

Unpublished Disposition

551 N.W.2d 870

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THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Cornelius REED, Defendant-Appellant.

No. 95-2207-CR. June 25, 1996.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GARY B. SCHLOSSTEIN, Reserve Judge. *Reversed and cause remanded with directions.*

Before WEDEMEYER, P.J., SULLIVAN and SCHUDSON, JJ.

Opinion

PER CURIAM.

*1 Cornelius Reed appeals from a judgment of conviction for first-degree intentional homicide, party to a crime, and from the trial court's order denying his postconviction motions. He argues that he received ineffective assistance of counsel, that he is entitled to a new trial based on newly-discovered evidence, and that the State failed to disclose exculpatory evidence. We conclude that Reed is entitled to a new trial based on newly discovered evidence and, therefore, we reverse.

At about 5:30 p.m. on December 28, 1992, Danielle Daniels and her fiancée, Dionysis Thomas, were walking on the sidewalk near the intersection of North Avenue and Sherman Boulevard in Milwaukee. A car drove near them, stopped, and a man fired a “gauge” pump rifle from the rear passenger window. Ms. Daniels was struck by one shotgun blast and died.

At the jury trial, the State presented two witnesses who identified Reed. Thomas testified that he saw Reed fire the shotgun. Anthony Lester, who was driving with his wife in the same area, testified that he saw Reed and two others in the car shortly before the shooting. Defense counsel anticipated calling alibi and other defense witnesses and, in his opening statement, told the jury “you're going to hear where Mr. Reed was at the time of the shooting, and he wasn't in the automobile.” At the conclusion of the State's presentation of its case-in-chief, however, defense counsel considered the State's identification witnesses and other evidence so weak that he called no witnesses.

The record reveals the bases for defense counsel's estimation of Thomas and Lester. Thomas's identification testimony was compromised by numerous factors including: (1) he initially did not give police Reed's name although he subsequently acknowledged that he had known Reed for about two years prior to the homicide; (2) he knew of no reason why Reed would have wanted to shoot him; (3) after looking at photos at the police station for about an hour,¹ he identified the photo of Gary Stoval as the gunman, although Stoval was in Arkansas at the time of this murder;² (4) he testified that he “didn't care at that time” about the results of making a wrong identification; (5) after positively identifying Reed, he still told a detective that he was “no longer positive” that Reed was the gunman; (6) he testified at the preliminary hearing that he identified Reed and his accomplices based on “three faces that I seen in my dream”³; and (7) he stated that Reed was “sticking his body halfway out the window with a gauge,” although the undisputed police testimony established that the window could open only eight and three-fourths inches.⁴

- 1 Milwaukee Police Detective Steven Spingola testified that Thomas looked through drawers of hundreds of photos for about an hour; Thomas testified that he looked for ten or fifteen minutes and “picked the first one; any one.”
- 2 Thomas testified at the trial that he did not truly believe Stoval was involved but that, “I picked out the photograph-any photograph just to get back home, because I was scared.”
- 3 Thomas testified that the preliminary hearing court reporter might have recorded his statement inaccurately.
- 4 Thomas also testified that the gunman was leaning out “[p]robably about to his chest part” and with both arms out of the window.

Lester's identification testimony also was compromised by factors including: (1) he did not see the shooting; (2) although he identified Reed as the person in the back seat, he also identified Dotson, one of the accomplices, as the person riding in the back seat.

On December 9, 1993, the jury found Reed guilty. Ronnie Watkins, a Wisconsin prison inmate who had recently been sentenced to twenty-two years for five armed robberies, read of the verdict in a newspaper and, on December 11, 1993, wrote the following letter to Reed:

*2 Cornelius

You don't know me yet but I know that you didn't have anything to do with that drive-by that happen last Dec. This can help you and me if you would just get you Attorney to contact me. I'm not doing this to help you but to help the both of us. My Attorney ... know about your case because I told him some parts about it earlier this month. So have your Attorney to appeal your case and I'll come to court and testify in your favor. This is no bull shit. I was reading the news paper tonight and I saw what was happening. That's why I'm writing you this letter, so go right on and get in touch with your Attorney or your family so they can contact me, I know who did the drive-by because I was with them that night it happe.

