

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 6, 2017

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. RODNEY TURNER

Appeal from the Criminal Court for Shelby County

No. 10-02394 James C. Beasley, Jr., Judge

No. W2016-01520-CCA-R3-CD

A jury convicted the Defendant, Rodney Turner, of two counts of attempted first degree murder and one count of employing a firearm during the commission of a dangerous felony. On appeal, this Court affirmed the Defendant's convictions. *State v. Rodney Turner*, No. W2012-01930-CCA-R3-CD, 2013 WL 6706092, at *1 (Tenn. Crim. App., at Jackson, Dec. 18, 2013), *perm. app. denied* (Tenn. May 23, 2014). The Defendant filed a petition for post-conviction relief seeking a delayed appeal and an opportunity to file a delayed motion for new trial. The post-conviction court granted a delayed motion for new trial and, after a motion for new trial hearing, denied the Defendant's motion. The Defendant appeals the trial court's denial, maintaining that the trial court erred by not requiring the State to produce state witness Officer Brian Falatko's prior statement. He further asserts that this statement is newly discovered evidence warranting a new trial. We affirm the trial court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and NORMA MCGEE OGLE, J., joined.

Megan R. House, Bartlett, Tennessee, for the appellant, Rodney Turner.

Herbert H. Slatery III, Attorney General and Reporter; Alexander C. Vey, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Karen Cook, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

Following a trial, the jury convicted the Defendant of two counts of attempted first degree murder and one count of employing a firearm during the commission of a dangerous felony. This court summarized the evidence presented at trial, as follows:

In the early morning hours of August 3, 2009, Officer Brian Falatko of the Memphis Police Department (MPD) responded to an “auto theft” call. When Officer Falatko stepped out of his patrol car, the victim, Terry Higgs, came running up to him. Officer Falatko testified that Mr. Higgs seemed “pretty upset” and said to Officer Falatko, “They’re trying to rob me, they’ve taken my car.” Officer Falatko recalled that Mr. Higgs “appeared as though he was trying to get away from someone.” Mr. Higgs told Officer Falatko that the men were running along a nearby fence that separated two apartment complexes.

Officer Falatko testified that he and Mr. Higgs were walking towards the fence when he saw “four individuals” running along the fence. Almost immediately, one of the men shot at Officer Falatko and Mr. Higgs with “what appeared to be shotgun.” Another man, the Defendant, began shooting at them with “what appeared to be a pistol.” Officer Falatko testified that he knew it was a pistol because the Defendant was “back lit extremely well” and he could see “the silver gleam from the light.” A third man then began shooting at them with another pistol.

Officer Falatko testified that Mr. Higgs “was struck by the shotgun blast” and that he pushed Mr. Higgs behind him to protect Mr. Higgs. According to Officer Falatko, he then saw the Defendant, who was wearing a “white shirt and blue jean shorts,” stop and “square off” to fire at Officer Falatko and Mr. Higgs. Officer Falatko testified that he “could see the muzzle flashes coming from” the silver pistol. Officer Falatko pulled out his gun and shot at the Defendant three times, hitting him on the third shot. The men with the shotgun and the other pistol took cover behind some nearby dumpsters and continued to shoot at Officer Falatko.

Officer Falatko testified that a fourth man in a red shirt tried to help the Defendant over the fence but that the Defendant’s shirt got stuck on the fence, and he was left hanging there. The man in the red shirt abandoned the Defendant when more police officers arrived to assist Officer Falatko. Officer Jack Henry of the MPD testified that he responded to Officer Falatko’s call for backup. When Officer Henry arrived on the scene, he saw the Defendant hanging from the fence and a man in a red shirt trying to help the Defendant before running away.

Officer Henry found a “two-shot,” silver derringer pistol on the ground near the Defendant’s feet. In addition to the derringer found by the Defendant’s feet, police officers also recovered spent shotgun casings near the fence. In the neighboring apartment complex, witnesses saw a man wearing a red shirt and another man run into an apartment after the shooting. Police officers found Chris Burchette and a man known as “Strilla” inside the apartment. A search of the apartment revealed a red shirt with what appeared to be blood on it, a pistol, and a shotgun.

