



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

QUINTEZ NUNN,

Petitioner

V.

Case No.: CC-2006-5141

STATE OF ALABAMA,

Respondent.

**ORDER GRANTING QUINTEZ NUNN'S RULE 32 PETITION AND
SETTING ASIDE HIS ORIGINAL CONVICTION AND RESULTING
SENTENCE**

Quintez Nunn filed his petition seeking to set aside his felony murder conviction and resulting 99 years' custodial sentence. The matter coming before the Court following an evidentiary hearing, it is hereby ordered as follows: the Rule 32 petition is due to be granted and a new trial or other proceedings are ordered for the reasons set out herein:

INTRODUCTION

The Court held an evidentiary hearing and took testimony in fully examining these issues.

THE FACTS AND APPLICABLE LAW

In this case, it appears that Nunn is proceeding under Rule 32.1 (e) that states:

“Any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:...

(e) Newly discovered material facts exist which requires that the conviction or sentence be vacated by the court, because:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.”

The Court is satisfied that the procedural elements have been met. See, King v. State, 729 So.2d 366 (Ala. Crim. App. 1998); Rule 32 of the Ala. R. Crim. Procedure.

These new facts are not merely cumulative or amount to mere impeachment evidence. The Court will therefore direct this inquiry to the remaining elements:

1. Whether had this information been known at the time of trial or sentencing, would the result “probably” have been different, and
2. Whether the facts establish that the petitioner is innocent of this offense or that he otherwise should not have received this sentence.

The facts that assisted this Court in arriving at its decision are numerous. These facts present not only newly discovered evidence, but also certain additional errors that were made.

Prior to trial, the defense objected to any effort to connect Quintez Nunn with some gang activity. However, despite these objections, the state proffered that if certain prosecution witnesses amended their testimony to exculpate Nunn, the state would seek to impeach those witnesses by alleging some “gang” relationship or connection with Nunn. (Trial Transcript at pg.’s 16-18).

At trial, there was virtually no dispute that Sanders was the sole aggressor, the shooter, and otherwise the far more culpable party.

Also, at the time of this incident it is important to note that co-defendant Sanders was 19 years old and Nunn was 16 years old. (Id. at 323).

Specifically, on or about February 13, 1998, co-defendant, Nigel Sanders, pulled his vehicle behind Gwendolyn Gadsden's vehicle at the Villa Rica Apartment complex. Nunn was seated on the passenger side. Sanders exited the vehicle, and approached Gwendolyn Gadsden – pointing a gun to her head.

Importantly, Gadsden testified that only one individual approached her and held a gun. (32-35). Gadsden also specifically testified that the gunman exited from the vehicle's driver side. Moreover, she claimed that the passenger not only did not exit the vehicle, but he also did not say anything or make any gestures towards her. (45-47).

After Sanders stole her purse, Gadsden began screaming and blowing her car horn. Hearing the commotion, her husband, Darren Seales, walked outside his front door. Sanders then turned and shot Seales. She testified, that except for the armed gunman who robbed her and shot Seales, she did not see anyone else including the passenger exit the vehicle. (45).

Consistent with Gadsden's version, Nunn's voluntary statement to police confirmed that Sanders alone robbed Gadsden and shot Seales. Nunn further claimed that he remained in the vehicle and did not know that Seales was intending to commit a robbery, much less capital murder. He also consistently denied any claim that he possessed the victim's checkbook or sought to use or sell it.

Again, the state's version of events did not seriously controvert Nunn's statement to investigators or Gadsden's testimony. By their collective account, he remained in the passenger seat and took no action during the robbery and shooting. There was also no physical evidence discovered from a search of Nunn's property connecting him to this offense. (303-305).

Therefore, beyond his presence at the scene, the state's theory for capital murder rested entirely on proving accomplice liability through circumstantial evidence. The state sought to make this critical connection by claiming that Nunn was in possession and sought to dispense or sell the victim's checkbook or checks taken by Sanders.

TYRONE WHITE

To advance this theory, the state called Tyrone White to establish Nunn's connection to certain checks or a checkbook taken from the victim. White was known for "cashing check" crimes and had admitted to forging checks on scores of occasions in the 1990's. (Trial at 211, 251). Following this shooting incident, White was charged with possession of a forged instrument, as he was in possession of certain checks and a checkbook belonging to the victim, Gadsden¹. (190, 197).

