

ORAL ARGUMENT REQUESTED

1 THE JURY RELIED ON HAROLD DAVIS'S TESTIMONY TO FIND THAT FROM A DISTANCE OF THREE FEET, WORKMAN LEVELED HIS GUN AT POLICE OFFICER RONALD OLIVER AND COOLLY AND DELIBERATELY SHOT HIM

While Workman was robbing a Memphis Wendy's Restaurant, an employee tripped a silent alarm. Memphis Police Officers Ronald Oliver, Aubrey Stoddard, and Stephen Parker responded. When Workman walked out of the Wendy's, Oliver approached him. Workman attempted to run, and Oliver died from a through and through gunshot wound to his chest. At Workman's trial, only Harold Davis claimed to know who shot Oliver and how he was shot.

Davis claimed that after he parked his car on the vacant Wendy's parking lot, he saw a white male leave the Wendy's building. Davis then testified in detail to events he supposedly witnessed thereafter:

A I heard the policeman tell (the white male) to hold it, and they started struggling. Then this other policeman came up and started struggling with them. When he - I saw the other policeman who came in on the other side, he got shot and spun away and I saw a gun and I saw a white male shoot the policeman who fell back and drew his revolver and started shooting. I saw the white male running away shooting back.

Q [C]ould you describe to us in the greatest detail that you can what happened between Lieutenant Oliver and the shooter?

A Well, I saw the police officer trying to grab the arm that had the gun, but he didn't quite get a hold of it ...

Q Where was the pistol at when the shooter shot Lieutenant Oliver?

A It was in his hand.

Q Where was his hand at in relation to Lieutenant Oliver's body?

A I guess it was around chest height or stomach height.

ORAL ARGUMENT REQUESTED

Q How far was the muzzle, the end of the pistol where the bullet comes out, from the body of Lieutenant Oliver?

A No more than two or three feet at the most.

Q How far was your car parked from where these people - where the struggle began?

A No more than ten feet at the most.¹

To emphasize Davis's testimony, the prosecution had him step down from the witness stand and act out the events he supposedly saw.²

At closing argument, the prosecution relied on Davis's testimony to have the jury find not only that Workman shot Oliver, but that Workman did so in a cold, calculating, manner.

Harold Davis had pulled up to get something to eat and was getting out of his car and he virtually saw the whole thing. And what did Mr. Davis say in regards to the tussle that he saw take place? Mr. Stoddard gets shot and spins away, Lieutenant Oliver and the defendant.

Was it a thing where they were wrestling over this pistol? No. Was it a thing where the Lieutenant was trying to get the pistol away and there's an accidental discharge. No.

[From] approximately two feet away is what I believe Mr. Davis said and a shot was fired. He coolly and deliberately pulled this trigger and sent the bullet down this barrel and into the body of that man right there.³

The jury credited Davis's testimony and sentenced Workman to death.

TR 655-56, 664 (Davis Testimony)(attached Appendix ("App.") at 001-002, 005).

² TR 657 (Davis Testimony)(App. at 003).

³ TR 1056-57 (Prosecution Closing Argument-emphasis added)(App. at 009-010).

ORAL ARGUMENT REQUESTED

II HAROLD DAVIS COMMITTED PERJURY

Appellate Rule 22(a) allows you to consider evidence in resolving whether you will order Workman's death. You should do so because recently obtained evidence establishes that perjured testimony condemned Workman.

A **In The Past Months, Members Of My Staff Have Obtained Statements Establishing, Beyond Any Doubt, That Harold Davis Committed Perjury At Workman's Trial**

One of my Assistants, Christopher M. Minton, reported to me that on September 24, 1999, he traveled to Memphis, Tennessee, to ascertain whether Davis's sister could identify a man appearing in a photograph as Davis. After Mr. Minton spoke to Davis's sister, she set up a meeting between Mr. Minton and Vivian Porter. At that meeting, Ms. Porter gave Mr. Minton startling information. Harold Davis was with her the night Oliver was shot, neither of them were on the Wendy's parking lot when the shooting occurred, and neither of them saw Workman, or anyone else, shoot Oliver. Ms. Porter signed a sworn statement recounting these facts and she allowed Mr. Minton to videotape a statement from her. I submit Ms. Porter's sworn statement as page 037 of the attached Appendix. Videotape of her interview is contained on Exhibit I.