Later testing by the Tennessee Bureau of Investigation (TBI) determined that the derringer found at the Defendant’s feet had the Defendant’s blood and DNA on it. The derringer was in working order and had two spent casings in it, meaning that it had been fired. The Defendant’s blood and DNA were also found on the red shirt discovered in the apartment where Mr. Burchette and “Strilla” had run into after the shooting. The spent shell casings found by the fence matched the shotgun recovered from the apartment.

Mr. Higgs testified that he called the police because a man known as “G-Baby” had walked into his apartment and taken the keys to his car. According to Mr. Higgs, after he got off the phone with the police he went outside to see if he could find his car and he saw a man with a shotgun. Mr. Higgs testified that he ran back into his house and slammed the door. Mr. Higgs then saw “some more guys standing” outside his apartment. When Officer Falatko arrived, Mr. Higgs went outside to tell him about the men. Mr. Higgs testified that as he and Officer Falatko approached the men, the man with the shotgun fired at them and then “two more guys behind him fired with handguns.” Mr. Higgs further testified that he only saw three men along the fence. Mr. Higgs was struck by buckshot from the shotgun and ran back to his apartment when Officer Falatko began shooting at the men.

Shaterrica Rufus testified that she lived in a nearby apartment complex and that she saw the Defendant with “Strilla” and “G-Baby” the day before the shooting. Ms. Rufus further testified that she again saw the Defendant with “Strilla” and “G-Baby” approximately ten minutes before the shooting and that the Defendant was carrying a black “long gun.” Ms. Rufus also testified that she saw Mr. Burchette wearing a red shirt and carrying a handgun before the shooting.

State v. Rodney Turner, No. W2012-01930-CCA-R3-CD, 2013 WL 6706092, at *1 (Tenn. Crim. App., at Jackson, Dec. 18, 2013), *perm. app. denied* (Tenn. May 23, 2014). Based upon this evidence, the jury convicted the Defendant, and the trial court imposed an effective sentence of fifty years with six years to be served at 100%.

Defendant appealed, asserting that the trial court erred by not requiring the State to produce a prior statement made by Officer Brian Falatko. The prior statement was Officer Falatko's statement given to internal affairs for the purpose of a departmental investigation of officer-involved shootings. The trial court excluded the statement pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the United States Supreme Court held that "statements obtained under threat of removal from office" by several police officers could not later be used to prosecute the officers because the statements had been coerced. 385 U.S. at 500. On appeal, this court concluded that the Defendant had waived review of the issue for failing to file a timely motion for new trial. In considering whether to apply plain error review, the court disagreed with the trial court's reliance on *Garrity* but ultimately declined to review for plain error because the trial court's failure to require the production of the statement would not change the outcome of the trial given the "overwhelming evidence" against the Defendant. *Rodney Turner*, 2013 WL 6706092, at *5.

On February 9, 2015, the Defendant filed a post-conviction petition, alleging his trial counsel was ineffective for failing to timely file a motion for new trial. The Defendant sought a delayed appeal and an opportunity to file a delayed motion for new trial. Following a hearing, the post-conviction court granted the Defendant a delayed motion for new trial and a delayed appeal.

In the Defendant's delayed motion for new trial, the Defendant challenged the State's failure to produce Officer Falatko's statement. Additionally, the Defendant claimed that the prior statement was newly discovered evidence warranting a new trial. In Officer Falatko's statement about the shooting given to the Police Department's Inspectional Services Bureau, he said that he was dispatched to an apartment complex in relation to a carjacking. When he arrived, the victim ran toward him yelling, "there they are, there they are." Officer Falatko said he observed two black males, one carrying a shotgun, run down the center of the apartment complex. As he searched for the men, he saw and heard "the blast of the gun coming at me."

Officer Falatko stated that he saw two more black males at a fence raise pistols and began firing at him. In response, Officer Falatko fired his duty weapon nine times, striking one of the men, the Defendant. Officer Falatko then observed the man who first shot at him run across an "opening back behind a dumpster." Officer Falatko stated that, at this point, he advised dispatch about the gunfire exchange. Officer Falatko took cover

behind a vehicle and observed the suspect with the shotgun running through the complex. Once additional officers arrived on the scene, Officer Falatko approached the Defendant and found a silver Derringer lying next to him.

Officer Falatko estimated that the suspect firing the shotgun fired between six and eight times. He recalled that one of the men firing a pistol, the Defendant, was “heavier set” and wearing blue jean shorts and a white shirt. The other suspect firing a pistol wore black shorts and a red shirt. Both men wore bandanas over their faces. Officer Falatko said that he fired his issued duty weapon, a Sig Sauer .40 caliber P2290 caliber nine times and struck the Defendant in the face. Officer Falatko did not know how many times each of the two men with pistols fired but collectively he estimated they fired between four and six rounds.

Officer Falatko stated that, although he was at a distance, the two men with pistols were “back lit,” so he could clearly see the “silver shine” of the guns and recognized them as pistols. After Officer Falatko fired at the suspects, the suspect with the shotgun ran through the apartment complex, another suspect jumped the fence, and the Defendant was lying on the ground. The Defendant got up and attempted to get over the fence but was unable to do so. The suspect wearing the black shorts and red shirt attempted to help the Defendant over the fence but, when he could not do so, fled “through the cut.”

Officer Falatko stated that initially, he did not give any verbal commands to the suspects because they immediately began firing at him. After striking the Defendant, he began giving verbal commands, but the suspect wearing the red shirt did not comply and continued to aid the Defendant in trying to get over the fence. Officer Falatko recalled that the Defendant held his gun in his right hand.

After the hearing, the trial court issued an order with the following findings:

Upon hearing Defendant’s delayed Motion for a New Trial, this Court finds that the statement of Officer Brian Falatko, turned over to the Defendant and the State, was not wholly inconsistent with his trial testimony, though there were minor inconsistencies between the Officer’s statement and testimony at trial, it is not enough to rise to [the] level of impeachment. It is the opinion of the Court that the statement would not have made a difference in trial counsel’s cross-examination of Officer Falatko nor would it have affected the jury’s verdict.

It is from this judgment that the Defendant appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it concluded that that Officer Falatko's statement could not be produced and that he is entitled to a new trial based upon newly discovered evidence, Officer Falatko's prior statement.

A. Production of Officer Falatko's Prior Statement

Rule 26.2 of the Tennessee Rules of Criminal Procedure, also known as Tennessee's version of the Jencks Act, states in pertinent part:

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

Tenn. R. Crim. P. 26.2(a). Pursuant to Rule 26.2, the State has no duty to provide a defendant with a copy of a witness's statement until after the witness has testified on direct examination. *State v. Caughron*, 855 S.W.2d 526, 535 (Tenn. 1993) (citing *State v. Taylor*, 771 S.W.2d 387, 394 (Tenn. 1989)).

In this case, the trial court did not compel the State to produce Officer Falatko's prior statement based upon *Garrity*. 385 U.S. at 500. In the Defendant's first appeal, this Court disagreed with the trial court's application of *Garrity* based upon the facts of this case. In *Garrity*, the United States Supreme Court held that "statements obtained under threat of removal from office" by police officers could not later be used to prosecute those officers because the statements had been coerced. *Id.* In distinguishing the present case from *Garrity*, this Court noted in our prior opinion, "Officer Falatko's statement was not being used to prosecute him." The Defendant sought the prior statement for impeachment purposes. Therefore, the trial court erred when it did not require the State to produce the statement. We now consider whether this error requires reversal of the conviction.

The Tennessee Rules of Appellate Procedure provide that a final judgment "shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36. As this Court observed in the prior opinion, "the overwhelming evidence" against the Defendant renders any error harmless.

The Defendant was found hanging from a fence, shot, wearing clothes matching Officer Falatko's description, and with a silver derringer at his feet with his blood and DNA on it. The derringer was in working order and had two spent casings in it, meaning that it had been fired. Mr. Burchette and "Strilla" were seen running into a nearby apartment after the shooting. Inside the apartment officers found a red shirt with the Defendant's blood on it, a pistol and the shotgun used in the shooting. The Defendant had been seen in the company of "G-Baby" and "Strilla" carrying a gun ten minutes before the shooting.

2013 WL 6706092, at *5.

Furthermore, we agree with the trial court that there are no substantial discrepancies between Officer Falatko's statement and his trial testimony. The discrepancies identified by the Defendant do not alter the fact that the Defendant was armed with a pistol and shot at Officer Falatko. We conclude that the trial court's error was harmless beyond a reasonable doubt. Therefore, the Defendant is not entitled to relief as to this issue.

II. Newly Discovered Evidence

The Defendant asserts that Officer Falatko's prior statement is newly discovered evidence entitling him to a new trial. The State responds that, had Officer's Falatko's prior statement been presented at trial, it would not have changed the verdict; therefore, the trial court properly exercised its discretion in denying relief. We agree with the State.

The decision to grant or deny a new trial on the basis of newly discovered evidence is a matter that rests in the sound discretion of the trial court. *State v. Goswick*, 656 S.W.2d 355, 358 (Tenn. 1983). However, a new trial is a matter of right only when the defendant establishes (1) reasonable diligence in seeking newly discovered evidence, (2) the materiality of the evidence, and (3) that the new evidence is likely to change the result of the trial to one more favorable for the defendant. *State v. Bowers*, 77 S.W.3d 776, 784 (Tenn. Crim. App. 2001) (citing *State v. Singleton*, 853 S.W.2d 490, 496 (Tenn. 1993)). When newly discovered evidence merely tends to contradict or impeach the trial evidence, a new trial is not always warranted. *State v. Sheffield*, 676 S.W.2d 542, 544 (Tenn. 1984). On appeal, our standard of review is abuse of discretion. *State v. Meade*, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996).

In his brief, the Defendant contends that he was prevented from adequate cross-examination and impeachment of Officer Falatko because he was deprived of the use of the prior statement. The Defendant asserts that at trial Officer Falatko did not testify that

he failed to give verbal commands initially as he did in his statement to internal affairs. He also notes that Officer Falatko told internal affairs that the suspects wore bandanas over their faces while his trial testimony was that he could not see their faces. These discrepancies, in our view, are likely due to the difference in the specific questions asked of Officer Falatko and do not go to the issue of whether the Defendant shot at Officer Falatko. The Defendant complains that Officer Falatko's testimony at trial was "more specific."

As noted earlier, the Defendant was found caught on a fence with clothing and a weapon that matched Officer Falatko's description. Other witnesses at the scene also placed the Defendant at the apartment complex around the time of the shooting armed with a weapon. At the time of the offense, the Defendant's gun had been recently fired and had the Defendant's blood and DNA on it. The suspect wearing the red shirt that Officer Falatko identified as having tried to help the Defendant flee over the fence had the Defendant's blood on his shirt.

As evident by its denial of the motion for new trial, the trial court did not find the newly discovered evidence so crucial to the defendant's guilt or innocence "that a reasonable basis exist[ed] for concluding that had the evidence been presented at trial, the result of the proceedings might have been different." *State v. Vasques*, 221 S.W.3d 514, 527 (Tenn. 2007). We agree and conclude that the trial court did not abuse its discretion. Any discrepancies between Officer Falatko's trial testimony and his prior statement are not so significant that a different result at trial may have occurred had the prior statement been provided to the Defendant at the trial. The Defendant is not entitled to relief on this issue.

III. Conclusion

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

ROBERT W. WEDEMEYER, JUDGE