The state expected White to testify that Nunn specifically provided him with these same stolen checks.

However, at the outset, White denied that he had seen or spoken with Nunn following this incident. (253). Instead, he stated that he had provided certain inculpatory statements concerning Nunn because he was "under...pressure...without an attorney being by my side." (253). White stated that he had been threatened with the death penalty by detectives. (258). At that point, Judge Bahakel excused the jury and suggested to the state that the prosecutor

¹ It should be noted that White was also originally charged with this same capital offense. (DC-98-1943).

refresh White's recollection by having him listen to his previous taped statement. (260).

During this critical dispute related to White's testimony, co-defense counsel, Mike Shores, asked to be excused from the trial because of a family medical emergency. (262). Nevertheless, Judge Bahakel denied Nunn's request for a short continuance.² (263).

While defense counsel was forced to proceed without lead counsel, the state also revealed for the first time that White had provided grand jury testimony indicating that Sanders had provided him with the checkbook. Despite its clear exculpatory nature, this previous grand jury testimony was provided only after White's testimony and outside the presence of the jury.

Judge Bahakel suggested that this late production was to prevent White from committing perjury. (263). Regardless, consistent with his present claims, White's grand jury testimony implicated co-defendant Sanders and not Nunn, as the person who

² The Alabama Court of Criminal Appeals concluded that this issue had not been properly preserved at trial. (Opinion p. 8). This case was Attorney McFarland's first capital murder trial and he was not originally planning to cross-examine either Tyrone White or Tim White. (Evidentiary Hearing @ 155).

ultimately provided him with the victim's check(s).³ Before these outstanding issues surrounding White's testimony could be resolved, the prosecution moved on with another witness.

TIM WHITE

The state called Tyrone White's brother, Tim White, to instead confirm this alleged exchange of checks between Nunn and Tyrone White. (270). However, from the outset, Tim White admitted that he knew Nunn, but denied that he could recall any specific discussion with him about these charges.

Judge Bahakel quickly interjected her own commentary, as to White's failure to recollect. The following exchange ensued:

Q. When you were riding around in the car with Scoop [Quintez Nunn], did you hear him talking about details of the crime?⁴

A. I don't recall, sir.

THE COURT: Mr. White, I remind you, you are under oath.

THE WITNESS: I don't really --- ten years ago, ma'am, I don't remember.

³ White's grand jury testimony is exculpatory and under the circumstances should have been provided in advance of trial. However, the Court of Criminal Appeals also concluded that this issue had not been properly preserved for appellate review. (8).

⁴ This Court is unaware of any evidence suggesting that Nunn discussed the details of the crime with Tim White.

THE COURT: You have got a pretty good memory of what happened before that.

THE WITNESS: That's because –

THE COURT: And I remind you, you are under oath. Don't argue with me.

THE WITNESS: Yes, ma'am, but I was saying –

THE COURT: Just listen to his question. (275).

After the state sought to refresh Tim White's recollection with a transcript of his previous testimony, White claimed that he was "in a panic...I saw my brother [Tyrone White] in the newspapers, saying he killed somebody...I was in a panic...it was an assumption" that Nunn gave his brother the checkbook. (277). At other times, White provided a confusing narrative claiming he could not remember what he had told investigators, but some of it could have been untruthful.

Judge Bahakel then suggested that the state treat Tim White as a hostile witness. (279). The state then proceeded to read White's previous hearsay statement to the jury which in part indicated that both Sanders and Nunn were acting in concert. (279).

Following his testimony, no effort was made by the Court or defense counsel to explain that White's previous statements were

hearsay and could only be used to impeach the witness and not serve as substantive evidence.

Thereafter, the Court revisited the issues surrounding the continuation of Tyrone White's testimony. Tyrone White indicated that if recalled he would likely invoke his Fifth Amendment privilege against self-incrimination and not testify. (284).