During the last week of September 1999, Mr. Minton and another of my Assistants, Jefferson Dorsey, reported to me that one of Davis's relatives had given them a telephone number of a motel in Phoenix, Arizona. They requested permission to travel there to see if they could find Davis. Due to the gravity of Workman's situation, I authorized their travel. On October 1, 1999, Messrs Minton and Dorsey returned to Nashville with Davis's videotaped statement in which Davis admits that he did not see Workman shoot Oliver.

ORAL ARGUMENT REQUESTED

Davis's statement left unanswered an important question: why would he lie at a criminal trial? On November 19, 1995, I authorized Mr. Dorsey to travel to Phoenix to try to find the answer to this question. Mr. Dorsey did so, and accompanied by an investigator from the Arizona Federal Defender's Office, he again located and interviewed Davis. In a videotaped statement, Davis told Mr. Dorsey a troubling story

Through uncontrollable sobs, Davis related the following. The day after the Oliver shooting, he called police to inform that he had heard shots coming from the Wendy's the previous night. Police came and took him to the police station where he was shown a picture of Workman and told that he was going to be an eyewitness. When he balked at testifying against Workman, authorities threatened to jail him and harm his family. He decided to testify against Workman, not because he saw Workman shoot Oliver, but because authorities coerced him to falsely claim that he saw such an event. Videotape of Davis's statement is contained on Exhibit 1.

I do not know if Davis was with Porter the night Oliver was shot. I do not know if authorities threatened Davis as he claims. I do know, however, that undisputed evidence validates the central fact on which Davis and Porter agree: Davis was not at the scene of the Oliver shooting.

While Davis testified that after Oliver was shot, he remained at the scene as a "bunch" of police officers arrived,

⁴ TR 662 (Davis Testimony)(App. at 004)

ORAL ARGUMENT REQUESTED

- a. every eyewitness to events before, during, and immediately after the Oliver shooting did not see Davis or any car that could have belonged to him;⁵
- b. contemporaneous police reports listing witnesses to events surrounding the shooting do not mention Davis;⁶
- c. the crime scene diagram reflects that no vehicle was parked on the Wendy's lot in the place where Davis claimed he parked his car;⁷ and
- d. Davis did not attend a lineup held upon Workman's capture which every available witness attended.⁸

A recently obtained expert report confirms that Davis did not see Workman shoot Oliver on the Wendy's parking lot.

B Davis Could Not Have Seen Workman Shoot Oliver

In federal habeas corpus proceedings, Workman asserted that Davis could not have seen him shoot Oliver because Oliver's mortal wound could not have been caused by one of Workman's bullets. To support this claim, Workman presented the report of Dr. Kris Sperry, who is now the Chief Medical Examiner for the State of Georgia, that the mortal wound to Oliver was inconsistent with wounds caused by the type of bullets that were in Workman's gun. Specifically, Dr. Sperry reported that because Workman's bullets expand upon impact, they

⁵ Joint Appendix filed in the United States Court of Appeals for the Sixth Circuit ("J.A.") at 1056 (Steve Craig Declaration)(App. at 025), 1074 (Kerry Kill Declaration) (App. at 030); 1069 (Garvir Null Declaration)(App. at 028), 1459 (Parker Testimony)(App. at 036); 1490 (Stoddard Testimony)(App. at 035); 1408B (T. L. Cobb Testimony)(App. at 034).

⁶ J.A. at 961-71 (Supplementary Offense Reports)(App. at 011-021).

⁷ J.A. at 973-74 (Crime Scene Diagram)(App. at 022-023).

⁸ J.A. at 976-77 (Line Up Report)(App. at 024-025).

