

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN BERNELL WARRIOR,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) **NOT FOR PUBLICATION**

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Case No. F-2016-519

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 24 2018

ORDER GRANTING MOTION FOR NEW TRIAL
BASED ON NEWLY DISCOVERED EVIDENCE

Appellant, Kevin Bernell Warrior, was tried by jury and found guilty of Count 1, first degree murder, in violation of 21 O.S.Supp.2012, § 701.7; and Count 2, possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2012, § 1283; in the District Court of Tulsa County, Case No. CF-2014-5106. The jury sentenced Appellant to life imprisonment in Count 1 and ten (10) years imprisonment in Count 2. On May 16, 2016, the Honorable James M. Caputo, District Judge, pronounced judgment and sentence accordingly. Appellant filed a timely notice of appeal from the judgment and commenced an appeal in this Court.

On May 9, 2017, Appellant timely filed with this Court a motion for new trial based on newly discovered evidence pursuant to Rule 2.1(A)(3), 22 O.S.Supp.2016, Ch. 18, App., with attached affidavits from the Appellant, a witness, and appellate counsel, as well as exhibits supporting the motion. On September 1, 2017, this Court remanded to the District Court with

instructions to conduct an evidentiary hearing on the motion for new trial based on newly discovered evidence.

The Honorable James M. Caputo subsequently conducted the evidentiary hearing, heard the testimony of witnesses, and filed findings of fact and conclusions of law on the questions presented by this Court. The Appellant subsequently filed a supplemental brief as permitted by the order of remand, stating his position on the evidence presented at the evidentiary hearing and the findings of the trial court. The State elected not to file a supplemental brief within the time allowed by our previous order. The record presented is sufficient for this Court's resolution of the merits.

Appellant was convicted at trial based on circumstantial evidence. The State presented no living eyewitnesses to the murder itself. At the time of Appellant's trial, the parties believed that the murder weapon had not been recovered. The State's evidence indicated that Appellant had a possible motive for the crime and an opportunity to commit it. Evidence also indicated Appellant's possession of a weapon around the time of the crime, but did not directly connect Appellant, or a particular weapon, to the murder. Appellant also made statements around the time of the crime that might be considered incriminating.

The facts developed at the hearing show that Appellant was convicted of this murder on or about March 11, 2016. Marquez Goff was arrested around May 5th, 2016, and after his arrest was housed for a time with Appellant at the Tulsa County Jail while Appellant awaited formal sentencing.

Goff had never met the Appellant before, but the men eventually discussed their cases while in jail. At some point, Goff told Appellant that his co-defendant, Mikel Ball, had admitted committing a drug-related robbery and murder in 2014. Mikel Ball had also told Goff that police had taken a pistol from him at the time of his arrest. Ball also stated, to Goff and other witnesses, that another man was already being prosecuted for the murder he had committed.

From these conversations, Goff and Appellant soon realized that Appellant was the person charged with and convicted of the 2014 murder confessed by Ball. Appellant provided this information to his appellate defense counsel, who took immediate action on Appellant's behalf.

Appellate counsel confirmed that Tulsa police had arrested Mikel Ball on June 24, 2014, twenty days after the murder. Police had seized a .38 caliber pistol from him. With cooperation from prosecutors and police, Appellant's counsel arranged for a ballistic comparison of the weapon taken from Mikel Ball to a bullet recovered from the murder victim in this case. Ballistics analysts from the Tulsa Police Forensic Laboratory matched the weapon seized from Mikel Ball to the bullet recovered from the victim. None of this evidence was presented to the jury in Appellant's trial.

We analyze a motion for a new trial based on newly discovered evidence to determine: (1) whether the evidence could have been discovered before trial with reasonable diligence; (2) whether the evidence is material to guilt or punishment; (3) whether the evidence is cumulative to other evidence at trial;

and (4) whether the evidence creates a reasonable probability that, if introduced at trial, it would have changed the outcome. 22 O.S.2011, § 952(7); *Underwood v. State*, 2011 OK CR 12, ¶ 93, 252 P.3d 221, 254-55.

Pursuant to the order of remand, the District Court made the following findings and conclusions based on the existing record and the evidence presented at the evidentiary hearing.

1. Evidence of Mikel Ball's alleged confession of murder to Marquez Goff and others, and of Ball's possession of the murder weapon at the time of his arrest in June, 2014, could not have been discovered by Appellant before his trial with reasonable diligence;
2. Appellant did not know either Mikel Ball or Marquez Goff before his trial. Mikel Ball's murder confession was known only to Marquez Goff and two other witnesses. Appellant could not have reasonably discovered, before his trial, the link between Mikel Ball's confession, his arrest, and the seizure of the murder weapon from him by police;
3. This evidence, and further evidence that may yet be developed as a result of these new discoveries, is material to Appellant's guilt or innocence of this murder, and is not cumulative to other evidence presented at Appellant's trial.

4. Newly discovered evidence, considered in light of the circumstantial evidence of guilt presented at trial, creates a reasonable probability that the outcome of the trial would have been different.¹

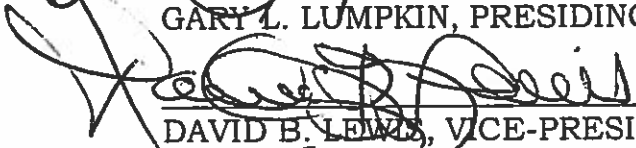
We conclude that the trial court's findings are substantially supported by the evidence in the appellate record. Those findings compel us to conclude that Appellant is entitled to a new trial.² *Hunter v. State*, 1992 OK CR 19, ¶¶ 15, 17-19, 829 P. 2d 64, 67. The motion for new trial should be, and is hereby, **GRANTED**. The convictions are **REVERSED** and **REMANDED** for a new trial.³

WITNESS OUR HANDS AND THE SEAL OF THIS COURT ON THIS 24th

DAY OF January, 2018.



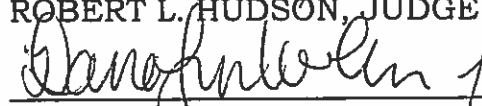
GARY L. LUMPKIN, PRESIDING JUDGE



DAVID B. LEWIS, VICE-PRESIDING JUDGE



ROBERT L. HUDSON, JUDGE



DANA KUEHN, JUDGE

CIR - I object to footnote 2 as it is unnecessary.



SCOTT ROWLAND, JUDGE

¹ The State candidly conceded on remand that the evidence was newly discovered, was material to Appellant's guilt, and was not cumulative to the trial evidence. The State argued only that the newly discovered evidence created no reasonable probability of a different outcome at trial.

² Judge Caputo and counsel for both parties are to be commended for their prompt and professional actions in this case, which reflect the highest ideals of fairness and justice under law.

³ Appellant's remaining claims on appeal are mooted by the disposition of his motion for new trial.

ATTEST:

John D. Hadden
Clerk