IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 21, 2008

STATE OF TENNESSEE v. HUGH PETER BONDURANT

Direct Appeal from the Circuit Court for Giles County
No. 3990 Jim T. Hamilton, Judge

No. M2007-01937-CCA-R3-CD - Filed December 23, 2008

Petitioner, Hugh Peter Bondurant ("Pete Bondurant") and his twin brother, Kenneth Patterson Bondurant ("Pat Bondurant"), were convicted in 1991 of the second degree murder of Gwen Swanner Dugger. In 2006, Petitioner filed a petition for writ of error coram nobis in which he asserted a claim of newly discovered evidence in the form of Pat Bondurant's statement that Petitioner did not participate in the murder of Ms. Dugger. On appeal, Petitioner contends that the trial court erred in summarily dismissing his petition without granting him an evidentiary hearing. After a thorough review, we affirm the judgment of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the appellant, Hugh Peter Bondurant.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; T. Michel Bottoms, District Attorney General; Richard H. Dunavant, Assistant District Attorney General; and Patrick Butler, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The facts surrounding Petitioner's conviction were summarized by a panel of this Court in the direct appeal as follows:

> This case involves the homicide of Gwen Swanner Dugger (victim). On May 30, 1986, Ken Swanner testified that he and his sister, the victim, went to the appellants' residence to repair a car. While Mr. Swanner was working on the vehicle,

the victim went into the appellants' house. After the repairs were made, Mr. Swanner walked up to the house and asked the victim "if she was ready to go." The victim followed Mr. Swanner outside and informed him that "she was going to stay." Mr. Swanner never saw the victim again.

Approximately one week later, the victim's family became concerned after not hearing from the victim. Ken Swanner returned to the appellants' residence. He asked the appellant, Pat Bondurant, and his wife, Denise, if they knew the victim's whereabouts. They responded that they did not know. Several days later, Mr. Swanner saw the appellant Pete Bondurant. He questioned Pete concerning the victim's whereabouts. Pete responded: "I dropped her off at Shady Lawn last week."

In June of 1986, Jack Swanner and Ken Swanner embarked on another effort to locate the victim. While en route to the appellants' residence, they observed Pete Bondurant on the interstate. They followed Pete to a night club. At the night club, the Swanners confronted Pete. Pete stated, "I didn't kill her.... I ain't done nothing. Leave me alone. I'm crazy." The club's owner came outside and told them to "break it up." Pete then backed into the nightclub yelling that "he was crazy; that he had killed once; he'd kill again." The Swanners left.

In 1990, Investigator William Coleman approached Denise Bondurant. Denise was separated from the appellant, Pat Bondurant. She stated that she was afraid Pat would hurt someone else. Therefore, she gave Investigator Coleman a statement concerning the victim's death. She was later given immunity from prosecution.

Denise Bondurant testified that on May 30, 1986, she, Pat Bondurant, Pete Bondurant, Dwayne Howell, and Gary Hardin were all present at the Bondurant residence when the victim and her brother arrived. Denise stated that the victim walked up to the house and purchased Valium from the appellant Pat Bondurant. She testified that although Ken Swanner wanted the victim to leave with him, the victim decided to "stay and party." She stated that everyone there "was drinking and doing drugs, except for [her]." She attributed her abstinence to her pregnancy.

Later in the evening, Denise testified that Pat told her to "put on some steaks." She stated that the victim attempted to assist her. However, the victim was so intoxicated she could "barely even stand up." In addition to the Valium and beer, Denise stated that "Pete had given her some Placidyls."

Denise stated that Gary Hardin was "trying to make a pass at [the victim]" while they were in the kitchen. Pat, however, came into the kitchen carrying a .38 caliber pistol. She testified that Pat said "if anyone's getting her, Pete's going to have her her [sic] first, because he had bought her drugs." Pete then took the victim

into the bathroom. Denise stated that she saw the victim performing fellatio on Pete in the bathroom.

Denise testified that later "Dwayne came back in the kitchen, and I felt like he was trying to keep me in there; you know, that he was stalling, you know, for conversation." She stated that she became "suspicious of what's going [on in the] front of the house." She stated that she went up front and noticed that the bedroom door was closed. Although Gary was holding the door shut from the inside, she forced her way in and found Pat having sex with the victim. She stated that she hit both Pat and the victim, gathered up some clothes, and left.