ORAL ARGUMENT REQUESTED

rarely exit a body they strike. In the rare instance when they exit a body they strike, they create an exit wound significantly larger than the entry wound. Dr. Sperry noted that the bullet that killed Oliver entered his left chest, emerged intact from the right side of his back, and, in doing so, left an exit wound slightly smaller than the entry wound. Dr. Sperry reported that these characteristics were inconsistent with every wound that he had ever seen that was caused by the type of bullets that were in Workman's gun.⁹

The federal courts opined that Dr. Sperry's Report was inconsequential because it did not state that, in Dr. Sperry's opinion, one of Workman's bullets could not have killed Oliver.¹⁰ On April 5, 1999, Mr. Minton obtained a report stating just that: to a reasonable degree of medical certainty, Oliver was not killed by one of Workman's bullets. The doctor providing this report is one of this country's most renowned pathologists, Dr. Cyril Wecht.

As a member of the Los Angeles County Coroner's Office, Dr. Wecht investigated the Robert F. Kennedy assassination, the Sharon Tate/LaBianca murders, and the Symbionese Liberation Army.¹¹ As a member of the United States Select Committee on Assassinations, he investigated the shootings of John F. Kennedy, Robert Kennedy, and Dr. Martin Luther King.¹² Since 1973 Dr. Wecht has served as the Chairman of Pathology for a large Pittsburgh,

⁹ J.A. at 1076-77 (Declaration of Dr. Kris Sperry)(App. at 031-032).

¹⁰ See, e.g., Workman v. Bell, 160 F.3d 276, 285 (6th Cir. 1998).

¹¹ Curriculum Vitae (App. at 360).

¹² Id.

ORAL ARGUMENT REQUESTED

Pennsylvania hospital, and has been its Chief Pathologist.¹³

Dr. Wecht reviewed the evidence and provides the opinion the federal courts considered missing from Dr. Sperry's Report:

based on the path that the bullet took, the fact that the bullet exited the body, and the fact that Mr. Workman was using a .45 caliber pistol loaded with aluminum jacketed, hollow point bullets. I do not believe that it was Mr. Workman's gun that fired the shot that fatally wounded Officer Oliver.¹⁴

The Wecht Report, the State's own documents, and statements from eyewitnesses confirm what Harold Davis and Vivian Porter now tell us: Davis committed perjury when he claimed that he saw Workman shoot Oliver. Contrary to repeated misstatements, no other person testified to knowing who shot Oliver or how he was shot.

C Workman Did Not Confess That He Shot Oliver

Decision makers have viewed skeptically Workman's claim that Davis gave perjured testimony because they believed that Workman confessed at trial to shooting Oliver.¹⁵ I have reviewed the transcript of Workman's trial. If you do the same, you will discover that Workman never testified at trial that he shot Oliver.

Workman testified that as he ran from police he tripped, fell, and offered his surrender.¹⁶

¹³ Curriculum Vitae (App. at 649).

¹⁴ Wecht Report at 7 (App. at 011).

¹⁵ See, e.g., Workman v. Bell, 160 F.3d at 283 ("Workman testified during trial that he shot Officer Oliver ... any attempt to retract this confession must be viewed skeptically")

¹⁶ TR 1000 (Workman Testimony)(App. at 006).

ORAL ARGUMENT REQUESTED

After being hit or grabbed, he fired his pistol twice.¹⁷ Workman testified that the first shot went up in the air, and he did not know if it hit anybody.¹⁸ As to the second shot, Workman testified that:

The next thing I know, I just heard the noise, the gunfire, the flame from the barrel, and I turned to it and I guess I shot again.¹⁹

The State's theory, however, was that Oliver did not fire a shot until *after* he was shot.²⁰ Thus, the unknown person toward whom Workman shot could not have been Oliver. The record speaks for itself: Workman's testimony cannot be construed as a "confession" to shooting Oliver.

III THE JURY BASED WORKMAN'S DEATH SENTENCE ON DAVIS'S PERJURED TESTIMONY

The jury relied on Davis's false testimony to make the two decisions that resulted in Workman's death sentence: (1) Workman committed capital murder, and (2) that murder was among "the worst of the worst."

A The Jury Relied On Davis's Perjured Testimony To Find That Workman Committed Capital Murder

In State post-conviction proceedings, Workman asserted that if the fatal bullet did not come from his gun, he is not guilty of capital murder. Throughout the years of litigation that followed, the Tennessee Attorney General's Office never contested this statement. The reason

¹⁷ TR 1001 (Workman Testimony)(App. at 007).