On December 29, 1993, and on January 5, 1994, a private investigator, Robert D. Wilson, on behalf of Reed's counsel, interviewed Watkins and prepared memoranda of the interviews, both of which were received as evidence at the postconviction motion hearing. According to Wilson's account of the first interview:

WATKINS told the writer that on the night of the Homicide, he and a girlfriend ... were at his sister's house.... He stated that his sister is SAHRA FRANKLIN. He further states that FRANKLIN is the mother of MAURICE TREMMEL TAYLOR.... Watkins further stated that he and [his girlfriend] were in bed talking when his nephew TAYLOR, “JODY”, “FONTAINE”, and another B/M he did not know came to his sisters house. He could hear them talking and someone said to his nephew TAYLOR, “man, you really fucked up, you shot a bitch.” WATKINS stated that he heard MAURICE TAYLOR say something to the effect, “fuck it man, I shot the damn bitch anyway.”

....

The writer asked WATKINS if MAURICE TAYLOR told him directly that he had done the shooting and WATKINS stated that he did not say those exact words, however, WATKINS heard TAYLOR talking about the shooting with the other people at his sister's house the night of the shooting.

WATKINS stated that the next day, TAYLOR called him and told him that he had hidden the shot gun used in the shooting in a small shed behind the house.... TAYLOR told WATKINS to get the shot gun and take it to HAMPTON's apartment building and put it in the Cadillac that was parked in the rear. WATKINS told the writer that he and “JODY” got the shot gun and took it over to HAMPTON'S house and put it in the back of the car. The writer asked WATKINS to describe the shot gun and he stated it was a pump with a pistol grip and sawed off to about 30# in total length.

....

WATKINS stated that he is not seeking any consideration for himself by telling what he knows. He states that he feels bad because REED is going to prison for something he had nothing to do with.

According to Wilson's account of the second interview:

The writer ... asked WATKINS if he had given any thought to the possible ramifications of his decision to come fourth with the truth about who committed this Homicide. This, meaning that he would undoubtedly be questioned at length by the Milwaukee Police Department, would probably be labeled as a “snitch” by other inmates, and would face the anger of some family members.

*3 WATKINS stated that he had given much thought to these questions and had made a decision when he wrote the letter to CORNELIUS REED that he was going to tell what he knew about his nephew, MAURICE TAYLOR being the person responsible for the shooting death of Ms. DANIELS on 12/28/92.

WATKINS stated that this had bothered him for some time.... [W]hen he read in the newspaper that REED had been convicted of this Homicide, he stated that he confided in a 2nd shift Sergeant known to him as “SMITTY”, Sgt. SMITH.

Sgt. SMITH works at the DODGE COUNTY CORRECTIONAL FACILITY and told WATKINS that he needed to tell what he knew concerning the Homicide because he could prevent the killer from doing it again. WATKINS stated that after his talk with Sgt. SMITH, he wrote the letter to REED, and began this process.

The report then stated that Wilson showed Watkins six photographs of various exterior and interior views of a 1970 Cadillac. The report continued:

RONNIE WATKINS immediately recognized these photographs as the Cadillac he knew to belong to a B/M he knows as “FOUNTAIN”. He also stated that this is the same Cadillac that he and “JODY” placed the shotgun into, wrapped in the white and gold towel. He further stated to the writer that he and “JODY” had acted on MAURICE TAYLOR'S instructions to pick up the shotgun that TAYLOR had used in the shooting, and had hidden under some tires, in the shed behind SARAH FRANKLIN'S house....

Watkins testified at the postconviction motion hearing. On the first day, unrepresented by counsel, he provided information corresponding to that in the memoranda. When asked to identify the gunman, however, he stated that Reed was not the gunman but he declined to be more specific and, ultimately, invoked his Fifth Amendment rights. The next day, however, after conferring with his attorney, Watkins waived his Fifth Amendment rights, identified Taylor as the gunman, and provided further information substantially corresponding to that in the memoranda. Based on the newly-discovered evidence from Watkins, Reed moved for a new trial.

The trial court denied his request for a new trial. In doing so, however, the trial court stated that “the I.D. testimony [at the trial] could have gone either way,” and that “[t]here was evidence from which I feel a jury [could fairly have supported a decision either way.” Indeed, the trial court further commented that defense counsel “properly characterized” the State's case-in-chief as “skimpy.”

A motion for a new trial based on newly discovered evidence is addressed to the sound discretion of a trial court and will not be reversed unless the trial court erroneously exercised discretion. *State v. Kaster*, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct.App.1989). A new trial based on newly discovered evidence should not be granted unless:

(1) the evidence came to the moving party's knowledge after the trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the testimony is not merely cumulative to that which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result.

*4 *Id.* In this case, the trial court concluded, and the State does not dispute, that the Watkins disclosure satisfied the first four criteria. Thus, the only issue we consider is whether the trial court erroneously exercised its discretion in concluding that the newly discovered evidence would not make it “reasonably probable that a new trial will reach a different result.”⁵

5 The trial court stated that the newly-discovered evidence “has to be examined ... in view of the determination of whether or not [Watkins's] testimony *would create* a different result on retrial.” (Emphasis added.) We note that, with this articulation, the trial court began its oral decision in a way that may have held Reed to a higher standard than that of “reasonable probability.” That, in turn, may have had some impact on the trial court's analysis. At the conclusion of its decision, however, the trial court did state the correct standard.

Motions for a new trial based on newly discovered evidence are considered with great caution. *Erickson v. Clifton*, 265 Wis. 236, 239-240, 61 N.W.2d 329, 330-331 (1953). We will affirm a trial court's discretionary decision if it had a reasonable basis and was made in accordance with accepted legal standards and the facts of record. See *State v. Jackson*, 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct.App.1994). In this case, however, the trial court's analysis was factually and legally flawed in three important respects.

First, the trial court weighed the newly discovered evidence against unknown evidence *not* presented at the trial:

I further note the existence of another witness; to wit, Lucner Freeman available to both the State and the defense whose position then and up to now appears to have consistently been that Mr. Reed was the shooter and who was not called as to either party.

Freeman had pled guilty as a result of his role as the driver of the car from which the shotgun was fired. The State, however, never called him to testify at Reed's trial. Had he “consistently” identified Reed as the gunman, perhaps the State would have done so, but the record simply offers no basis for reaching any conclusion on this point. The memorandum of the second interview with Watkins, however, offers additional information countering the trial court's unexplained estimation of Freeman's “position.” After Watkins identified a photo of Freeman, investigator Wilson wrote:

FREEMAN admitted to Milwaukee Police that he was in fact the driver of the car that the fatal shot was fired from that killed Ms. DANIELS. *He put REED in the front seat, and “JODY” in the back seat.*

WATKINS stated to the writer that FREEMAN is currently at DODGE COUNTY CORRECTIONAL FACILITY, and that he has talked with FREEMAN. The writer asked WATKINS if he had told FREEMAN that he was making a statement concerning his knowledge of what he knew about this Homicide. WATKINS stated that he had told FREEMAN that he was and that he knew REED had nothing to do with the shooting. WATKINS also told the writer that FREEMAN told him that he (FREEMAN) had told the Police that REED did the shooting because he knew REED had been identified in a line-up so he just went along with that story. WATKINS also stated that FREEMAN told him that he was not going to “turn his brothers in for a Hook”, meaning Disciple.

(Emphasis added.)

This, of course, does not absolutely answer any questions about the roles of Taylor or Reed, or the credibility of Watkins or Freeman. It does, however, illustrate the substantial risk of erroneous analysis when a trial court attempts to measure the impact of newly discovered evidence *not* in relation to the trial evidence, but rather, in relation to possible testimony from a potentially critical witness who never testified to identify Reed as the gunman.

*5 Second, the trial court considered Watkins's testimony with an erroneous analysis of whether he was acting against his penal interest. The trial court stated:

I look carefully at the statement against penal interest, the quality of Mr. Watkins' statements because at first blush it obviously appears so. But then realistically we must look at the fact that he was serving a lengthy prison term on five counts of armed robbery, a very substantial and serious offense and serving a term that would no doubt[] be beyond anything that he would be charged with at being a party after the fact to this offense. So that if he were charged-although it is possible he could get a consecutive-it is contrary to our normal expectations or

experience, and it would be probable that the exposure would be no more than a consecutive not resu[ll]ting in any significant degree of penal risk insofar as he is conce[r]ned.

This portion of the trial court's analysis is incorrect for several reasons. The trial court's assessment of whether Watkins would receive a consecutive sentence is ambiguous, but seems to say that a consecutive sentence would be "contrary to our normal expectations or experience." Nothing in the record supports that notion and, indeed, this court's collective experience in countless criminal cases would suggest that one who hides a murder weapon could very well be sentenced to consecutive time for that conduct.

The trial court's comment that any consecutive sentence would not result "in any significant degree of penal risk" does not necessarily square with the law or, more importantly, with Watkins's possible understanding of his potential liability. Whether he could have been prosecuted for being party to the crime of first-degree intentional homicide or merely with obstructing presents a close call—both factually and legally.⁶ We need not determine whether Watkins could have been charged with being party to the homicide or merely with obstructing. It is enough to recognize that, in the absence of anything in the record to establish what Watkins might have understood, he could very well have believed that he faced a potential charge carrying an additional life sentence.

⁶ See *State v. Rundle*, 176 Wis.2d 985, 500 N.W.2d 916 (1993). In *Rundle*, the Wisconsin Supreme Court considered whether the evidence was sufficient to support a father's conviction for aiding and abetting the mother's intentional and reckless physical abuse of their daughter. In a four to three decision, the supreme court explained: It has been recognized that the "accessory after the fact, by virtue of his involvement only after the felony was completed, is not truly an accomplice in the felony. This category has thus remained distinct from others, and today the accessory after the fact is not deemed a participant in the felony but rather one who has obstructed justice...." *Id.*, 176 Wis.2d at 1006-1007, 500 N.W.2d at 925 (citation omitted). The supreme court, however, then went on to discuss whether the evidence supported "an inference beyond a reasonable doubt that the defendant dressed his daughter inappropriately to conceal her bruises from discovery by nursery school teachers," *id.*, 176 Wis.2d at 1007-1008, 500 N.W.2d at 925, thus implying that if the evidence had done so, this after-the-fact conduct could have constituted the aiding and abetting of the crime. Thus, the trial court's confusing comments about whether Watkins "would be charged with at being a party after the fact to this offense," may have reflected understandable confusion in this area of law.

Additionally, Watkins reasonably could have believed that he risked repercussions in the prison if his cooperation would become known or if his testimony would lead to Taylor's prosecution or conviction. Clearly, the trial court's assessment of Watkins's penal interest was inconsistent with the evidence presented at the hearing.

Third, the trial court measured Watkins's statement *not* according to the substantial corroboration in the trial evidence, but rather, once again, in relation to speculation about unknown information from persons who never testified. The trial court stated:

I note the multiple participants and the possible corroborators that were present at the time of the act, but which all are unavailable and whose whereabouts are presently unknown at this time to come forward and back up Mr. Watkins' story and position and to assure the State or the criminal justice system in any way that his statement is not just a mere fabrication created in a prison jail structure where they are too unfortunately common.

*6 The fact that he indicates he moved the gun to a location where it appears that it was found is not corroboration insofar as identity of a shooter. It is perhaps some corroboration that he did move it at somebody's request for somebody who may be the shooter, but that could have been done insofar as that particular act is concerned for Mr. Reed as well as for anybody else. Granted, Watkins's account does not absolutely establish that Taylor was the one who called him and told him to move the gun. It is, however, the *only* account and can hardly be dismissed simply because of speculation about unknown potential testimony from unknown persons.

The trial court never found Watkins incredible. At most, the trial court pointed to factors that raised "questions as to credibility insofar as Mr. Watkins is concerned." Such questions, of course, will be appropriate for a jury's consideration. It is undisputed, however, that numerous powerful factors of record support Watkins's credibility: (1) he did not know Reed and had no apparent

interest in helping him; (2) he knew the timing and circumstances of the shooting; (3) he accurately identified the murder weapon and its location; (4) his disclosures were contrary to his penal interests; (5) his disclosures-implicating his own nephew-were also contrary to his apparent familial interests; and (6) although he initially explored the possibility that his cooperation could be personally beneficial, he ultimately implicated his nephew and testified *after* he had been sentenced for armed robberies, and after being advised of the self-incrimination he risked.

Balanced against this newly discovered evidence from Watkins, the trial court substantially based its denial of Reed's motion on speculation about Freeman, unknown witnesses, or unknown evidence, on misinterpretations of Watkins's penal interests, and on misunderstanding of whether there was corroboration for Watkin's information.

As the trial court stated, the identification evidence at trial “could have gone either way,”⁷ and the State's case was “skimpy.” The record of the trial and the record of the postconviction motion hearing establish that the newly discovered evidence from Watkins renders a reasonable probability that a different result would be reached in a new trial.⁸ Accordingly, we reverse the judgment of conviction and the order denying Reed's postconviction motions, and remand for a new trial.

7 Indeed, the trial court even instructed the jury on *falsus en uno*.

8 Resolving Reed's appeal on this basis obviates the need to address his additional arguments regarding ineffective assistance of counsel and exculpatory evidence.

By the Court.-Judgment and order reversed and cause remanded with directions.

This opinion will not be published. See [Rule 809.23\(1\)\(b\)5, Stats.](#)

Parallel Citations

551 N.W.2d 870 (Table), 1996 WL 343871 (Wis.App.)