Gary Hardin testified that after Denise left, he and Pete "got [the victim] up." They carried her, while nude, outside and put her in a car. They then drove her down to the barn. He testified that the victim was "messed up" and mumbling. Gary stated that after the victim was taken to the barn, he, Pete, and Dwayne all had sex with her. Dwayne testified that when they finished with the victim, they left her lying in the barn and went to the house to eat.

Patricia Howell Love testified that she worked in a strip bar across the street from the Bondurants' residence. She stated that on the evening of May 30, 1986, Pete entered the club and said "he had a whore tied up to a bale of hay, if anybody needed a good f___."

Denise testified that after she had left the house, she drove to the interstate and headed toward Alabama. When she got to the Ardmore-Huntsville exit, she turned around and headed back home. Denise returned to the house and found that Gary and Dwayne had not left. She again instructed them to leave. They then left.

Denise walked into the house and found that the victim had been brought back up to the house from the barn. Denise stated that she walked into the room where the victim lay nude on a mattress. She tried to wake her by "nudging her with [her] foot." She stated that the victim was unresponsive so she "started smacking her in the face, trying to get her to awake." She stated that the victim starting "coming to" but described the victim as "groggy."

As the victim regained consciousness, Denise began accusing the victim of having sex with her husband, Pat. The victim denied her allegations. Denise stated that "right then [she saw] that [the victim] was not aware of what had happened." Denise stated that she hit the victim. She, however, described the victim as being helpless and unable to defend herself "so [Denise] stepped out of the way."

Denise then described the victim's murder. She stated that Pat walked in from the back of the house. He was carrying a big stick or ax handle. She stated that

Pat told her to use the stick on the victim. Denise responded, "Pat, look at her. I don't need that." Pat then said, "Well, I'll do it for you."

Denise testified that Pat began the assault by striking the victim on top of the head with the ax handle. She stated that she saw blood on both the victim and the weapon. She stated that Pat then hit her a second time. The victim fell to her knees. Denise testified that she told Pat to "please stop before you hurt her really bad." However, as the victim was attempting to rise, Pat struck her again. She believed that the third blow was to the victim's side. She stated that the blow to the side "flung [the victim] across the room." She estimated that Pat administered nine to twelve blows to the victim.

After Pat ceased striking the victim with the ax handle, he began having sexual intercourse with her. Denise stated that he raped the victim vaginally and anally. While raping the victim vaginally, "Pat made the statement to Pete that [the victim] was peeing ... like it was something really funny to him." Denise further testified that while Pat was anally raping the victim, the victim began losing her bowel on him about which Pat also commented. After climaxing, Pat offered the victim to Pete. Denise stated that Pete "turned it down." She then testified that she told Pat he "ought to get cleaned up before someone were to come up, and you know, catch [him] like this.... [H]e had blood and her bowel movement all over him."

Pat went to the bathroom to take a bath and Denise followed. Denise testified that, while Pat was bathing, Pete entered the bathroom carrying a .22 caliber revolver. Pete "said [he was] going to put [the victim] out of her misery." She stated that Pete walked into the room where the victim lay unconscious. Denise then heard two shots. She stated that Pete returned to the bathroom and removed two spent cartridges from the gun. Denise then walked into the room where the victim lay. She looked down at the victim and saw two gunshot wounds in the victim's head, one to the "[r]ight temple and one between her eyes." Denise also testified that she saw movement in the victim's body following the gunshot wounds.

Denise stated that Pete left the house and came back with some large trash bags. She stated that Pete began bagging the victim's body with lime in the large trash bags. Then they began cleaning blood splatterings from the walls, floor, and ceiling. They gathered the mattress, cushion, carpeting, couch, chair, victim's clothes, and other items covered with the victim's blood. These items were burned in a backyard pit. Later the ax handle was also burned.