¹⁸ TR 1002 (Workman Testimony)(App. at 008).

¹⁹ *Id.*

²⁰ TR 1057 (Prosecution Closing Argument)(App. at 010).

ORAL ARGUMENT REQUESTED

for this silence is clear: The well-established felony murder rule in Tennessee is simple and straight forward.

Under Tennessee law, for a felon to be guilty of felony-murder, the deadly force must come from him or one acting in concert with him. If deadly force comes from a third-party attempting to thwart the crime the felon is attempting to commit, while the felon is guilty of a non-capital offense, he is not guilty of felony-murder. State v. Farmer, 296 S.W.2d 879, 883 (Tenn. 1956); Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932); State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988).

Because there is no evidence that Workman had an accomplice, the jury could find him guilty of capital murder only if it found that the bullet that killed Oliver came from his gun. Because Davis was the only person to claim that he saw Workman shoot Oliver, the jury relied on perjured testimony to convict Workman of capital murder.

B The Jury Relied On Davis's Perjured Testimony To Find That Oliver's Murder Was "The Worst Of The Worst"

Even if Workman actually shot Oliver, even if Workman remains guilty of felony-murder irrespective of who shot Oliver, the jury nonetheless relied on Davis's perjured testimony to sentence Workman to death.

Law reserves the death penalty for crimes that can be characterized as "the worst of the worst." In determining whether a crime fits this description, the State and Federal Constitutions require that a jury consider, among other things, the facts and circumstances surrounding the defendant's crime. Clemons v. Mississippi, 494 U.S. 738, 748, 110 S.Ct. 1441, 108 L.Ed.2d 725

ORAL ARGUMENT REQUESTED

(1990). see State v. Howell, 868 S.W 2d 258, 270 (Tenn. 1993)(Reid, J., concurring). In this case, the jury relied on Davis's perjured testimony to find that the Oliver shooting was among "the worst of the worst" crimes.

Davis was the only person who claimed to know how Workman shot Oliver. Davis claimed that Workman leveled his gun at Oliver, and from a distance of no more than three feet, he shot Oliver in the chest.²¹ The prosecution told Workman's jurors that Davis's testimony established that Oliver was not shot during a struggle or by an accidental discharge, but, rather, Workman "coolly and deliberately pulled the trigger."²² Based on this purported fact, the jury found the Oliver shooting to be among "the worst of the worst" crimes, and it sentenced Workman to death.

We now know that Davis was not at the scene, and the only evidence that Workman "coolly and deliberately" shot Oliver is therefore perjured testimony. Because the jury relied on Davis's false testimony in determining Workman's culpability and how it should punish him, Workman's death sentence is a product of perjury.

IV ORDERING THE DEATH OF A MAN WHEN YOU KNOW THAT PERJURED TESTIMONY CONDEMNED HIM IS AN EVENT THAT CANNOT BE CONDONED FOR ANY REASON

Can you, the Justices of this Honorable Court, order a man to his death when you know that the condemning evidence is perjured testimony? Every oath you have taken as members of

²¹ TR 655-56 (Davis Testimony)(App. at 001-002).

²² TR 1056-57 (Prosecution Closing Argument)(App. at 009-010).

ORAL ARGUMENT REQUESTED

the bar and as Justices of this Court counsels that you should not. Perjured testimony simply cannot be permitted to be the cornerstone upholding a decision that a man should die. Yet, if the sentence in this case is carried out that is exactly what will happen. As other states are rethinking the death penalty in light of recent revelations of official misconduct resulting in innocent men and women condemned to die, Tennessee will be taking a long step backward. I have a deep faith that you will not let this happen.

I do not believe that Philip Workman should be ordered to his death when we know that perjured testimony condemned him. No Tennessean can condone killing a man based on false evidence. You must therefore deny the Attorney General's request that you order Workman's death, and you should consider, instead, issuing a certificate recommending that Governor Sundquist commute Workman's death sentence.