During this exchange, Judge Bahakel claimed that she doubted whether White was visually impaired. She stated, that "if he was Stevie Wonder, he couldn't see the hand or [his] girlfriend." (286-287). At another point, she asked White if he had also lost his hearing. (292). Thereafter, White was released and the jury was only told his testimony had concluded.

Despite Tyrone White and Tim White's direct testimony failing to directly connect Nunn as an accomplice, the Court of Criminal Appeals' opinion stated that while "[Tyrone White] did not remember telling the police that he received a checkbook from Nunn, he did not deny doing so." (Court's Opinion pg. 3). The Court also declined to consider whether Nunn's uncorroborated confession was sufficient to sustain his conviction, as this issue was not properly preserved at trial. (Id. at 4).

ALBERT MOORE

Finally, Albert Moore was the sole witness who directly testified that he witnessed Nunn exchange a “checkbook or something” with Tyrone White. (Trial at 215). Although he was unclear as to the exact circumstances, Moore also testified that during this supposed exchange that Nunn stated to White, “Don’t mention my name...[in a] threatening [tone].” (215).

After this alleged transaction, Moore claimed that White, Nunn, and Sanders all traveled to Western Hills mall. (216). At some point, Moore insisted that they leave the mall, so he could get to work. After leaving the mall, Moore claimed that he dropped off Sanders and Nunn at the gym near Central Park. (218).

On cross-examination, Moore admitted that initially in February, 1998 he was dishonest with investigators and did not mention Nunn exchanging some checkbook with White. Nevertheless, after several months, on or about August 11, 1998, Moore finally revealed to investigators that some exchange occurred. (238-239).

Sometime later, Moore also testified before the grand jury. The following exchange occurred with Moore and the prosecutor.

Q. Did Quintez [say] anything to him when he gave them to him?

A. Not that I know. I could not hear because I was sitting in the car.

Despite the importance of this contradiction, Moore was not cross-examined on this point.

At the evidentiary hearing, Moore testified that Nunn handed White “the check...yeah, I seen a check, but I didn’t see who it was from...” (Evidentiary. Hearing at pg.’s 11-12). After some additional questioning, Moore instead referenced that multiple “checks” were exchanged. (Evidentiary Hearing at 41-42).

Adding to the confusion, Nunn at trial testified that Nunn handed White “a little book, like a little checkbook or something.” (Trial at 215). By the conclusion of the evidentiary hearing, Moore’s testimony had departed from all previous narratives, evidenced by the following exchange:

Q: And sitting here today, do you know if he [the defendant] gave him [Tyrone White] a checkbook or a check?

A: Well, I’m not sure, because I don’t know – it could have been [Tryone] White, his booklet that he – that he kept with him, but – like when I know he gave – he [Tyrone White] gave Player the check, that’s the only thing I know.

Q: You know that Tyrone [White] gave Player the check.

A: Yes, [White] told me he gave Player the check.

Q: But you don't know what he gave Player was the exact same thing that you claim [Nunn] gave [Tyrone] White, are you?

A: Not that I recollect. (Evidentiary Hearing at 60).

The above testimony raises serious doubts as to Moore's credibility and whether Moore is even sure what if anything was exchanged between White and Nunn.

Even more troubling, at this recent hearing, Moore testified that he did not hear any words being exchanged between Nunn and White. (Id. at 52-53). Again, at trial, Nunn specifically stated during the alleged check exchange that Nunn threatened White by telling him "don't mention my name." (215). In fact, despite other contradictions at trial, Moore remained consistent that Nunn threatened White.

Nevertheless, Moore's current testimony seriously compromises his trial testimony on this important issue. Moore's trial testimony that Nunn threatened White and told him not to mention his name, served as direct evidence of Nunn's consciousness of guilty and likely overcame any concerns the jury might have had about Moore's credibility or the lack of evidence.

Now, Moore also strangely claims that he purposely left Nunn at Western Hills Mall. (57). However, at trial, Moore provided a lengthy narrative about how he accompanied Nunn and Sanders to the mall and then later dropped them off at the gym in Central Park. While not stated specifically, the import of this trip suggested that Nunn was on some sort of shopping spree following this alleged checkbook exchange with White.