The victim's body was loaded onto a trailer in tow by a three-wheeler. They took the victim's body to a secluded area. Denise testified that they stuffed the victim's body head first into a 55-gallon drum. She also stated that they placed rubber matting inside the barrel to increase the fire's temperature. She testified that the

appellants used a hammer and nails to perforate the bottom of the barrel to increase air flow. They poured kerosene on the victim "and just set a fire." She stated that after the fire was set, they sat "there and ... watched her flesh burn off the bones of her feet." Later, they went out to eat.

After eating, they returned to the location of the victim's burning body. Denise stated that the victim was then dumped from the barrel. Denise described the victim as follows:

> her legs were burnt up past her knees, and her whole body was ju-it just looked like her f[l]esh was all wrinkled, and you could still see that her head had some hair.

Because the victim was not burning fast enough, they left the victim out of the barrel so "it could get more air to burn a little bigger fire." Denise testified that they continually added wood and rubber to the fire. She stated that they burned the victim from Friday night until Sunday afternoon. She further stated that Pat used a shovel to chop "up little sections" and crush "bones that had already burned." She stated that by Sunday afternoon, the victim was "completely burned up." She stated that there were "just some round piece[s] of bone" and "chunks of bone" that Pat "would just smack down with a shovel."

Denise stated they shoveled the victim's ashes, more lime, and topsoil from the fire pit into the drum. The drum was loaded onto their truck and transported to the Elk River. Pat then disposed of the victim's cremated remains by pouring the mixture of ashes, lime, and topsoil from the barrel into the river.

Dwayne Howell testified. He stated that a few days after the May 30, 1986 party, Pat and Denise Bondurant stopped by his house. He testified that Pat had "wanted to know if anybody had come around asking any questions." Howell responded that he "didn't know what [Pat] was talking about." He testified that Pat then responded "well, if [you] know what's good for [you], if anybody comes over asking, questions, [you] don't know anything."

Gary Hardin testified that he saw Pete shortly after the May 30, 1986 party. He stated that Pete said "you ain't seen nothing up there that night." Hardin further testified that approximately one year later, Pete approached him and said "like I said, you ain't seen nothing, and they ain't got a case without a body."

Investigator Coleman testified. He stated that in 1990, they excavated a pit in the appellants' backyard. There he discovered a partially burned high top tennis shoe. He stated that a pink diaper pin was attached to the shoe. Investigators also found springs, remnants of carpet, and other household materials in the pit.

> Patricia Howell Love testified. She stated that she was familiar with a peculiarity of the victim's mode of dress. She stated that the victim always wore either a pink or blue baby's diaper pin attached to her high top tennis shoes. She also testified that Pete Bondurant said the victim "wouldn't be back" and "[y]ou can't make a case without a body." She further stated that "Pete made the statement that he could get out of it, because he was crazy."
>
> Ms. Love's testimony also revealed that she was commonly addressed by the childhood nickname, "Snow." Pete, however, referred to her as "his little 'Snowby.'" She testified that, following the victim's death, Pete carried around two .22 caliber shells that he referred to as "Gwenbys." She stated that "[h]e would roll [the 'Gwenbys'] in his hand like dice, or he would put them on the table and play with them like a shell game."
>
> The terms "Gwenbys" and "Gwembies" are used interchangeably throughout the record. For purposes of consistency, we will refer to the shell casings as "Gwenbys."
>
> Inmate Billy Dwayne Golden testified. He stated that while he and the appellant, Pete Bondurant, were in jail, Pete spoke with him regarding the victim's death. Mr. Golden stated that Pete told him "they would never convict him of murder when there wasn't [sic] no body, and he took care of the body. He burned it in a fifty or hundred gallon barrel feed drum. He had properly disposed of the remains.... He told me that he took care of that bitch [the victim]." Mr. Golden also testified that Pete told him that he and Pat would "pin" the murder on Denise Bondurant. Mr. Golden further testified that he overheard Pete, in a phone conversation, say "not to do anything to Denise, right now. He said, they couldn't handle another stiff on their hands. The T.B.I. agent would freak."

State v. Kenneth Patterson Bondurant and Hugh Peter Bondurant, No. 01C01-9501-CC-00023, 1996 WL 275021 (Tenn. Crim. App., at Nashville, May 24, 1996), perm. to appeal denied (Tenn. Nov. 12, 1996).

