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Shelby County DA will not stand in way of 2002 Beale Street robbery case getting new trial



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The Shelby County District Attorney's Office will not stand in the way of a Memphis man, who has spent 20 years behind bars for a crime his attorneys say he did not commit, having a new trial, the office said in a written response to an early September hearing.

A ruling is yet to be handed down by Shelby County Criminal Court Judge Jennifer Fitzgerald, who said after a Sept. 7 hearing she would like to have a ruling "done rather quickly," but has two days' worth of arguments, and hundreds of pages of evidence, to comb through prior to her decision.

"Given that the case against [Whitehead] was based on two identifications of tenuous certainty undermined by the absence of seven other possible identifications, a criminal informant who lied under similar circumstances and the fact that trial counsel had an actual conflict of interest, the state is no longer confident in the verdict," Assistant District Attorney Kindle Nance and Deputy Chief of the Justice Review Unit Robert Gowen wrote in the response. "The state recognizes that had the trial court and jury been allowed to hear the new evidence presented at the post-conviction proceeding that a materially different verdict would have been likely."

Whitehead, 60, was convicted for a 2002 robbery at B.B. King's Blues Club on Beale Street. His attorneys from the Tennessee Innocence Project recently asked for a new trial, citing advances in witness identification science, malpractice in the original trial, a shaky informant, along with attorney and police malpractice.

The 2004 conviction hinged upon two eyewitnesses identifying Whitehead as the man who robbed them, but Tennessee Innocence Project Executive Director Jessica Van Dyke said in

an early September hearing that those witnesses were faulty and that Whitehead's stature was completely different from the initial descriptions from witnesses at the scene. Seven other witnesses either could not, or did not, identify Whitehead.

Lakina Pree, one of the two witnesses to identify Whitehead, later said her identification could have been faulty, which Gowen and Nance noted in their response.

"Ms. Pree, one of the only two eyewitnesses to identify [Whitehead], has issued a declaration, now in evidence, expressing doubt in her choice, stating, '...it could have been human error' when she identified [Whitehead]," the two attorneys wrote. "Seven other potential eyewitnesses and victims were at the scene of the crime and either could not or did not identify [Whitehead]. So, the two eyewitness identifications have become only one, and the second of the two is problematic for reasons that will be discussed below."

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The reason the second witness identification was deemed faulty was due to the initial statement the man, Ray Spence, gave to police after the robbery was lost by officers.

Other problems with original conviction

Other alleged malpractice by the Tennessee Innocence Project included Memphis Police Department investigators hiding a criminal informant behind a CrimeStoppers tip. The DA's office agreed with Van Dyke's arguments, saying the tip "was a subterfuge to hide the identity of [the] criminal informant," who was later identified to be a man named Gregory Jones.

"During his pretrial incarceration for his own crimes, [Jones] made the call to CrimeStoppers from the police robbery office, on a police officer's phone and at the direction of a police officer," Nance and Gowen wrote. "We have confidence that this is true because our personnel personally interviewed [Jones], who stated the same."

Jones, according to the DA's office and Tennessee Innocence Project, was actively fighting a case of his own in federal court and was trying to have time knocked off his sentence. He was ultimately unsuccessful, and MPD investigators testified in that hearing that Jones had lied in the past, and implicated innocent people in another crime.

The DA's office also acknowledged that the conflict of interest between Whitehead's original trial attorney and that attorney's coworker, who was representing Jones at the same time,

was problematic, and did not allow for Whitehead to receive adequate representation.

The final point highlighted by the DA's office's response focused on a potential Brady violation, meaning the prosecution and police did not provide evidence favorable to Whitehead during the initial trial.

"There appears to have been a clear effort by the police to cloak the identity of [Jones] behind a CrimeStoppers tip," Nance and Gowen wrote in the response. "State's counsel's statement to the court is ambiguous and did not put [Whitehead's] trial counsel on notice that the police engineered the 'tip.' As a legal matter, withholding of favorable information by the police is imputed to the state."

The original prosecutor in the Whitehead case was former District Attorney Amy Weirich, though she did not hold that role at the time of the trial.

What happens next?

Should Whitehead be granted a new trial by Fitzgerald, the decision to re-try the case would fall to Shelby County District Attorney Steve Mulroy. If Mulroy declines to re-try the case, Whitehead would be a free man for the first time in over 20 years. The case would be cleared from his record, and it would be as if he was arrested but never charged.

In essence, that decision by the DA's office would declare Whitehead legally innocent of the robbery at B.B. King's — something he has said for over two decades.

The DA's office said they have been "working with the Innocence Project, and once decisions are finalized we will have more to discuss," but said that a decision on re-trying the case has not been publicly made and the office doesn't "want to be too premature."

Whitehead was sentenced to 249 years in prison for five counts of especially aggravated kidnapping, two counts of especially aggravated robbery, two counts of aggravated assault, one count of aggravated robbery and one count of attempted aggravated robbery.

The B.B. King's robbery involved a man tying up five employees at gunpoint in an attempt to get one of them to open the restaurant's safe that was located in the basement.

As they were all tied up, one man was able to get free of the bindings and grabbed for the gun, which was then fired and the bullet grazed that man's head.

None of the employees were able to open the safe, and the robber eventually left the restaurant. He did not “steal any money or thing of value from B.B. King’s,” the filing from Whitehead’s attorneys said. The robber did steal personal effects and cash from the people that were held captive.

The initial description of the robber was “5’6 to 5’8, thin build, dark complexion, mustache, 35 to 40 years of age.” Whitehead is 6’0 and, at the time of his arrest, weighed between 245 and 250 pounds. That weight, he said in the hearing earlier this month, was from muscle mass since he would “be in the gym four or five days out of the week.” Whitehead said he now weighs about 230 pounds.

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