

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 19, 2009 Session

STATE OF TENNESSEE v. CARLOS MAHONE

**Appeal from the Criminal Court for Knox County
No. 70074E¹ Mary Beth Leibowitz, Judge**

No. E2008-00099-CCA-R3-CD - Filed March 31, 2010

The Defendant, Carlos Mahone, appeals as of right from his Knox County Criminal Court jury convictions for criminally negligent homicide, especially aggravated robbery, and aggravated robbery for which he received an effective sentence of twenty-seven years. Following the filing of a pro se petition for post-conviction relief and the appointment of counsel, the trial court granted the Defendant a delayed appeal based upon trial counsel's ineffective assistance for failing to file a notice of appeal. The Defendant now urges this court to reverse his convictions based upon the insufficiency of the evidence and the failure of the trial court to grant his motion for new trial based upon what he alleges to be newly discovered witness testimony.² Following our review, the judgments of the trial court are affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are
Affirmed.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

¹ The notice of appeal in this case was filed in case number 87807, the post-conviction case seeking delayed appeal. However, the appeal should have been taken from case number 70074E – the original convicting case number. All relevant transcripts of the trial have been included in the record on appeal. We will treat this as a clerical error and deem this case properly before the court.

² The Defendant also raised errors in his brief relative to the trial court's sentencing. However, at oral argument, the Defendant conceded that consecutive sentencing did not violate his Sixth Amendment rights and that the trial court imposed a sentence for especially aggravated robbery below the presumptive minimum; therefore, Blakely v. Washington, 542 U.S. 296 (2004), was not implicated by the trial court's sentence. See also Oregon v. Ice, U.S. ___, 129 S. Ct. 711 (2009). Based upon these concessions, we will not address the Defendant's allegations regarding sentencing.

Richard L. Gaines, Knoxville, Tennessee, attorney for appellant, Carlos Mahone.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Marsha Mitchell, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the Defendant was indicted for two counts of first degree felony murder, alleging robbery and theft as separate underlying felonies, and one count of premeditated first degree murder concerning the shooting of Keith Jackson. The Defendant was also indicted for the especially aggravated robbery of Mr. Jackson and the aggravated robbery of Orlando Murphy. Following a jury trial, the Defendant was acquitted of felony murder, but he was convicted of criminally negligent homicide as a lesser included offense of premeditated murder, especially aggravated robbery, and aggravated robbery.

Post-Trial Procedural History

Approximately one month after trial but before sentencing, the Defendant filed a motion for new trial based upon the newly discovered testimony of an alleged witness, Deon McKinley Turner. Mr. Turner contacted the Defendant's counsel after trial and told counsel that he saw a separately-tried codefendant, Derrick Perry, shoot the victim. Mr. Turner also told counsel that he did not know who the Defendant was, presumably providing some evidence that the Defendant was not present at the shooting. Following a hearing, the trial court found that Mr. Turner's testimony that Mr. Perry was the shooter was known to all attorneys prior to trial; that Mr. Turner had been unwilling to testify at trial; and that his many inconsistent statements, in addition to admitted alcohol and drug impairment at the scene, rendered his testimony less than credible. Therefore, the trial court denied the motion for new trial and proceeded to sentencing the Defendant. Judgments were entered on May 24, 2001. Trial counsel failed to file a notice of appeal or pursue any direct appeal of the Defendant's convictions.

On September 27, 2007, the Defendant filed a pro se petition for post-conviction relief alleging that he was denied the effective assistance of counsel by counsel's failure to pursue a direct appeal. He specifically alleged that his attorney "died prior to preparing and filing the appeal" and that he was unsuccessful in his "many attempts to ascertain information about his appeal." The Defendant requested relief in the form of a delayed appeal.

The trial court appointed counsel who filed a "Motion for Delayed Appeal." The motion avers that the Defendant "was led to believe that [trial counsel] was going to handle

any post-trial motions and/or appeals.” The motion further avers that following the entry of judgments in May 2001, the Defendant had “no further contact” from trial counsel regarding any appeal or post-conviction matters. Significantly, the motion states that trial counsel died on January 26, 2003. On December 11, 2007, the trial court granted the delayed appeal based upon its finding that trial counsel rendered ineffective assistance of counsel by failing to pursue a direct appeal. On appeal to this court, the Defendant contends that the evidence is insufficient to support his convictions and that his convictions should be reversed based upon the now-willing testimony of Mr. Turner. However, for the first time on appeal, the State contends that the post-conviction court did not have jurisdiction to grant a delayed appeal because the pro se petition and subsequent motions were filed well beyond the one year statute of limitations applicable to post-conviction proceedings and the Defendant failed to allege any grounds to toll the statute of limitations.

The State correctly asserts that the Post-Conviction Procedure Act (the Act) provides that a petition for post-conviction relief must be filed within “one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.” Tenn. Code Ann. § 40-30-102(a). Therefore, the petition in this case, filed almost six and a half years after the judgment became final, was clearly untimely. The Act further provides that “[n]o court shall have jurisdiction to consider a petition filed after the expiration of the limitations period” except under certain circumstances. Tenn. Code Ann. § 40-30-102(b). Additionally, “[section] 40-30-202(a) declares that the one-year statutory period is an element of the right to file a post-conviction petition and that it is not an affirmative defense that must be asserted by the State.” State v. Nix, 40 S.W.3d 459, 464 (Tenn. 2001). In addition to the circumstances listed under section 40-30-102(b)(1)-(3), a trial court may also consider an untimely petition for post-conviction relief when application of the limitations period would result in a denial of due process. Burford v. State, 845 S.W.2d 204, 209-20 (Tenn. 1992).

Notably, in his pro se petition, the Defendant did not argue that any of the statutory exceptions applied or that due process concerns required the statute of limitations to be tolled. Furthermore, the record does not contain a transcript of any hearings or discussions regarding the granting of the delayed appeal; such discussions may have revealed some basis to toll the statute of limitations in this case. Based upon the record before this court, it appears that the delayed appeal in this case was granted by the agreement of the parties without any objection or question of the trial court’s jurisdiction to do so.

The Act provides that an appeal from “[t]he order granting or denying relief under the provisions of this part shall be deemed a final judgment, and an appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate

Procedure.” Tenn. Code Ann. § 40-30-116. Tennessee Rule of Appellate Procedure 3(c) permits the State to “seek a direct appeal from any judgment in a ... post-conviction proceeding.” In this case, the State consented to the granting of the delayed appeal in the trial court and did not seek an appeal from the trial court’s order pursuant to T.R.A.P. 3(c). Thus, the trial court’s jurisdiction to grant the delayed was settled in that prior proceeding. At any rate, this court has the power to excuse the timely filing of a notice of appeal, see T.R.A.P. 4(a), and would have done so under the circumstances of this case had the Defendant sought such relief instead of filing his petition for post-conviction relief.

Evidence Presented at Trial

Gerald Smith, an evidence technician with the Knoxville Police Department, testified that he received a call to the parking lot of Mr. C’s Private Party Lounge at 6:02 a.m. on September 26, 1999. He testified that he arrived by 6:08 a.m. to find the victim lying near a gray Ford Granada, dead from a gunshot wound to the head. Mr. Smith recalled that J.T.’s Pool Hall was also located nearby, adjacent to the parking lot. After processing the vehicle, he concluded that it was not linked to the shooting. Mr. Smith testified that he found no fingerprints belonging to the Defendant inside the vehicle.

Rauf Muhammad testified that he arrived at J.T.’s lounge at approximately 3:00 a.m.. He recalled seeing the Defendant and some other men in the parking lot when he arrived, but he never saw the Defendant and his friends inside the lounge. Mr. Muhammad identified Derrick Perry as one of the men with the Defendant. Although he was outside when he heard shots fired, Mr. Muhammad did not see the robbery and did not see the Defendant with a gun. He recalled seeing all the men scattering and soon thereafter, a man who was later identified as Alando Murphy approached Mr. Muhammad and asked for help because his friend had been shot. Mr. Muhammad identified Mr. Perry as one of the men who “scattered” when the shots were fired, but he also stated that he did not pay much attention to who was present that night because everyone was just outside the lounge “kicking it” – socializing – when the shooting occurred. However, Mr. Muhammad identified the Defendant and his codefendant, Hamadi Haley, at trial as being among the men with Mr. Perry.

Michael Taylor testified that he arrived at J.T.’s Pool Hall at approximately 1:00 a.m.. He stated that he had known Mr. Haley for a couple of months in September 1999 but that he did not know the Defendant. Mr. Taylor recalled seeing Mr. Haley and the Defendant inside the lounge and outside in the parking lot that night. He recalled that Mr. Perry, Chase Jackson, and John Fox were also at the lounge. Mr. Taylor stated that he did not know Alando Murphy or the shooting victim, Keith Jackson. Mr. Taylor stated that he never saw anyone with a gun and that he left the lounge before the shooting occurred. However, he

recalled that Chase Jackson approached him sometime during the evening and asked him if he had a pistol. Mr. Taylor testified that he told Chase Jackson that he carried one for protection. In fact, Mr. Taylor admitted that he was arrested at a nearby Weigel's Market later that morning while in possession of a Colt 1911 .45 caliber pistol. During an interview with investigators, Mr. Taylor recalled seeing "two guys from Alcoa" – the Defendant and Haley – sitting on the wall outside the lounge when he left that morning.

Dr. Sandra Elkins, then-medical examiner for Knox County, testified that she performed the autopsy on the victim. She stated that the victim was a healthy, thirty-year-old man who died from a gunshot wound to his head that severed his brain stem. She testified that she found no signs that the victim had been involved in a fight and that his death would have been "almost instantaneous."

Alando Murphy testified that he was born in Jamaica but moved to Brooklyn, New York at the age of sixteen. After school he moved to Nashville. While in Nashville, he pled guilty to theft over sixty thousand dollars for his involvement in a botched home invasion robbery. Mr. Murphy was sentenced to ten years; and, upon his parole, he moved to Dismas House in Knoxville. While living in Knoxville, he worked many jobs in numerous restaurants and maintained an apartment in South Knoxville. The victim lived in the same apartment complex, and the two men became friends in the summer of 1999.

On September 26, 1999, Mr. Murphy and the victim went to J.T.'s Pool Hall at approximately 2:30 a.m. to celebrate Mr. Murphy's birthday. Mr. Murphy testified that the victim seemed to know a lot of people at the lounge. He recalled that a man who he later learned to be Mr. Perry said something to him but that Mr. Perry thought Mr. Murphy was someone else. When the lounge closed, the victim and Mr. Murphy began to leave. Mr. Murphy recalled seeing a large group of men outside in the parking lot. As he and the victim walked to Mr. Murphy's car, someone yelled out "You out-of-state n****r" to Mr. Murphy. He stated that six armed men approached him and the victim as they made it to the car. Mr. Murphy testified that Mr. Haley had a shotgun which he handed to the Defendant and that Mr. Haley instructed the Defendant to hold the gun to Mr. Murphy's head. He recalled that Mr. Haley instructed the Defendant to shoot him if he moved while Mr. Haley went through his pockets and robbed him.

Mr. Murphy testified that during the robbery he looked at Mr. Perry and asked him to tell the other men to stop. He stated that Mr. Perry said, "I can't tell these young boys what to do." Mr. Murphy testified that the victim gave the men all of his jewelry but that he did not want to give them his wedding ring. He recalled that Mr. Haley told the victim, "You ain't married no more" and took the ring from the victim's hand. Mr. Murphy described the men as "acting crazy" throughout the robbery. He stated that they beat him with the pistol

and ordered him to the ground several times. Mr. Murphy testified that he tried to help the victim at one point, but they beat him to the ground and ordered him to stay on the driver's side of the car.

Mr. Murphy recalled that he pleaded with the men not to kill him and the victim because they had already gotten all of their valuables. Mr. Murphy heard the men order the victim to take off his shoes. The victim said, "You got everything else, man; I ain't gonna take my shoes off." Mr. Murphy testified:

[T]hat's the last of what I heard. I was lookin' over there and I heard – I saw the gun blast, boom. All of a sudden I saw that [the victim] [was] falling. [The Defendant] . . . I saw Hasley [sic] and [the Defendant] with a gun. They r[a]n straight to a brown car and took off.

Mr. Murphy stated that he was "110% sure" that the Defendant and Mr. Haley were among the men involved in the robbery and shooting.

On cross-examination, Mr. Murphy admitted to further details regarding his theft conviction. He testified that he and two others planned to rob a Robertson County couple who were known to carry large amounts of cash home from their business each night. When he and his friends approached the couple with their weapons drawn, they were surprised to discover that the couple also had weapons. Mr. Murphy denied firing his weapon; but he admitted that shots were exchanged and that the husband was shot in the spine and rendered a paraplegic as a result of the offenses. Mr. Murphy also admitted that since his parole he had smoked marijuana and associated with felons. However, he testified that he is a truthful person because he has a child to care for now. Mr. Murphy denied that he was unable to witness the assault on the victim. He stated that although he was squatting on the ground near the driver's side of the car, he could see the victim and the assailants through the windows of the car or over the rear end of the car. On redirect examination, he reiterated that he was "110%" sure that the Defendant was involved in the offenses.

ANALYSIS

The Defendant contends that the evidence is insufficient to support his convictions for criminally negligent homicide, especially aggravated robbery, and aggravated robbery. He also contends that the trial court erred in denying his motion for new trial based upon newly discovered testimony of Mr. Turner. The State argues that the evidence is sufficient to support the convictions and that any credibility determinations were appropriately addressed by the jury. The State also argues that the trial court properly denied the motion

for new trial based upon the correct findings that the newly discovered eye witness testimony lacked credibility and would not have changed the outcome of the trial.

Sufficiency of the Evidence

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

A conviction for criminally negligent homicide requires proof that the defendant engaged in criminally negligent conduct that resulted in the death of the victim. Tenn. Code Ann. § 39-13-212(a). Criminally negligent conduct occurs when the defendant "ought to be aware of a substantial and unjustifiable risk" that a death will occur and "[t]he risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the [defendant's] standpoint." Tenn. Code Ann. § 39-11-302(d). Criminally negligent homicide is a Class E felony. Tenn. Code Ann. § 39-13-212(b).

A conviction for aggravated robbery, as relevant to this case, requires proof that the defendant committed an "intentional or knowing theft from the person of another by violence or by putting the person in fear" and that the robbery was "accomplished with a deadly weapon." Tenn. Code Ann. §§ 39-13-401 and -402(1). A conviction for especially aggravated robbery, as relevant to this case, requires the additional proof that "[t]he victim suffer[ed] serious bodily injury." Tenn. Code Ann. § 39-13-403. Aggravated robbery is a Class B felony, Tenn. Code Ann. § 39-13-402(b), and especially aggravated robbery is a Class A felony. Tenn. Code Ann. § 39-13-403(b).

Pursuant to Tennessee Code Annotated section 39-11-401, “[a] person is criminally responsible as a party to an offense, if the offense is committed by the person’s own conduct, by the conduct of another for which the person is criminally responsible, or by both.” As relevant to this case, a person is criminally responsible for an offense committed by another if “[a]cting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person . . . aids . . . another person to commit the offense.” Tenn. Code Ann. § 39-11-402(2).

Under the facts of this case, the jury could have found the Defendant guilty by his own conduct and by the assistance he provided to his codefendants during the commission of the offenses. The testimony of each witness placed the Defendant at the scene and in the company of other men reportedly involved in the robberies and shooting. Mr. Murphy testified that the Defendant held him at gunpoint while Mr. Haley emptied his pockets and took jewelry from him. Mr. Murphy also testified that he heard the gunshot that killed the victim and immediately saw the Defendant and Mr. Haley, with weapons, flee the scene together. Mr. Murphy’s testimony sufficiently establishes the Defendant’s involvement and participation as a primary actor in Mr. Murphy’s robbery. The evidence further shows that the Defendant, at a minimum, was criminally responsible for the offenses committed against Mr. Jackson because he assisted others in the commission of the especially aggravated robbery and shooting of the victim. Therefore, we conclude that the evidence is sufficient to support the convictions.

Newly Discovered Eye Witness Testimony

The Defendant also contends that the trial court erred in overruling his motion for new trial based upon the newly discovered evidence of Mr. Turner’s testimony that Derrick Perry was the actual shooter and that Mr. Turner could not recall seeing the Defendant at the scene on the night of the offenses. Mr. Turner testified at the motion for new trial hearing that he was at J.T.’s Pool Hall on the night of the offenses. He admitted that he was “real drunk” that night. In fact, Mr. Turner stated, “To tell you the truth about the whole thing I didn’t really see nothin’. I was just drunk. . . . everything just happened so quick.” Mr. Turner testified that after the Defendant’s trial, he contacted Mr. Haley’s attorney and told her that Derrick Perry was the shooter. He claimed that he did not testify at trial because he was “frightened of reprisals.” He also admitted that he failed to appear once when subpoenaed by defense counsel because he had a probation violation warrant pending and he “was intoxicated” on the night of the shooting and “just wasn’t too sure of [his] statements” about the incident.

During the State’s examination of Mr. Turner, he acknowledged that once in 1996 when he was facing criminal charges for automobile theft he gave investigators a statement

regarding another homicide which led to the wrongful arrest of a man who was later exonerated with his case dismissed. He insisted, however, that he did not lie to investigators in 1996 and that he only told them what he knew.

During examination by Mr. Haley's attorney, Mr. Turner claimed that he was afraid to get involved in this case because he felt threatened by the prosecuting officer who he claimed "just ke[pt] messin' with [him]." He testified that he contacted defense counsel after the trial because he wanted to tell them that he saw Mr. Perry shoot the victim and take marijuana from the victim. He admitted to previously telling counsel that he did not see Mr. Murphy get pistol-whipped by anyone. However, each arguably exculpatory acknowledgement by Mr. Turner was qualified with such statements as "the truth was I was drunk" and that "I can't too much remember. . . ." Mr. Turner also admitted that he smoked marijuana on the night of the offenses and was "pretty high."

Following the conclusion of the hearing, the trial court took the motion under advisement and issued a written ruling on May 8, 2001. The court found that the attorneys had exercised due diligence in obtaining the information and that the information was material. However, the trial court denied the motion for new trial because it found that the newly discovered evidence would have unlikely changed the outcome of the trial. The trial court based its finding on the "less than believable" testimony of Mr. Turner which the trial court found "changed . . . on so many occasions" just during the hearing, that it was "unlikely to change the result of the trial."

As stated in State v. Nichols, 877 S.W.2d 722 (Tenn. 1994):

To obtain a new trial on the basis of newly discovered evidence, the defendant must establish (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial.

Nichols, 877 S.W.2d at 737 (citing State v. Goswick, 656 S.W.2d 355, 358-60 (Tenn. 1983)).

We agree with the trial court that the Defendant exercised due diligence in obtaining the information. Mr. Turner testified at the motion for new trial hearing regarding his reluctance to testify at trial due to fear of reprisals from Mr. Perry. He also stated that he failed to appear when subpoenaed by counsel. Mr. Turner's testimony that Mr. Perry was the actual shooter was material, although similar evidence was presented at the trial regarding Mr. Perry's participation in the offenses. Mr. Turner's testimony that he did not recall seeing the Defendant at the scene was unquestionably material as well. However, we agree with the trial court's assessment regarding the credibility of Mr. Turner. His equivocal statements

regarding the offenses and participants coupled with his persistent statements that he was under the influence of drugs and alcohol which impaired his memory lead us to conclude that his testimony likely would not have changed the outcome of the trial. Therefore, we conclude that the trial court correctly denied the motion for new trial based upon the allegation of newly discovered evidence.

CONCLUSION

The evidence is sufficient to support the Defendant's convictions for criminally negligent homicide, especially aggravated robbery, and aggravated robbery. The trial court correctly denied the motion for new trial based upon the Defendant's allegation of newly discovered evidence. Accordingly, we affirm the judgments of the trial court.

D. KELLY THOMAS, JR., JUDGE