On August 1, 2006, Petitioner filed a pro se petition for writ of error coram nobis in which he alleged that Pat Bondurant had recently revealed to Petitioner that Pat Bondurant's wife, Denise Bondurant, shot Ms. Dugger. Pat Bondurant stated in an affidavit attached to the petition that:

> Pete Bondurant was passed out on his medication when my wife shot Gwen Dugger. I did not tell [Petitioner] about Denice [sic] shooting [Ms. Dugger] because I wanted to protect my children's mother (Denice [sic] Bondurant).

Attached to Pat Bondurant's affidavit was a letter written to Governor Phil Bredeson on August 5, 2005, in which Pat Bondurant requested favorable consideration of Petitioner's request for parole. In this letter, Pat Bondurant stated:

> After catching me in bed having sex with Gwen Dugger, my wife, Denise Bondurant, shot and killed Gwen. Denise shot Gwen in the head in a dead rage. . . . [Petitioner] was taking psychotropic medication and was asleep when my wife shot Gwen. The psychotropic medication [Petitioner] was taking put [Petitioner] in a deep stupor. I did not even attempt to wake [Petitioner] up after Denise shot Gwen. . . . After Denise killed Gwen I chose my wife and family over my twin brother. I knew that [Petitioner] would rat Denise out. So what I did along with Denise was load up Gwen's body and take it to my family's home in West Point, Tennessee. We burned Gwen's body up.

Pat Bondurant, who is currently on death row for the murder of another individual, acknowledged that his letter would probably hinder any future pleas for clemency. Pat Bondurant, however, stated that he could "no longer live with . . . the betrayal of my brother." Pat Bondurant stated, "I admitted to part of the above at my sentencing hearing in 1991, but I have never had the courage to tell the whole story before."

In his error coram nobis petition, Petitioner contended that this evidence was not available to him at the time of trial because his brother invoked his Fifth Amendment privilege against self-incrimination at their joint trial, and that the results of the trial may have been different had the jury been informed of this evidence. The State filed a response to the petition, arguing that the petition was filed outside the applicable one year statute of limitations. In addition, the State submitted that the petition did not present newly discovered evidence which might have affected the verdict and contended that in any event the proffered evidence was not credible.

The trial court appointed counsel to represent Petitioner and conducted a hearing on the petition on July 27, 2007. Before any witnesses were called to testify, however, the trial court addressed the State's challenge to the timeliness of the petition's filing. After argument of counsel, the trial court found no due process concerns which required the tolling of the limitations period. In addition, the trial court found that even if Petitioner were allowed to proceed with his coram nobis claim, the "alleged newly discovered evidence was not such as might have produced a different result" in the trial. The trial court thus summarily dismissed the petition.

II. Analysis

Relief by petition for writ of error coram nobis is provided for in Tennessee Code Annotated section 40-26-105(b). That statute provides, in pertinent part:

> The relief obtainable by this proceeding 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.

The writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999) (citation omitted). The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995). A petition for writ of error coram nobis must relate: (1) the grounds and the nature of the newly discovered evidence; (2) why the admissibility of the newly discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial; (3) that the petitioner was without fault in failing to present the newly-discovered evidence at the appropriate time; and (4) the relief sought by the petitioner. Freshwater v. State, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004). Our supreme court has recently held that to be successful on a petition for a writ of error coram nobis,"the standard to be applied is whether the new evidence, if presented to the jury, may have resulted in a different outcome. . . ." State v. Vasques, 221 S .W.3d 514, 526 (Tenn. 2007).

Petitioner argues that the trial court erred in finding that the petition for writ of error coram nobis was barred by the statute of limitations. A petition for writ of error coram nobis relief must be filed within one year of the time judgment becomes final in the trial court. See T.C.A. § 27-7-103. However, a court may consider an untimely petition if applying the statute of limitations would deny the petitioner due process. See Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001); Burford v. State, 845 S.W.2d 204, 209-10 (Tenn. 1992). To determine if due process requires tolling of the statute of limitations, a court must weigh the petitioner's interest in having an opportunity to present his claims in a meaningful time and manner against the State's interest in preventing the litigation of stale and fraudulent claims. Burford, 845 S.W.2d at 208. More specifically, a court should utilize the following analysis: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are later-arising, determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

In conducting this analysis, "we must consider the governmental interests involved and the private interests affected by the official action." Workman, 41 S.W.3d at 103. As noted in Burford and later in Workman,

> the governmental interest in asserting the statute of limitations is the prevention of stale and groundless claims. The private interest . . . is the petitioner's opportunity to have a hearing on the grounds of newly discovered evidence which may have resulted in a different verdict if heard by the jury at trial.

