding whether he fired the shot that killed” the Memphis police officer. Workman, 41 S.W.3d at 103. The trial court dismissed the petition without an evidentiary hearing, holding that it was time-barred. However, applying the balancing test from Burford, our supreme court held that the petitioner’s “interest in obtaining a hearing to present newly discovered evidence that may establish actual innocence of a capital offense far outweighs any governmental interest in preventing the litigation [of] stale claims.” Id.; see also State v. Ratliff, 71 S.W.3d 291, 297 (Tenn. Crim. App. 2001) (concluding that due process required tolling of the statute of limitations when the “great weight of evidence” came from the victim, who recanted her testimony). The court remanded the case for an evidentiary hearing to determine if the newly discovered evidence may have resulted in a different judgment at trial.

Initially, we note that error coram nobis relief is not an appropriate remedy for the petitioner’s claim that the attorney who handled his motion for new trial and direct appeal had a conflict of interest. Regarding his claim that the state withheld exculpatory evidence in the form of the police records, we agree with the trial court that the petitioner is not entitled to error coram nobis relief. The trial court dismissed the petition on the basis that the petitioner filed it fifty months after he received the Chattanooga Police Department’s records. The trial court noted that the petitioner became aware of the newly discovered evidence in October 1997, yet waited over four years before filing his motion to reopen his post-conviction petition. Moreover, we note that three months after the Workman decision, the petitioner filed his motion to reopen his post-conviction petition but then waited almost two years before asking the trial court to treat the motion as a motion for error coram nobis. Although the petitioner claims that he could not file his petition until his federal habeas corpus proceeding was resolved and that he was not afforded an avenue of relief until the Workman decision in 2001, we agree with the trial court that the petitioner had ample opportunity to file his petition for error coram nobis and that he waited an unreasonable time to do so. Cf. Workman, 41 S.W.3d at 103 (petitioner filed his petition thirteen months after discovering the newly discovered evidence).

In any event, unlike Workman, the trial court in the present case held an evidentiary hearing. At the hearing, the petitioner’s trial, direct appeal, and post-conviction attorneys testified. Judge Carter, the petitioner’s trial attorney, testified that he was aware of allegations that the victim was involved in selling stolen property and was aware of Ray Harrison. According to David Boss’ statement to police, Ray Harrison and at least one other person were in the house and “they” ran when the victim entered her home. At best, the police department records indicate that Ray Harrison was in the Russell home at the time of the crime. They in no way exculpate the petitioner. Additionally, at the end of the evidentiary hearing, the petitioner failed to show conclusively that Rodney Strong had represented Ray Harrison. The conclusion that Strong had a conflict of interest

in representing the petitioner would be little more than speculation by this court. In light of the petitioner's confession and the fact that the police found property stolen from the victim's home in the petitioner's girlfriend's apartment and fragments from the murder weapon in the petitioner's car, the petitioner is not entitled to error coram nobis relief.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE