

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

PHILIP WORKMAN,)	
)	
Petitioner/Appellant,)	
)	
v.)	No. M1999-01334-SC-DPE-PD
)	
STATE OF TENNESSEE,)	Filed by clerk's office January 10, 2002
)	
Respondent/Appellee.)	

**MOTION OF THE STATE OF TENNESSEE TO DISSOLVE STAY
AND RESET DATE OF EXECUTION**

INTRODUCTION

Petitioner, Workman, was convicted of felony murder and sentenced to death in 1982 for the August 5, 1981, shooting death of Memphis Police Lieutenant Ronald Oliver. After a protracted history of litigation in both state and federal courts, including, indeed exceeding, exhaustion of the standard three-tier appeals process, *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), Workman had been scheduled to be executed on March 30, 2001. Within hours of his execution, however, a majority of this Court granted a stay of execution and ordered a hearing on Workman's petition for a writ of error *coram nobis*. That hearing has now been held; relief has been denied. Accordingly, the State now respectfully moves that the stay of execution be dissolved and that a new date for execution of Workman's sentence be set. Pursuant to Tenn.S.Ct.R. 12.4(E), that new date should be no less than seven (7) days from the date of such order.

ARGUMENT

In the decision issued by this Court on the late evening of March 29, 2001, a majority of the Court held that the due process considerations discussed in *Burford v. State*, 845 S.W.2d 204 (Tenn.

1992), required that Workman be afforded a hearing “to present newly discovered evidence that may establish actual innocence of a capital offense.” *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). The majority reasoned that if the procedural time bar to Workman’s petition for writ of error *coram nobis* were applied, he would “be put to death without being given any opportunity to have the merits of his claim evaluated by a court of this State.” *Id.* Accordingly, the majority granted Workman a stay of execution and remanded the matter to the trial court for a hearing to allow Workman to present his “newly discovered evidence,” namely, an autopsy x-ray and the “recantation” of trial witness Harold Davis.

The hearing ordered by the majority was conducted by the trial court, with Workman presenting testimony and other evidence on various dates between August 13, 2001, and November 5, 2001. On January 7, 2002, the trial court issued an order denying relief, concluding that Workman’s evidence did not warrant a new trial. *Workman v. State*, Shelby County No. B-81209, slip op. at 23 (Crim.Ct. 30th J.D.Tenn. Jan. 7, 2002)(order denying petition for writ of error *coram nobis*)(copy attached). Specifically, the trial court found that Harold Davis’ testimony at the *coram nobis* hearing “would have little if any impact upon the jury’s consideration of Davis’ original testimony.” *Id.* at 13. The court further found that Davis’ statements at the hearing “[did] not amount to a recantation of his original trial testimony,” “were neither clear nor persuasive,” and that “[t]he only definitive statement made by Harold Davis was that he did not clearly remember the events surrounding the death of Lieutenant Ronald Oliver.” *Id.* at 12.

With respect to the evidence of the victim’s autopsy x-ray, the trial court noted the testimony of Workman’s own expert pathologist, Dr. Cyril Wecht, that “he did not need the x-ray of the victim to render his opinion,” and that “he had reached his conclusions and issued a report on his findings

several months before he even received the x-ray of the victim.” *Id.* at 16. Nevertheless, the trial court proceeded to evaluate Dr. Wecht’s testimony, which was presented by Workman in support of his contention that he did not fire the shot that killed Lieutenant Oliver, as if it too were “newly discovered.”¹

The trial court concluded, after examining both the original trial testimony and the hearing testimony of Dr. Wecht, that Workman “had failed to demonstrate that a different judgment may have resulted had the jury been presented with Dr. Wecht’s opinions.” *Id.* at 17. Specifically, the trial court found that “the jury essentially heard, through the testimony of [F.B.I.] Agent [Gerald] Wilkes, the same information provided by Dr. Wecht.” The trial court noted that, while Dr. Wecht opined that the .45 caliber bullet fired from Workman’s gun and recovered from the scene was not the bullet that killed Lieutenant Oliver and that it was unlikely that a .45 caliber aluminum-jacketed bullet would create an entrance wound considerably larger than the exit wound, he also admitted that “he could not conclusively exclude the possibility that a .45 caliber bullet caused the fatal wound,” and “that it was possible for a .45 caliber, hollow-point bullet to create a smaller exit than entrance wound.” *Id.* at 20-21. Accordingly, the trial court found that it was “unable to see any significant difference between the testimony of these two witnesses.” *Id.* at 22.

The trial court further found that, “even if the jury accepted the testimony of Dr. Wecht, they still could have concluded the defendant delivered the fatal shot,” noting the trial testimony

¹In so doing, the State submits that Workman received the benefit of a hearing that exceeded the scope of the hearing this Court had ordered. In this respect, the hearing contemplated by the Court’s order of March 29, 2001, was to be limited to evaluating Workman’s claims “based upon evidence obtained from the Shelby County Medical Examiner’s Office long after the conclusion of the state post-conviction proceedings,” *i.e.*, the autopsy x-ray. *Workman v. State, supra*, 41 S.W.3d at 103.

indicating that the only weapons fired prior to the fatal shot were those of Workman and the victim, and that the defendant fired at least four shots and possibly as many as six during the altercation with the officers. The court observed that “[it could] find no testimony, including that of Dr. Wecht, which affirmatively rules out the possibility that one of the other three to five bullets shot by Workman caused the fatal injuries,” and that “the jury would have still heard the defendant’s admission that he fired his weapon and that he indeed pointed the weapon at the victim.”

Thus, considering that the jury heard similar proof at the original trial; the strength of the evidence presented at the original trial; and the inconclusiveness of Dr. Wecht’s testimony, this court cannot reasonably conclude that the admissibility of the evidence elicited by Dr. Wecht’s testimony may have resulted in a different judgment at the original trial.

Id. at 22-23.

In light of these findings and conclusions of the trial court, the State submits that the purpose for the majority’s issuance of a stay of execution and its order of remand to the trial court — to afford Workman an opportunity to have a court of this State evaluate his newly discovered evidence — has now been satisfied. Workman has had that opportunity and has failed to convince the court not only that this evidence proves his actual innocence but that it would have made any difference had it been presented at his original trial some twenty years ago. The findings and conclusions of the trial court, after hearing and considering evidence on Harold Davis’ statements and the autopsy x-ray — the evidence upon which Workman has long insisted proves his innocence — are consistent with the position maintained by the State with respect to this evidence ever since Workman first commenced to advance it in late 1999. *See, e.g.*, State’s December 10, 1999, Reply to Response to Motion to Set Execution Date, p. 4, *Workman v. State*, No. 02S01-9910-CR-00096 (Tenn.)(questioning veracity of Harold Davis’ statements); State’s March 29, 2001, Answer in

Opposition to Application for Permission to Appeal, pp. 3-4, *Workman v. State*, No. W2001-00774-SC-R11-PD (Tenn.) (pointing out lack of significance of x-ray). Furthermore, the trial court's findings and conclusions are consistent with the conclusions previously drawn by members of this Court when presented with such evidence. *See Workman v. State*, 22 S.W.3d 807, 811 (Tenn. 2000) (Drowota, J., concurring) (questioning reliability of Davis "recantation," noting that, despite new expert testimony, Workman had "presented no uncontroverted evidence that someone else fired the fatal shot," and otherwise finding the evidence of Workman's guilt "overwhelming"); *see also Workman v. State, supra*, 41 S.W.3d, at 104 (Anderson, C.J. and Barker, J., dissenting) ("[t]he x-ray evidence and Dr. Sperry's affidavit do not conclusively establish that Workman did not fire the fatal shot"). Accordingly, the stay of execution should now be dissolved and a new date of execution set.

Workman, no doubt, will maintain that the stay should remain in place while he pursues an appeal of the trial court's judgment. But the majority's decision of March 29, 2001, cannot be read to have contemplated that Workman be afforded an opportunity for not only a hearing on his evidence, but a full complement of appellate review of any decision rendered thereon. The majority's opinion simply states that, if Workman makes the requisite showing, "he will be entitled to a new trial." *Workman v. State, supra*, 41 S.W.3d, at 104. Conversely, since he has failed to make the requisite showing, the State is now entitled to enforcement of the trial court's original judgment.

Moreover, given the timing of the filing of Workman's petition for writ of error *coram nobis* and the State's interest in enforcing its criminal judgments, continuing the stay of Workman's execution in effect pending appeal of the trial court's order would require a determination that Workman has a strong likelihood of success on the merits of that appeal. *In re Sapp*, 118 F.3d 460,

464 (6th Cir. 1997); *see Delo v. Blair*, 509 U.S. 823, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993)(per curiam)(stay of execution requires showing of substantial grounds upon which relief might be granted). *Compare Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission*, 32 S.W.2d 1043, 1045 (Tenn. 1930)(injunction to maintain status quo will not issue unless party establishes that it will probably prevail on the merits). No such determination is possible here. As the trial court itself observed, the granting of, or refusal to grant, a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial court. *State v. Walker*, 910 S.W.2d 381, 395 (Tenn. 1995). Indeed, the trial court's determinations on the petition for writ of error *coram nobis* were predominantly factual ones. The trial court clearly applied the correct legal standard, as directed by the majority opinion, and a review of the trial court's twenty-three page order reveals that it is unassailable. While the State would not typically advocate depriving a criminal defendant of an opportunity to appeal, under the circumstances of this case, where myriad avenues of review and appeal have previously been exhausted and where there is simply no likelihood of success on appeal of the trial court's judgment, no legal justification exists for leaving the stay of execution in effect pending any appeal.

Even if an opportunity for some appellate review of the trial court's decision rendered after the hearing ordered by the majority was in fact contemplated by the March 29, 2001, order of this Court, or is otherwise now deemed warranted by the Court, the State notes that this Court has the authority, under Tenn. Code Ann. § 16-3-201(d)(3), to immediately assume jurisdiction of any appeal noticed by Workman and, under Tenn.R.App.P. 2, to suspend the appellate rules and order proceedings in accordance with its discretion in the interest of expediting a decision of any such

appeal. *See also* Tenn.Code Ann. § 16-3-201(d)(4)(Supreme Court may take such actions “necessary or appropriate” to the exercise of its authority). Workman’s eleventh-hour bid in late March of 2001 to forestall execution of his sentence has now further delayed that execution an additional nine months. The State respectfully submits that this effort should not be allowed to engender any further delay. Nevertheless, should the Court see fit to allow the stay to remain in force pending some appellate review of the trial court’s order denying relief to Workman, the State further requests, respectfully, that the Court exercise its authority to minimize any such further delay and expedite such review to the greatest extent possible.

CONCLUSION

For the reasons stated, the State’s motion to dissolve the stay of execution and reset the date of execution should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by first class mail, postage prepaid, and by facsimile, to Robert L. Hutton, Glankler Brown, PLLC, 100 Commerce Square, Suite 1700, Memphis, Tennessee, 38103, on this the _____ day of January, 2002.

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