Id.

Petitioner concedes in his brief that the petition for writ of error coram nobis was filed outside of the applicable statute of limitations, and it is clear from the record that the State raised the untimeliness of the petition in its response to the filing of the petition. See Harris v. State, 102 S.W.3d 587, 593 (Tenn. 2003). Petitioner argues, however, that the evidence in the form of Pat Bondurant's affidavit arose only after the running of the statute of the limitations, and he has, therefore, been denied the opportunity to present his claim. The State contends that Petitioner's due process rights are not implicated because he has failed to present a claim that is cognizable in a coram nobis proceeding. That is, Petitioner has not presented any evidence which may have resulted in a different result at trial.

In Workman, due process concerns were implicated because the petitioner's newly discovered evidence "raised serious questions regarding whether he fired the shot" that killed the victim, and the delay in obtaining the evidence was not attributable to either the petitioner or his attorneys. Workman, 41 S.W.3d at 103. Under the facts presented in Workman, our supreme court concluded that the interest of the petitioner, who was scheduled to be put to death for the offense, "clearly outweigh[ed] the governmental interest embodied in the statute of limitations." Id.

In the case sub judice, however, we conclude that Petitioner had failed to demonstrate that the evidence presented in Pat Bondurant's affidavit, that Denise Bondurant, not Petitioner, killed the victim, arose only after the limitations period had run. See Sands, 903 S.W.2d at 301. In their joint trial, Petitioner and his co-defendant, Pat Bondurant, presented a theory of defense through the extensive cross-examination of the State's witnesses which was based on their allegation that Denise Bondurant shot Ms. Dugger. Obviously, Petitioner had knowledge of the extent of his own participation in the crime, and he had ample opportunity at trial to cross-examine Ms. Bondurant about any aspect of the offense, including whether or not he was unconscious at the time the victim was shot. We conclude that Petitioner's interest in again litigating his claim that Ms. Bondurant shot the victim is outweighed by the State's interest in protecting the finality of judgments and conserving the limited resources of the justice system. Accordingly, we conclude that the trial court did not err in dismissing Petitioner's coram nobis petition as untimely, and nothing in the record implicates due process concerns which would require the tolling of the statute of limitations and a hearing on the merits. Petitioner is not entitled to relief on this issue.

Moreover, procedural bar notwithstanding and as the trial court indicated, Petitioner's claim does not survive scrutiny on the merits even assuming arguendo that the claim constitutes newly discovered evidence. As a general rule, subsequently or newly discovered evidence which is simply cumulative to other evidence in the record or serves no other purpose than to contradict or impeach

the evidence presented at trial will not justify the granting of a petition for the writ of error coram nobis when the evidence, if introduced, would not have resulted in a different judgment. Hart, 911 S.W.2d at 375.

At trial, Mr. Howell and Mr. Hardin both testified that Petitioner was present on the evening of the murder, and that Petitioner was not only conscious but an active participant in the sexual assaults on the victim prior to her murder. Denise Bondurant testified that Petitioner shot the victim in the head twice with a .22 caliber revolver. Ms. Love testified that Petitioner carried around two .22 caliber shells after the May 30, 1986 party, which he referred to as "Gwenby's." Witensses Hardin and Love also testified about certain statements Petitioner made to them concerning the victim's murder. The State thus presented overwhelming evidence establishing Petitioner's active participation in the offense. We observe that Petitioner submits that in a later affidavit, Pat Bondurant stated that he made these exculpatory statements to witnesses Hardin and Love while he was impersonating his twin brother. This affidavit, however, is not included in the record on appeal. Based on our review, we conclude that Petitioner has failed to present any newly discovered evidence that may have resulted in a different judgment had it been presented at trial. See T.C.A. § 40-25-105.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE