

**IN THE CRIMINAL COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN DIVISION AT JACKSON**

State of Tennessee,

Appellee,

W2023-01177-CCA-R3-ECN

vs.

Shelby County Criminal Court Case: C1702460

**Jason White,
Appellant.**

Rule 39 Petition For Rehearing

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Comes now Appellant, pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, and respectfully requests a rehearing on this matter.

Under Rule 39 of the Tennessee Rules of Appellate Procedure:

(a) On Petition; Grounds. Rehearing may be granted by the Supreme Court, Court of Appeals, or Court of Criminal Appeals on its own motion or on petition of a party. In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's opinion is in conflict with a statute, prior decision, or other principle of law; (3) the court's opinion overlooks or misapprehends a material fact or proposition of law; and (4) the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. A rehearing will not be granted to permit reargument of matters fully argued.

Appellant respectfully asserts that in this case, the Court's opinion On June 20, 2024 appears to have: misunderstood or inadvertently misstated a material fact established by the evidence and set forth in the record; the opinion is in conflict with a statute of prior decision or principle of law; or it may have overlooked, or misapprehended material facts and propositions of law. Appellant further asserts that Appellant may not have been fully heard on some issues, open to reasonable dispute.

I. Affidavit of Kristina Cole.

Appellant focuses this Petition on the narrow issue regarding the affidavit of Kristina Cole which was addressed in part, but not fully, in Appellant's humble opinion.

As stated in the Opinion on Pages 6-7:

In exercising its discretion, the trial court must determine the credibility of the witnesses who testify in support of the accused's error coram nobis application. If the trial court does not believe that the witnesses presented by the accused are credible, the court should deny the application. Conversely, if the witnesses are credible, and the evidence presented would result in a different judgment, the trial court should grant the relief sought.

Appellant believes that the law is stating that the credibility determinations are made based on a witnesses testifying on a witness stand. Appellant does not interpret, and asked this Court to reconsider, if the proper interpretation for this language is to mean that a written statement is what is meant by the word, "testify." Appellant asserts that the plain meaning and context of the language requires an interpretation that what is being referred to is testimony from the witness stand. Appellant is concerned that if this issue is not clarified, future litigants will rely on this case and create precedent that is not consistent with the law.

In addition, to further conclude that the affiant was not credible due to her fear of being relocated, as discussed on page 7 of the Opinion, deals directly with

her personal thoughts and beliefs that she had at the time. Appellant asserts that there is no way to properly gauge how the affiant felt, and why, without having her testify on the witness stand.

Even if the trial court was not going to allow her to testify, it was not permitted to then make assertions as to the affiant's personal beliefs and thoughts, without there being anything in the record to explain where the trial court got its information from to make those assertions as fact.

In addition, the Opinion on page 8 asserted:

Even if Co-defendant Cole's affidavit were found to be credible, the information contained therein was not "newly discovered." As the coram nobis court concluded, "the content and basis of the affidavit have been heavily litigated during the trial and post-conviction stages of litigation." Co-defendant Cole's text logs and arrest records, the testimony of, and opportunity to cross-examine Detective Gaia were all available at trial, as was Co-defendant's Mullins statement indicating that Petitioner had no knowledge of the package. As pointed out by the coram nobis court, "[t]he only thing this affidavit adds is the convenient addition that the co-defendant now asserts that she witnessed Detective Gaia using her phone to send the messages."

Appellant asserts that representations made by the affiant that she witnessed Detective Gaia using her phone is significant.

This information was not previously known, so it was not previously alleged. If affiant along with Detective Gaia were allowed to testify at a new Hearing, and her testimony was found to be true, then that would completely change the facts and the outcome of the case.

Looking “shady,” as referenced in the Opinion, and being found to have provided materially false testimony is significantly different, and juries interpret the two things differently.

Juries who know that the State has provided them with materially false evidence tends to cause juries to determine who is at fault for the evidence-the witness or the State. If the witness is believed to be at fault, the jury instructions allow them to discredit all of the testimony provided by the witness. If the State is believed to have provided the information intentionally, juries tend to disregard all evidence presented by the State and find the accused Not Guilty.

Under these circumstances, defendants could also move for a mistrial, or a motion to dismiss based on Brady violations if the misrepresentations were known or supported by the State. In addition, the trial court sua sponte could have dismissed the case based on Brady violations if the misrepresentations were known or supported by the State.

This is something that the Opinion does not appear to delve much into. To be clear, the Opinion does appear to explain why it believes that the affiant does not appear to be credible. However, it does not appear to clarify whether an affidavit is in fact enough to allow the trial court to judge the credibility of the witness. Also, it does not appear to clarify if statements made in an affidavit is what our sacred laws meant when it refers to, “testify” regarding a witness in a

Writ of Error Coram Nobis proceeding. Appellant believes that to reach the conclusion that a statement in an affidavit is “witness testimony” that a trial court can judge the credibility of, would be to create new law.

In addition, while the Opinion does state that the affiant did not have a credible fear of retaliation against her, it does not explain how any of us could know what fears or emotions were contained inside of the affiant without having her take the witness stand, especially when there is nothing in the record to provide us with what she was experiencing internally.

Furthermore, while the Opinion appears to express that the affiant would have an incentive not to tell the truth, it does not appear to clarify if the Opinion is stating that merely having an incentive not to tell the truth in and of itself discredits or disqualifies an affidavit. If that were the standard, under that standard, Detective Gaia had an incentive not to tell the truth, and a Hearing should occur as to whether his testimony should have been discredited.

Furthermore, if it was known that Detective Gaia was not telling the truth by other officers or even the State, then there would at least be an incentive for that information not to get out, and the entire prosecution would then be potentially discredited.

So, to the extent that is the standard, or a potential standard, that further solidifies the need for a Hearing, as the potential standard supports Appellant’s

position, that the evidence used against him was not reliable and that he is in fact innocent.

In addition, as stated in the footnote on page 6:

We note that the coram nobis court did not address the timeliness of the petition in its order summarily dismissing the petition, and there is no response filed by the State to the petition in the technical record. However, this does not preclude us from considering the timeliness of the petition. Nunley, 552 S.W.3d at 831

There does not seem to be anything in the record to suggest that the trial court or the State failed to argue timeliness because of an oversight. It appears, and the record supports, that it was not argued because the arguments were concluded to be timely, just disagreed with.

Clarity then needs to be provided, so that the standard is not perceived to be that what made Appellant's allegations untimely is the belief that the information in the affidavit was not all new evidence. As long as something in the affidavit was new, then the evidence should have been interpreted as new. Having additional information provided in the affidavit that was previously known to provide context, should not convert all the information in the affidavit to facts that were "known."

In addition, clarification is needed so that the future litigants do not reach the conclusion that if an affiant makes a statement in the affidavit that the trial court

does not find credible, then that statement does not qualify as new evidence.

Appellant fears that this conclusion will be reached if this issue is not clarified.

It is also imperative to note that the statements in the affidavit, if true, makes it improbable for Appellant to have ever been convicted of a conspiracy to commit any crime.

In this matter, co-defendant Mullins and affiant are all saying, to their own detriment, that Appellant was not aware of, or involved in the conduct that Appellant was charged with and convicted of.

Appellant was convicted, in part, based on a conspiracy with the co-defendants involving text messages. Some of these text messages, affiant is now asserting that not only did she not send them, but that she witnessed Detective Gaia send them from her phone to Appellant.

For a jury to have convicted Appellant based in part on the belief that he was in a conspiracy with the affiant, involving these text messages in part, is not the type of justice that we should get comfortable seeing in this precious State of Tennessee. Appellant urges this Court to consider these narrow issues more fully, so that our fragile and delicate democracy can be shielded and protected from misinterpretation or abuse by future litigants.

Conclusion

Therefore, based on the arguments presented, Appellant moves this Court to reconsider its Opinion and to reverse and remand this case. If for no other reason, then out of an abundance of caution.

CERTIFICATE OF COMPLIANCE

I, Terrell Tooten, certify that this brief has been submitted in compliance with Supreme Court Rule 46 regarding electronic filing and there are 1,892 words.

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on all parties through the electronic filing system on July 1, 2024.

Respectfully Submitted,

_____/s/Terrell Tooten____

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