V INSTEAD OF ORDERING WORKMAN'S DEATH, YOU SHOULD RECOMMEND THAT GOVERNOR SUNDQUIST COMMUTE HIS SENTENCE

The Tennessee Code authorizes you to issue a certificate recommending that the Governor commute a death sentence. T.C.A. § 40-27-106 (Michie). In addition, as Justice Henry recognized over twenty years ago, this statute

in no sense encroaches upon the Court's power, duty or obligation to convey to the Governor its views in appropriate cases. We, therefore, are not limited to the certificate set forth in the statute, but, independent of the statute, in a proper case, may make our determination that executive commutation is appropriate, and communicate this determination to the Governor.

Collins v. State, 550 S.W.2d 543, 549 (Tenn. 1977)(Henry, J., concurring in part; dissenting in part). In the past, this Court has invoked this principle to recommend that the Governor

ORAL ARGUMENT REQUESTED

commute a death sentence.

The Tennessee Department of Corrections maintains an old log book in which officials recorded events surrounding the disposition of pre-Furman death sentences. That book reflects that during the period 1935 to 1958, the Governor commuted twenty death sentences—nine on recommendation of this Court.²³ The case of Arthur Bass, while less compelling than the case before you now, is instructive.

Arthur Bass beat his cousin to death with an iron poker, stole his money, and fled to Ohio. At trial, Bass testified that he and his cousin had been playing poker and drinking alcohol through the night, and the game ended when Bass had won all of his cousin's money. Bass testified that at that point his cousin accused him of spreading false rumors and attacked him with the poker. Bass claimed that he wrestled the poker away from his cousin and only beat him with it when his cousin went for a gun. Bass could not explain, however, why he fled to Ohio instead of contacting authorities. The jury rejected Bass's testimony, convicted him of first-degree murder, and sentenced him to death.

While this Court had no problem concluding that the evidence was sufficient to support Bass's conviction, it felt that "a curtain of uncertainty" surrounded events prior to the murder. As a result, this Court felt that the question of whether the defendant's mind was sufficiently clear to be capable of deliberation "naturally intrudes itself." Recognizing that it could not exercise the prerogative of pardon, this Court followed the course I recommend you follow in

²³ 12/7/99 Affidavit of Rosale Kraft at ¶ 3 (App. at 095).

ORAL ARGUMENT REQUESTED

this case. It wrote

the question concerning the defendant's deliberation well warrants the indulgence of executive clemency to the extent that the death sentence be commuted to one of life imprisonment. Such a course is recommended.

Bass v. State, 231 S.W.2d 707, 715 (Tenn. 1950). Ten days later, Governor Gordon Browning commuted Bass's sentence to life.²²

In Bass's case, a "curtain of uncertainty" surrounding testimony about the facts and circumstances of the crime prompted this Court to recommend that the Governor commute a death sentence. In this case, there is no uncertainty. We now know that when Harold Davis said he saw Workman coolly and deliberately shoot Oliver from no more than three feet away, Davis lied. Knowing this, you should do as the Court did in Bass: recommend that the Governor commute Workman's death sentence.

VI CONCLUSION

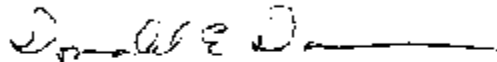
I do not take lightly the manner in which I approach this Court. I realize that when I come before you as the Post-Conviction Defender, I represent that the course I recommend is one I believe necessary to fulfill the mission Tennesseans have assigned me. I realize that when any attorney comes before you as an officer of this Court, s/he represents that the statements made are necessary to maintain the integrity of the judicial process. I have no doubt that such is the case here.

We now know, beyond any doubt, that Philip Workman has been condemned to die based

²² 12/7/99 Affidavit of Rosalie Kraft at ¶ 4 (App. at 095).

ORAL ARGUMENT REQUESTED

Respectfully submitted,

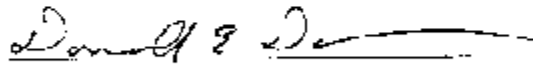


Donald E. Dawson
POST-CONVICTION DEFENDER
460 James Robertson Parkway
Nashville, Tennessee 37243
(615) 741-9331

CERTIFICATE OF SERVICE

I certify that on December 9, 1999, I hand delivered a copy of the foregoing to:

Paul Summers
Attorney General and Reporter
ATTORNEY GENERAL'S OFFICE
500 Charlotte Avenue
Nashville, Tennessee 37243-0493



Donald E. Dawson