Regardless, Moore now has little recollection of these and other events and instead claims that he does not recall any statements made by Nunn to White and believes he abandoned Nunn and Sanders at the mall.

FINDINGS

In the current Rule 32 proceeding, Nunn offered the alleged recantation of certain testimony by Tyrone White and Timothy White. First, the Court finds that Tyrone White has recanted and has provided a clearer statement and explanation as to these events. Timothy White's testimony also supports and confirms this new information and testimony.

However, more than a mere recantation is needed to set aside a conviction, especially in the case of serious charges as are present here. See, Smith v. State, 745 So.2d 284 (Ala. Crim. App. 1998). Therefore, the Court does not merely rely on Tyrone White's testimony alone, but finds that his current testimony is also supported by other substantial evidence.

A review of Tyrone White's trial testimony indicates that from the outset he was reluctant and gave contradictory testimony. He stated that he had provided certain statements to investigators "under...pressure...without an attorney being by my side." (253). He also remarked that he had been threatened with the death penalty by detectives. (258).

Judge Bahakel then suggested that the State should refresh his recollection with his previous statement. Thereafter, she suggested that White may have committed perjury and appointed him counsel.

In this same discussion, Judge Bahakel also raised the possibility that White was not visually impaired as previously claimed. Not surprisingly, White quickly invoked his Fifth Amendment protections and declined to testify and endure this treatment any further. (95).

Unfortunately for the defense, Tyrone White was never questioned about his previous grand jury testimony or given an opportunity to fully testify. Therefore, Nunn was prevented from eliciting exculpatory testimony that Sanders provided the checkbook to White. Finally, since Tyrone White's grand jury testimony was never mentioned or referenced, the jury was left with the impression that Tyrone White had always maintained that Nunn made this transfer and was perhaps being uncooperative to protect Nunn.

In contrast, at Nunn's Rule 32 hearing, Tyrone White clearly testified that Nunn never furnished him with the victim's checkbook. (81, 86). Instead, consistent with his grand jury testimony, White testified that Nigel Sanders furnished the check or checkbook.

The Court took exhaustive measures to examine and re-examine White on these very points. White was asked many times whether Nunn provided the victim's checkbook to him, and he repeatedly and unequivocally denied that any such exchange took place as consistent with his grand jury testimony.

As further supporting evidence, Timothy White, Tyrone White's brother, also testified. In comparison to his brief trial testimony, Timothy White explained that his statement to law enforcement was

false. Timothy White testified that this check transaction never occurred and that he lied to investigators. He explained that he lied to the police to assist them with their preferred narrative, and to ultimately help his brother charged with capital murder.

Previous defense counsel, Tommy McFarland, also testified. McFarland stated that he had no knowledge of the above recantation information at the time of defendant's trial and that, had he known, he certainly would have utilized this information to further the interests of his client and that the outcome of the trial would have likely been different.

This Court is required to make findings of fact concerning the evidence and testimony before it. In undertaking this duty, this Court considers the first prong of the Boyd analysis. This Court finds that this information -- having been protected by the Fifth Amendment right to silence, as well as motivation on the part of both White brothers to satisfy law enforcement and to deflect any culpability -- it was not known by defendant or his counsel at the time of trial or post-trial motions.

Similarly, this Court finds that Nunn has satisfied the second and third Boyd requirements as well. The evidence before the Court

is not merely cumulative to other facts that were known by the defense at the time of trial, nor is it merely impeachment evidence, because the testimony of the White brothers completely undermines, if not compromises, the state's theory. Consequently, this Court makes a finding of fact that this evidence, had it been known by defense counsel at the time of trial, it would have probably resulted in a far different outcome.

Finally, concerning the fifth and final Boyd requirement, that the evidence establishes that Nunn should not have been convicted, this Court must take note of the sworn testimony of Attorney McFarland. This Court finds his testimony to be credible, persuasive, and compelling. Moreover, this Court must take judicial notice that the Tyrone White's grand jury testimony should have been provided to defense counsel well in advance of trial.

Had the state timely disclosed this testimony, defense counsel would have been better armed and prepared to effectively cross-examine Tyrone White. Had this transcript been disclosed prior to trial, it is very likely that defense counsel would have sought to carefully plan and impeach White.

