IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

May 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

TYLER WAYNE BANES,	)	
	)	**C.C.A. NO. 02C01-9508-CC-00249**
Appellant,	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. JOHN FRANKLIN MURCHISON,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Writ of Error Coram Nobis)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

On May 13, 1992, the petitioner was convicted of aggravated rape and aggravated sexual battery.[1] He has now filed a petition for a writ of error coram nobis, requesting that his conviction for aggravated rape be set aside and that he be granted a new trial because of newly discovered evidence. After a hearing on March 30, 1995, the trial court denied the petition.

In this appeal as of right, the petitioner contends that the trial court erred in dismissing his petition which relied on newly discovered evidence in the form of a recantation of testimony by the minor victim. After reviewing the record, we affirm the lower court's dismissal.

Petitioner's trial attorney was not allowed to interview the victim prior to the original trial. However, trial counsel did cross-examine the victim. The victim accused the petitioner of having had sexual relations with her, but admitted prior inconsistent statements to the Department of Human Services, to the detective investigating the case, to the doctor, and to a nurse. Also, evidence was presented at trial that the petitioner was not the father of the victim's child who was born prior to the trial. Also admitted into evidence at trial was a letter written by the petitioner to the district attorney in which the petitioner admitted to having had sexual relations with the victim.

After the trial, the petitioner's attorney met with the victim, who was being held at a juvenile detention facility, and obtained an affidavit from her denying that she

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[1] On appeal to this Court, the defendant's conviction for aggravated rape was affirmed but the conviction for aggravated sexual battery was reversed and dismissed. State v. Banes, 874 S.W.2d 73 (Tenn. Crim. App. 1993).

had ever had sexual relations with the petitioner and stating that she had lied at trial because she was mad at the petitioner. This recantation of the victim's testimony is the basis of the petition for writ of error coram nobis.

Our statutes provide that a proceeding in the nature of writ of error coram nobis is available to defendants convicted in criminal cases and that proceedings thereunder are to be governed by the same rules and procedures applicable to the writ of error coram nobis in civil cases. T.C.A. § 40-26-105. This statute also provides that relief is confined to cases in which errors were not or could not have been litigated at trial. Further, the statute provides that if a defendant can show that he or she was not at fault in failing to present certain evidence at the proper time, the writ will lie for subsequently or newly discovered evidence relating to matters which were litigated at trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented. T.C.A. § 40-26-105.

The general test as to whether a defendant should be granted a new trial because of newly discovered evidence is composed of three prongs: (1) did the defendant use reasonable diligence to discover the evidence; (2) is the newly discovered evidence material; and (3) would the introduction of the evidence likely change the result if accepted by the jury. State v. Goswick, 656 S.W.2d 355, 358-59 (Tenn. 1983). Ordinarily, a new trial will not be granted where the new evidence is to discredit the testimony of a witness, contradict a witness' statement, or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue and the evidence impeaching the witness is so strong and convincing that a different result would necessarily follow. Rosenthal v. State, 200 Tenn. 178, 292 S.W.2d 1, 4-5 (1956).

In determining whether to grant a new trial in cases involving recanted testimony, the test is as follows: "(1) Is the trial judge reasonably well satisfied that the testimony given by a material witness was false and that the new testimony is true; (2) was the defendant reasonably diligent in discovering the new evidence, or surprised by false testimony, or unable to know of the falsity until after the trial; and (3) might the jury have reached a different conclusion had the truth been told." State v. Phillip Lloyd Herndon, No.03C01-9303-CR-00098, Knox County (Tenn. Crim. App. filed May 11, 1994, at Knoxville). Recanted testimony is looked upon with distrust rather than favor due to the great temptation to strengthen the weak points of the case discovered during the trial by perjury or subornation of perjury. Ross v. State, 130 Tenn. 387, 170 S.W.1026, 1028 (1914).

At the conclusion of the hearing in this case, the trial judge found that the evidence offered was "not newly discovered evidence." In his finding the trial judge stated that a witness changing his or her story is not the same as a newly discovered witness. The trial court further found that this was simply an attempt to change testimony by a witness who had affection for the defendant and that "affection [was] going in both directions." The trial judge concluded that there was a strong inference that what the witness had originally testified to was true in view of the corroboration by the petitioner's letter admitting the sexual relations.

Our review of the record supports the findings of the trial judge who was not satisfied that the testimony given at trial was false and the new testimony was true. We also conclude that the record does not support a finding that the "new testimony" would likely change the result of the trial.

For the reasons set out above, we affirm the action of the trial court in dismissing the petition for writ of error coram nobis.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID H. WELLES, Judge