

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

# Supreme Court of Kentucky

2003-SC-0519-TG

AMOS STILTNER

APPELLANT

V. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE  
2000-CR-0115

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

This appeal is from an order of the Montgomery Circuit Court overruling a motion by Stiltner for a new trial. The only question presented is whether the circuit judge abused his discretion in failing to grant the motion for a new trial.

While in jail on other charges, Stiltner revealed to a jailhouse informant his desire to kill a circuit judge, a commonwealth's attorney and the wife and daughter of the commonwealth's attorney. Apparently, Stiltner was upset that he was denied an early release so that he could attend his mother's out-of-state funeral and be with his ailing father. Stiltner told the informant that he knew that Alfrey, an individual the informant knew, was attempting to contract with someone to kill the circuit judge and the commonwealth's attorney. Stiltner asked the informant to let Alfrey know that he was willing to take the contract. The inmate instead informed the Kentucky State Police.

Based on the information it received, the police set up an undercover sting operation. As part of that operation, the informant told Stiltner that someone was willing to meet with him. Stiltner instructed the informant to tell this person to meet him at an animal shelter where he (Stiltner) was employed as part of a work release program. On October 19, 2000, Stiltner met with a person whom he thought represented Alfrey. That person, however, was an undercover police officer who was wired with both a video camera and a tape recorder.

During their initial meeting, Stiltner told the undercover officer his willingness to "take care of business" for Alfrey. He explained that he wanted a four-wheel drive truck and \$20,000 up front. Then, when he finished, he wanted an additional \$100,000. When the officer asked what Alfrey was getting in return, Stiltner stated, "the word is [the circuit judge] and [the commonwealth's attorney] is to be wiped out."

On October 25, 2000, the undercover officer met with Stiltner a second time. The officer told Stiltner that Alfrey agreed to the final amount, but that he (Alfrey) would only agree to \$10,000 and the truck up front. Stiltner agreed to accept the smaller \$10,000 payment, but insisted that he wanted \$2,000 - \$4,000 immediately. Then, when he got out of jail, he wanted another \$10,000. Stiltner also explained that he planned on poisoning the commonwealth's attorney and his family and shooting the circuit judge.

Stiltner met with the undercover officer for the final time on November 9, 2000. The meeting began with the officer informing Stiltner that he had brought a \$2,000 payment. He indicated that if Stiltner accepted the money, Alfrey would expect him to complete the murders. Stiltner responded, "I'm going to do it." Stiltner even offered to kill another person if Alfrey left some cocaine inside the truck when it was dropped it off.

The meeting concluded when Stiltner took an envelope containing \$2,000 from the passenger door of the officer's truck and returned to the animal shelter. Once inside, Stiltner showed the money to a co-worker who was also on a work release program. Immediately thereafter, the Kentucky State Police converged on the shelter and arrested Stiltner. The envelope containing the money was recovered from behind a trashcan within reach of where Stiltner was sitting.

Stiltner was indicted on four counts of conspiracy to commit murder and one count of being a first-degree persistent felony offender. At trial, Stiltner testified in his own defense and claimed that he was running his own undercover operation. Although the charges for which Stiltner was currently incarcerated were to be served out December 29, 2000, he claimed that he undertook the operation so he could use the information to gain an early release.

The jury convicted Stiltner of four counts of conspiracy to commit murder and being a persistent felony offender. His twenty-year sentence on each count was enhanced to fifty years on each count because of the PFO conviction. The sentences were run consecutively for a total of two hundred years in prison.

Following his conviction, this Court rendered a unanimous opinion on August 21, 2003, reversing in part the judgment in order to merge all four convictions of conspiracy to commit murder against the four victims. We otherwise affirmed the one conviction of conspiracy, the persistent felony offense and the enhanced fifty year sentence.

While his direct appeal was still pending, Stiltner filed a motion for a new trial pursuant to RCr 10.02 and RCr 10.06. He claimed that a previously unknown witness, Billy Ray Miles, could provide testimony that supported his version of the facts and contradicted that of the informant who testified against him. On October 24, 2002, the circuit judge held an evidentiary hearing at which Miles was the only witness to testify.

The thrust of his testimony was that while he was in jail, the informant advertised the contract to kill both the judge and the commonwealth's attorney. According to Miles, Stiltner was not present at this time.

At the conclusion of the hearing, defense counsel argued that Mile's testimony contradicted the testimony of the informant and showed that he lied at trial. He further asserted that the testimony would have significant impact on the verdict.

The Commonwealth responded that the information was available to the defense before trial; that the defense did not file an affidavit verifying his diligence in finding this witness; and that the evidence was cumulative, which merely impeached the informant's testimony. It also stressed that the tapes contained overwhelming evidence of guilt, thus, there was no indication that the testimony would have affected the verdict.

The circuit judge denied the motion for a new trial. Upon transfer from the Court of Appeals, this appeal followed.

#### I. Motion for a New Trial

Stiltner argues that the circuit judge abused his discretion in failing to grant his motion for a new trial. He claims that the new evidence was not discovered until after trial; that the nature of the newly discovered evidence could not have been discovered prior to trial; that the evidence is not cumulative; and that the testimony of Miles would have likely resulted in a different outcome. We disagree.

Granting a new trial is within the discretion of the trial court, and such is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature. Epperson v. Commonwealth, Ky., 809 S.W.2d 835 (1990). Newly discovered evidence "must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." Coots v. Commonwealth, Ky., 418 S.W.2d 752, 754

(1967). Further, a motion for new trial based upon newly discovered evidence must be accompanied by an affidavit showing that Appellant exercised sufficient diligence to obtain the evidence prior to his trial. Wheeler v. Commonwealth, Ky., 395 S.W.2d 569 (1965).

Here, there is no affidavit in the record demonstrating that Stiltner exercised due diligence to obtain the evidence prior to trial. Moreover, the testimony of Miles was not of such a decisive quality as to change the outcome of the case. At best, it was impeaching testimony and, thus, insufficient to require a new trial. See Caldwell v. Commonwealth, Ky., 133 S.W.3d 445 (2004); Commonwealth v. Tamme, Ky., 83 S.W.3d 465 (2002).

A defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial. Foley v. Commonwealth, Ky., 55 S.W.3d 809 (2000). After careful review of the entire record, we conclude that the trial judge did not abuse his discretion in denying the motion for a new trial.

Therefore, the order denying the motion for a new trial is affirmed.

All concur.

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