Instead, the jury was left with the impression that White had always maintained Nunn's guilt, but at trial was simply trying to thwart the prosecution either out of fear or favor. The appellate court was similarly left with the understanding that since White did not provide an outright denial, then some check exchange may have taken place.

Consequently, given all the facts and circumstances, had Tyrone White and Timothy White fully testified at trial, agreed or been given the opportunity to explain what honestly occurred, and otherwise been examined on all their previous statements and testimony, this Court has serious doubts that Nunn's trial would have resulted in a conviction.

Despite this finding as to the recantations by Tryone White and Timothy White, this Court is even further convinced as to this conclusion after hearing from Alfred Moore. To be clear, this Court insisted that Moore be called to testify to further complete this record.

Moore was the remaining witness at trial - who claimed that Nunn provided some "check" to White. His testimony at trial was key for another reason. Moore not only claimed that Nunn exchanged something with White, but he also testified that Nunn instructed White in a threatening manner to not mention his name. This served as the

prosecution's most compelling piece of evidence tying Nunn to the offense and again demonstrating direct evidence of a consciousness of guilt.

To be fair, Moore's inconsistencies and false statements were presented at trial; however, Moore remained consistent and was never seriously impeached concerning whether some "exchange" occurred or as to any alleged threatening statements made by Nunn to White.

However, at our most recent hearing, Moore gave contradictory and at times dizzying testimony. At first he vacillated as to whether the exchange included a check, checks, or a checkbook. At one point, he admitted that he simply assumed that Nunn had given White the check based on some hearsay understanding.

Even more troubling was that Moore's latest version does not reference any threats or comments being made by Nunn to White. In fact, Moore stated the following:

Q. Do you remember what if anything Mr. Nunn said to Tyrone when you say he gave him the checkbook?

A. No, I don't know what they were talking about. I was on the porch...

Q. Okay, but you did not hear any words?

A. No. (Evidentiary Hearing pg. 23-24).

It is hard to reconcile that Moore would remember the “check” exchange and at trial clearly testify that Nunn threatened White, but now claim he only recalls the transaction.

Lastly, it is equally incomprehensible that Moore would provide two different reasons for claiming to have not heard Nunn’s threatening remarks. Previously during his grand jury testimony, he claimed that he could not hear any words exchanged, as he was inside a vehicle. Now, he asserts that he was on the porch and was unable to hear any conversation.

Regardless, the Court is convinced that had Moore fully testified as he did at the evidentiary hearing and his various contradictions been properly presented, it is doubtful Nunn’s trial would have resulted in a conviction.

It should also be noted that the state was assisted by certain improper hearsay remarks made by Deputy Williams. At trial, he claimed on direct that Tyrone White had led investigators to the location of the discarded checkbooks. However, more troubling, Williams testified in narrative form to hearsay evidence that Tyrone White claimed that Nunn had given him the checkbook. (323).

While the Court of Criminal Appeals' Opinion does not reference this hearsay testimony, it would certainly be reasonable to expect the jury to have considered this evidence beyond that of impeachment. Nevertheless, since Tyrone White had invoked his right not to testify, defense counsel was unable to respond or rebut this statement. (Evidentiary hearing at 157).

Considering the recantations made and inconsistent statements discussed, the lack of clear or other inculpatory evidence presented at trial, along with a combination of certain errors made, this Court finds that Nunn has satisfied his burden for obtaining relief based on newly discovered evidence.

CONCLUSION

The Court understands that this is an extraordinary remedy and such a serious matter is not taken lightly. Nothing in this order precludes retrial of this matter or the charging of any other person or persons for offenses. In fact, for reasons not entirely clear, the capital murder prosecution against the far more culpable party, Nigel Sanders, was delayed by several years and ultimately dismissed without prejudice. Nunn, who by all accounts was the non-triggerman

and was merely present at the scene, is the only person to ever be convicted in regards to this tragic event.

Nevertheless, for the foregoing reasons, the conviction is hereby set aside and reversed, with a new trial to be ordered and set in due course.

DONE and ORDERED on this the 3rd day of November, 2020.

s/ Stephen C. Wallace
Stephen C. Wallace
Circuit Judge